

Neutral Citation Number [2022] EWHC 709 (Ch)

Claim no BL-2021-NCL -000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
BUSINESS LIST (ChD)

Date: 01 April 2022

Before:
ANDREW LENON Q.C.
(sitting as a Deputy Judge of the Chancery Division)

BETWEEN:

PJP (NE) LIMITED Claimant

- and -

PHILIP ANTHONY TAYLOR Defendant

Sean Kelly (instructed by Knights plc) for the Claimant
Nigel Kidwell (instructed by Tilly Bailey & Irvine LLP) for the Defendant

Hearing dates 15,16,17, March 2022

JUDGMENT APPROVED

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 14.00 on 1 April 2022.

Andrew Lenon QC:

Introduction

1. The Claimant ("PJP") is claiming specific performance of a contract ("the Contract") for the sale to the Defendant ("Mr Taylor") of a property, the Bridge House Hotel, Catterick Bridge, Richmond, North Yorkshire ("the Property") and/or damages for breach of the Contract. As landlord of the Property, PJP is also claiming rent from Mr Taylor as the guarantor of the obligations of the tenant, Bridge House Hotel Limited ("BHHL").
2. Mr Taylor denies that PJP is entitled to any relief pursuant to the Contract on the basis that the Contract was subject to a condition which was not fulfilled so that the Contract was determined. He also denies that any rent is owed. Mr Taylor is counterclaiming damages for breach of contract and restitutionary remedies in respect of payments which he contends have unjustly enriched PJP at his expense.

The Witnesses

3. PJP's witnesses were Peter Foster ("Mr Foster"), the sole director of PJP, Mr Foster's wife Mary Ellen, John Hughes ("Mr Hughes"), a business associate of Mr Foster, Gemma Taylor, who is an estate agent engaged by PJP to market the Property and Christopher Todd, PJP's solicitor. In addition to Mr Taylor himself, I heard evidence from his wife Angela and his son Philip.
4. I consider that the witnesses were for the most part seeking to assist the court although, as set out later in this judgment, I have concluded that in places their recollections were influenced by the legal case that they were seeking to advance. I do not regard the evidence of either Mr Foster or Mr Taylor, the main witnesses, as entirely reliable.

The Facts

(1) The transactions

5. PJP is a single purpose vehicle incorporated to hold the Property. PJP's shareholders are a company owned by Mr Foster and a company owned by Mr

Hughes. Mr Foster and Mr Taylor are both businessmen and property owners. They have known each other for a number of years although they have never been close friends.

6. In or around August 2013, Mr Taylor approached Mr Foster about the Property which was being marketed for sale by its then owners, Town and Village Hotels Limited ("the Seller"). Mr Taylor said that he wanted to purchase the Property although he did not have the available funds to do so. He told Mr Foster that he owned some land which he was going to sell in three years or so at which point he would have cash available. It was agreed that Mr Foster would arrange to purchase the Property from the Seller on the understanding that Mr Taylor would purchase it when he had the funds to do so. Following discussions with Mr Taylor's solicitors it was decided that the Property would be let to BHHL for five years so that he and his family could start running a hotel there.
7. Accordingly, on 29 November 2013:
 - (1) A lease was entered into by the Seller as Landlord, BHHL as tenant and Mr Taylor as Guarantor ("the Lease"). The Seller granted a lease of the Property to BHHL for a term ending on 28 November 2018 at a rent of £25,000 per annum payable by equal quarterly instalments.
 - (2) The Property was sold, subject to the Lease, by the Seller to PJP at a price of £220,000 plus VAT. PJP thereby became the Landlord under the Lease.
 - (3) The Contract was exchanged between PJP and Mr Taylor, providing for the sale by PJP to Mr Taylor of the Property and fixed and moveable assets and catering equipment at the Property at a price of £305,000 plus VAT.
8. The Contract provided that the sale to Mr Taylor was conditional upon, amongst other things, PJP serving a Completion Notice upon Mr Taylor no earlier than six months prior to the fifth anniversary of the Contract confirming that completion was to take place on the fifth anniversary and that, if the Contract had not become unconditional prior to the fifth anniversary of the date of the Contract, the Contract would automatically determine.
9. On or about 29 November 2013, Mr Taylor went into possession of the Property and started to operate the Property as a hotel. Rent of £3,000 was paid in January and February 2014.

Insurance

10. Mr Hughes arranged, through PJP's brokers Henderson, for the Property to be insured with Aviva from 29 November 2013 at a premium of £10,787. The evidence as to whether either BHHL, which was liable under the Lease for the costs of insurance, or Mr Taylor, contributed anything to the insurance cost paid by PJP was unclear. Mr Taylor's evidence was that he was told by Mr Hughes that the insurance premium would be £3,000 and that he was unaware, prior to disclosure in these proceedings, of the much higher premium actually paid. In cross-examination, Mr Taylor said that he agreed to transfer to Mr Foster a truck by way of payment for the insurance. Mr Foster accepted that there had been an agreement over the transfer of the truck but said that the transfer was by way of payment of rent not insurance. There was no documentary or contemporaneous record of any contribution made by BHHL or Mr Taylor to the insurance cost.
11. On the basis of this exiguous and conflicting evidence, I am not satisfied that BHHL/ Mr Taylor paid anything towards the insurance of the Property.

The Fire

12. On 12 February 2014, a fire broke out at the Property causing substantial damage. The damage was to the central part of the building, that is to say the roof above the reception area, the rooms above the reception area and the reception area itself. There was an issue between the parties as to the extent of the damage. It was common ground that the main damage was water damage caused by the fire brigade. There are photographs of the exterior of the hotel taken in 2014 which show a temporary roof and the central part of the hotel surrounded by scaffolding. Mr Foster's evidence was that the bar area, kitchen, and most of the rooms could still be used as a hotel. The evidence of Gemma Taylor, who visited the Property on a number of occasions in or around 2016 was that overall the Property looked in good condition. She said that the downstairs area looked as if it had been turned down on an evening after dinner service and left ready for the next day. Mr Hughes' evidence was that the damage to the Property was limited to a couple of rooms although he also said that to carry out some initial repair works would have cost around £50,000.
13. Mr Taylor's evidence was that the whole place was completely uninhabitable and unusable. There was no electricity, gas, or water services and it was not possible to

operate a business there. Shortly after the fire, he agreed with Mr Hughes that he would tidy up the inside of the Property. Mr Taylor's son Philip spent a week or so clearing out debris. Mr Hughes visited the Property with Brendan May, a builder, who said it would take six weeks to get part of the building up and running again, but no work was ever started. Mr Hughes arranged for some felt to be put over the roof to keep the rain out but it did not last long. The rateable value of the Property was reduced to nil. More significantly, on 14 February 2014 North Yorkshire Building Control sent Mr Taylor a notification of dangerous structure referring to the collapsed roof requiring the owner to remove all loose material and make good within 7 days.

14. The parties did not discuss or agree what should happen to the Property following the fire but the fact that, following the fire, no rent was demanded indicates that Mr Foster and Mr Hughes recognised that the damage was serious enough for the Property to be no longer fit for commercial use.
15. In my judgment, taking into account the photographic evidence, the dangerous structure notification, the time taken to clear out debris, Mr Hughes' estimate of the cost of repairs, the builder's estimate of the time it would take to carry out repairs and the fact that no-one appears to have pressed for the Property to re-open, the damage was significantly more serious than Mr Foster and Ms Taylor claimed in their evidence. I consider that the evidence of Mr Taylor and his son as to the extent of the damage was more plausible.
16. After the fire, there were a number of break-ins at the Property and its condition deteriorated further.

Insurance claim

17. PJP made a claim on its insurance policy with Aviva in respect of the fire but Aviva avoided the policy on the ground of non-disclosure of material facts, These included the fact that a number of fires had taken place at properties owned by Mr Foster, the fact that Mr Foster had been charged with environmental offences and the fact that he had had been arrested for a criminal offence. On 23 October 2014, PJP received £8,629.62 by way of a refund of premium from Aviva.
18. PJP also advanced a claim in negligence against Henderson, its brokers on the ground that Henderson had failed to ensure that all material matters were disclosed to Aviva. The dispute with Henderson was settled in March 2015 by an agreement between PJP, Mr Foster and Henderson under which Henderson agreed to pay

£100,000 to PJP. Under a separate settlement agreement between PJP and Aviva, Aviva agreed to withdraw its policy avoidance and PJP agreed that Aviva had no liability under the insurance policy relating to the Property. Mr Taylor was not told about the avoidance of the policy or the settlement agreement and only found out about them following disclosure in these proceedings.

Attempts to sell the Property

19. From 2016 onwards, Mr Foster attempted to sell the Property. Mr Taylor was initially not consulted about the plan to sell. Gemma Taylor, who runs an estate agency called Bumble Bugs, was instructed by Mr Foster to market the Property and she showed the Property to a number of prospective buyers. She met Mr Taylor on at least one occasion. Mr Taylor's evidence, which I accept, was that Ms Taylor told him that Mr Foster intended to sell the Property and turn it into apartments and that she said to Mr Taylor (not realising that she was speaking to him) words to the effect that Mr Taylor did not have a say in the matter.
20. Mr Taylor alleges that, following this conversation, he had a meeting with Mr Foster and Mr Hughes at which he returned the keys to the Property, thereby surrendering the Lease. This is denied by Mr Foster and Mr Hughes. There is no contemporaneous record of the meeting or the return of the keys. During 2016 and 2017 there was correspondence between PJP's solicitors and Mr Taylor's solicitors concerning a possible sale of the Property, the surrender of the Lease and the grant of fishing rights at the Property to Mr Taylor (Mr Taylor was interested in the fishing rights because the Property adjoins fishing lakes owned by him). Mr Taylor's solicitors were clearly unaware of any return of the keys or purported surrender of the Lease. Mr Taylor's evidence was that it had never occurred to him that anyone would think that the Lease was still in existence and so he had not thought to mention it to his solicitors. I consider this explanation for the inconsistency between the solicitors' correspondence and his evidence as to the surrender of the Lease to be implausible.
21. In the absence of any contemporaneous or documentary evidence and given the inconsistency with the solicitors' correspondence, I do not accept Mr Taylor's evidence that he returned the keys of the Property.

Dissolution of BHHL

22. BHHL was dissolved on 19 May 2015. The interest of BHHL in the Lease was disclaimed by the Crown on 14 October 2015.

Service of the Notice to Complete

23. There was an issue of fact between the parties as to whether PJP's Notice to Complete which was required to be served under the Contract was served at all and, if so, as to the exact time on 28 November 2018 when service was effected. The timing is significant in the context of the validity of the service of the Notice, an issue considered later in this judgment.
24. Mr Foster's evidence, corroborated by Mr Todd who was at the time a partner in Archers Law LLP, which I accept, was that in or around early September 2018, Mr Foster discussed with Mr Hughes and Mr Todd the fact that the fifth anniversary of the Contract was approaching and the need to ensure that Mr Taylor purchased the Property in line with the Contract. Mr Foster instructed Mr Todd to prepare a Notice to Complete and on the afternoon of 28 November 2018 he drove to Archers' offices and picked it up.
25. Mr Foster's evidence was that he left Archers' offices at about 14.35 on 28 November 2018 and drove first to his home and then to Mr Taylor's home. In his first (pre-action) witness statement dated 18 March 2020 Mr Foster said that he attended Mr Taylor's home in the company of his wife Mary Ellen at approximately 17.00, that he handed over a signed Notice to Complete which Mr Taylor refused to sign, stating that he would speak to his solicitor. In the Reply served on behalf of PJP and dated 16 February 2021, it was alleged that the Notice was handed over at "approximately 3pm", that is to say some two hours earlier than previously alleged.
26. In his second witness statement, dated 7 June 2021, Mr Foster said that when providing instructions to Archers to prepare the Reply, he had had a further in-depth discussion about service of the Notice and went through a time-line of events. He said that on 28 November 2018 he spoke to someone on the phone at Archers and understood that the Notice needed to be served on that day. Mr Taylor did not suggest that he was advised, or that he was aware, that the timing of service was important. He said that he got to their offices at approximately 14.30 and was there for about 5 minutes. He says that he then drove straight to his home at Foster Hall, which took about 20

minutes and spoke to his gardener to ask whether he would act as a witness to the signature but that the gardener said that he was planning to finish work at 16.00 and had other plans afterwards so he could not come. Mr Foster went on to say that he was at his house for about 20 minutes and then drove straight to Mr Taylor's house which took about 10 to 15 minutes. It was "coming dusk" as he arrived and dark when he left Mr Taylor's house, after spending around 15 minutes there. His witness statement continued:

17. When I arrived at the Defendant's house, I parked outside of the side door to his house. My wife remained in my motor vehicle but within eye sight. I knocked on the side door to the property. The Defendant let me in. We were stood where he keeps the boots and coats. I said "*Philip will you sign this*". He said "*not without speaking to my solicitor*". I asked him if I could leave the notice there. He said "*do what you want*" or something like that. I had two copies of the notice in my hand, a copy for him and my own copy. I handed him one of the notices. I had a pen in my hand so that he could sign the notice. I left the notice on the side with him but he had not signed it. I then talked to the Defendant and his son for a bit longer and put my copy of the notice in my pocket and left the Defendant's house.

27. In cross-examination Mr Foster accepted that the time given in the Reply was incorrect and that the time of arrival at Mr Taylor's house was about 15.45. He said it was wet and miserable, dark enough when he left Mr Taylor's home to put the headlights on. His evidence was that he went into the Taylors' kitchen and left the Notice on a cabinet in the kitchen. He denied that the Taylors were finishing their tea at the time of the visit.
28. Mr Foster also relied on two subsequent telephone conversations in support of his case as to what happened on 28 November 2018. The first was fifteen months later on 28 February 2020 when he was at Mr Hughes' office. He says he rang Mr Taylor on his mobile phone. His evidence was as follows:

The Defendant answered the phone call and I said something like "*Philip so you know when me and my wife fetched that letter that needed signing and you wouldn't sign it*". He said "*what about it*". I said "*have you spoke to your solicitor about it and have you signed it*" He said "no". I asked the Defendant if he would meet me to go through it. He said that he didn't think he has got any time"

29. The second conversation which Mr Foster relies on took place in the following month on 11 March 2020 when he rang Mr Taylor in the course of a meeting at the offices of Archers. When asked about the Notice, Mr Taylor is alleged to have replied that he could not remember receiving it. Mr Foster considers it important that Mr Taylor did not deny receiving the notice.

30. Mr Foster's evidence concerning events on 28 November 2018 was supported by his wife Mary Ellen. In her first witness statement she confirmed what Mr Foster had said in his first witness statement about the time of the visit to Mr Taylor being at approximately 17.00. In her second witness statement she confirmed his second witness statement. She said that she remained in the car throughout the visit and could see him hand some paperwork to Mr Taylor. In cross-examination she said that she remembered about the gardener and the fact that she was preparing tea for her children when Mr Foster arrived. She said that they left for Mr Taylor's home at about 15.10. and that by the time they left Mr Taylor's home it was "coming in darkish", "not pitch black but half in half".

31. Mr Hughes confirmed Mr Foster's account of the telephone conversation on 28 February 2020.

32. Mr Taylor's evidence in his first witness statement was as follows:

10. I clearly remember 28 November 2018 because, earlier that month I got a field back from the council. They had rented from me for around 25 years. I was trying to get it ready to be used for cow grazing or something similar. It was extremely overgrown. I and my son, Philip Burt Taylor were pulling out the overgrowth, stacking it and burning it. We were there every day and excavators were also clearing the site. There is still work to do, it is a very big job. My wife, Angela Taylor would occasionally be with us but would go home before us to make tea. When there was a fire going, we could not just leave it, we had to wait until it died down. Often the fires were still burning in the dark. We wouldn't come back until after 5pm with so much work to do.

11. On 28 November 2018, I was surprised when Mr Foster came to my house. I wasn't expecting him. My wife, my son and I were home. It was dark and we had eaten tea and therefore I am sure it was after 5pm. We do not have tea before 5pm.

12. As my usual greeting I said "are you alright?" He responded "not really, I might be going to jail". He explained he had been stopped by the police with a lot of cash in his car on the motorway on his way to an auction. I asked what he had in his hand and he told me it was a bill for me, for the hotel, to sign. I did not know what kind of bill it was. I just said I couldn't sign as my solicitor hadn't seen it. He kept the piece of paper in his hand then put it back in his pocket. He never gave anything to me. I never read what the paper said and he didn't read it to me. He did not leave anything at my house. I did not contact my solicitor at that time.

13. Mr Foster had come in through the back door. This is a double door, with windows in each door. We park outside this door and on that day our car was there. Mr Foster's car was in the yard. I do not think Mary-ellen was in eyesight. I did not see her. When we were discussing what Mr Foster was holding in his

hand I was stood with my back to the door and he was inside. I do not believe it was possible for Mary-Ellen to have seen any actions of Mr Foster because of where I was standing.

33. In cross examination he said that Mr Foster stepped three metres into the house and that, when told that Mr Taylor would not sign the document without his solicitor, Mr Foster left. Mr Taylor accepted that there was a telephone conversation on 28 February 2020 but denied accepting that he had received the Notice. The evidence of Mr Taylor's wife and son supported his version of events. Mrs Taylor said that it was getting dark as she got home to make the tea. She said that she got home at 16.40 having set off at 16.20. She thought that Mr Foster had arrived at around 18.00 when Mr Taylor and their son were having tea.
34. Mr Taylor disputed Mr Foster's evidence that he admitted in the telephone conversation on 28 February 2020 that he received the Notice and points out, with regard to the second conversation on 11 March 2020, that he did not deny receiving a Notice to Complete which had been delivered by post to him on 18 January 2019.
35. In my judgment, the version of events concerning Mr Taylor's visit on 28 November 2018 as described in the evidence of Mr Taylor and his family is to be preferred to that of Mr and Mrs Foster. This is for the following reasons. First, the credibility of the Taylors' evidence as to the time of arrival at Mr Taylor's home is undermined by the inconsistencies between their evidence as to the time of the visit contained in their first witness statements, the Reply and their second witness statements. The first witness statements were not only closest in time to the events in question but also prepared at a stage when the significance of the time of service had not emerged as an issue. The later time of arrival given in the first statements may therefore be considered to be more objective and accurate than the earlier times given in the Reply and second witness statements.
36. Second, there were discrepancies between the evidence of Mr Foster and Mrs Foster with regard to Mr Foster's movements at the Taylors' home. Mr Foster's evidence was that he left the Notice on a cabinet in the kitchen. Mrs Foster's evidence was that she could see Mr Foster and that he remained in a doorway to the house rather than going into the kitchen.
37. Third, I consider that the evidence as to the state of light at the time of the visit is more consistent with the visit having taking place between 17.00 18.00 than the

earlier time contended for by Mr and Mrs Foster. According to a website with details of the timing of twilight and nightfall on 28 November 2018, dusk was at 16.31 and nightfall at 17.13. The evidence of Mr Taylor was that it was dark by the time of Mr Foster's visit. The evidence of Mr and Mrs Foster was that it was dark when they left the Taylors' home. Although the weather was wet, there was no evidence that the cloud cover was unusually dark. This evidence suggests that the visit took place at about the time of nightfall rather than before dusk.

38. As to whether any notice was served at all on 28 November 2018, I accept the Taylors' evidence as to the conversation that took place, the duration of the visit and the fact that, after being told that Mr Taylor would not sign the Notice without the solicitors, Mr Foster put the Notice in his pocket and did not hand it over. This would have been an understandable reaction on the part of Mr Foster. There was no follow-up to the visit as might have been expected had the Notice been left with Mr Taylor. I do not attach any weight to Mr Foster's disputed evidence as to the subsequent telephone conversations and do not accept that in the course of those conversations Mr Taylor admitted receiving the Notice to Complete on 28 November 2018.

The proceedings

39. These proceedings were issued on 11 January 2021.
40. On 21 July 2021 District Judge Temple dismissed an application by Mr Taylor for summary judgment in relation to the Contract claim. The reason for her dismissal of the application was that there were factual issues which could not be resolved until the trial. According to a note of her ex-tempore judgment, however, whilst dismissing the application, the District Judge accepted the case advanced on behalf of Mr Taylor as to the construction of the Contract.

In my view the clear and plain and obvious meaning as argued by NK [Counsel for Mr Taylor] is that the word prior is fatal. Do not agree there is any sensible argument that the sellers completion notice has to be served prior to 29th November at 11.59pm. There is no prospect of arguing otherwise. Common law rules are there but they can be varied by contract. The parties have agreed if it is received after 4pm it is treated as on 29th – that is the only clear construction of this contract.

The claimant has no prospects. If that was the only evidence, the application [D's

application for summary judgment] would succeed...

The application must therefore be dismissed because there are factual triable issues.”

And under the heading “Costs”:

The application overall has succeeded in part. It has assisted the parties in narrowing issues and hopefully cutting the length of trial.

41. It appears from this note that the District Judge determined that the case advanced on behalf of PJP that, on the correct construction of the Contract, the Notice to Complete could be validly served as late as 11.59 on 29 November 2018 had no prospects of success because the Notice had to be served before 29 November 2018.
42. The order drafted by the District Judge following the hearing made no reference to the construction issue and simply recorded that the summary judgment application was dismissed.

The Contract

The parties’ contentions

43. PJP’s claim in relation to the Contract was, in summary, as follows:
 - a. Under the Contract, Mr Taylor’s obligation to purchase the Property was conditional upon PJP serving a Notice to Complete on him at any time up to 11.59 on 29 November 2018.
 - b. PJP served a Notice to Complete on Mr Taylor before 16.00 on 28 November 2018. Accordingly, Mr Taylor is obliged to purchase the Property.
 - c. Even if the Notice to complete was conditional on service of the Notice by 16.00 on 28 November 2018, that condition was satisfied and Mr Taylor was obliged to purchase the Property.
 - d. In failing to complete the purchase of the Property, Mr Taylor is in breach of contract. PJP is entitled to specific performance of that obligation and/or damages for breach of contract.
44. Mr Taylor’s response to the contract claim was, in summary, as follows:
 - a. The Contract, correctly construed, required the Seller’s Notice to Complete to be served before 16.00 on 28 November 2018.

- b. No Notice to Complete was served by that time. It follows that that Mr Taylor did not come any obligation to complete the purchase of the Property.
 - c. Even if, contrary to Mr Taylor's primary case, the Notice to Complete was served in time, Mr Taylor is not obliged to purchase the Property for the following reasons:
 - i. PJP is estopped from relying on any contractual obligation on Mr Taylor to complete the purchase of the Property;
 - ii. the Contract was frustrated;
 - iii. the Contract was terminated.
45. These rival contentions give rise to the following main issues concerning the Contract:
- a. What is the correct construction of the Contract concerning the time by which the Notice to Complete must be served and was the condition fulfilled?
 - b. If the condition was fulfilled, is the Contract enforceable?
 - c. If the condition is enforceable, what relief is PJP entitled?

These issues are addressed in turn below.

(1) Construction of the Contract

46. Under the terms of the Contract, the sale of the Property was subject to a number of conditions including the one set out in clause 2.2.3 which states as follows:

... the Seller serving a Seller's Completion Notice no earlier than 6 calendar months prior to the fifth anniversary of this Agreement confirming that Completion is to take place on the fifth anniversary of this Agreement

47. Clause 2.4 of the Contract provides as follows:

Unless this Agreement has become unconditional prior to the fifth anniversary of the date of this Agreement, this Agreement shall automatically determine but without prejudice to the accrued rights and liabilities of either party against the other.

48. Conditions 1.3.4 to 1.3.7 of the Standard Commercial Property Conditions, to which the Contract was expressly subject, provide as follows:

1.3.4 Subject to conditions 1.3.5 to 1.3.7, a notice is given and a document

delivered when it is received.

- 1.3.5 (a) *A notice or document sent through the document exchange is received when it is available for collection*
- (b) *A notice or document which is received after 4.00 pm on a working day, or on a day which is not a working day, is to be treated as having been received on the next working day.*
- (c) *An automated response to notice of document sent by e-mail that the intended recipient is out of the office is to be treated as proof that the notice or document was not received.*

- 1.3.6 *Condition 1.3.7 applies unless there is proof:*
- (a) *that a notice or document has not been received; or*
- (b) *of the actual time of receipt*

- 1.3.7 *A notice or document sent by the following means is treated as having been received as follows:*
- (a) *by first class post; before 4.00 pm on the second working day after posting by second class post; before 4.00 pm on the third working day after posting*
- (b) *through a document exchange; before 4.00 pm on the first working day after the day on which it would normally be available for collection by the addressee*
- (c) *by fax; one hour after despatch*
- (d) *by e-mail; one hour after despatch*

49. On behalf of Mr Taylor, it was submitted as follows:

- a. Pursuant to Clause 2.4, the Completion Notice had to be served before the start of the fifth anniversary of the Agreement otherwise the Contract was determined.
- b. Pursuant to Clause 1.3.5.(b), service of the Completion Notice after 16.00 on 28 November 2018 is deemed by Condition 1.3.5(b) to be received on 29 November 2018; this provision applies as much to actual service as to deemed

service.

- c. Therefore, in order to be effective, the Completion Notice had to be served by 16.00 on 28 November 2018. Moreover, this issue of construction is *res judicata* following the determination of the District Judge.
- d. The Notice was not served at all on 28 November 2018. Alternatively, if, which is denied, the Notice was served on that date, service took place after 16.00. It follows that the condition in Clause 2.2.3. was not satisfied and the Contract was determined.

50. On behalf of PJP, it was submitted as follows:

- a. Clause 2.2.3 contains no final date by which a Seller's Completion Notice must be served. Completion can only take place on the fifth anniversary of the Contract being 29 November 2018. As matter of logic, a Seller's Completion Notice must be served before Completion. Looking at Clause 2.2.3 in isolation, a Seller's Completion Notice can be served at any time up to 23.59 on 29 November 2018 with Completion taking place immediately thereafter.
- b. Clause 2.4 is merely intended to emphasize that time is of the essence and that (if necessary) the words "*the end of*" ought to be added before "*the fifth anniversary of the date of this Agreement*" in order to assist in its reading. Any other construction would mean that a Seller's Completion Notice could be served up to 11.59 on 28 November 2018 but not thereafter even though in either case Mr Taylor would be left to find the £305,000 needed to complete effectively immediately.
- c. At common law, a notice can only be served by the physical handing over of the same to the intended recipient. Actual receipt needs to be proven (see *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWCH 1252). Actual service is fraught with evidential difficulties. As a result, most agreements which require a notice provide for deemed service, whereby the recipient is treated as having received the notice even if he or she did not. There is in principle no reason why a notice cannot be actually served on one date and deemed to be served on a different (usually later) date.
- d. Condition 1.3(b) does not apply to actual service but only to deemed service. It is intended to facilitate service; not place unnecessary or counter-intuitive

conditions upon it. No practical benefit is obtained by interfering with the common law rules relating to actual service. Indeed, proof of the actual time of receipt is maintained by condition 1.3.6(b). Restricting the common law rules for actual service could only cause confusion.

- e. The Completion Notice was served at about 15.45 on 28 November 2019. This was before 23.59 on 29 November 2019. Service was therefore valid. Even if, contrary to PJP's primary case, the Completion Notice had to be served by 16.00 on 28 November 2018, it was nevertheless validly served by then.

- 51. In my view, the construction of the Contract advanced on behalf of Mr Taylor is correct. In order for the Contract not to be automatically determined, it must become unconditional "prior to", i.e. before, the start of the fifth anniversary. PJP's construction of Clause 2.4 requires the words "prior to" the fifth anniversary to be construed as meaning "on or before" the fifth anniversary". That is not the natural meaning of the words "prior to". Attributing the ordinary meaning to these words does not give rise to any unreasonable consequences.
- 52. PJP's construction of Condition 1.3 requires it be construed restrictively as applying only to deemed receipt rather than to both actual and deemed receipt. There is no basis for importing a restriction to what is, on its face, a provision of general application. The rationale for treating a notice served late in the day as not served until the following day (i.e. that the recipient should have sufficient time to deal with the Notice on the day on which it is treated as being received) applies equally to actual service as to service by the alternative means listed in Condition 1.3.7. The recipient is in no better position to respond to a notice received after 16.00 by personal service than say by fax or email.
- 53. In short, I consider that on the correct construction of the Contract, the Notice to Complete had to be served by 16.00 on 28 November 2018 in order to avoid the automatic determination of the Contract pursuant to Clause 2.4.
- 54. I have found that the Completion Notice was not served at all on 28 November 2018. If, contrary my view, it was served, service cannot have taken place until after 16.00 because Mr Foster did not arrive at the Taylors' home until later. It follows that, pursuant to Clause 2.4, the Contract automatically determined and PJP's claims in relation to the contract fail.

Res judicata

55. It was submitted on behalf of Mr Taylor as follows:
- a. In her judgment dismissing Mr Taylor’s summary judgment application, District Judge Temple determined that, on the correct construction of the Contract, service of PJP’s Completion Notice had to be effected before 29 November 2018 in order to be valid.
 - b. That determination is binding on PJP. It does not matter that the District Judge’s determination was not referred to in her Order. The determination could have been appealed by PJP even though it was not referred to in the Order; see *Re B (A minor)* [2000] 1 W.L.R. 790
56. Given that I have come to the same conclusion as District Judge Temple with regard to the construction of the Contract, it is not necessary for me to determine whether PJP is bound by her determination. Had it been necessary to do so, I would have held that PJP is bound, for the following reasons.
- a. I accept that, in order for PJP to be bound by the District Judge’s determination, PJP would have to have had a right of appeal from that determination. If there was no right of appeal, the determination was not binding; see per Lord Denning MR in *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647 at pp 660–661; see also per Lewison LJ in *Thomas v Luv One Luv All Promotions Ltd* [2021] EWCA Civ 732 at paragraph 38 – 51.
 - b. Although the District Judge appears to have intended that her determination of the construction issue would be binding, given her reference to narrowing the issues, she did not refer to the issue of construction in her Order. It does not, however, follow from the absence of reference in her Order that there was no right of appeal from her determination; see *Re B* [2000] 1 WLR 790. The determination of the construction issue was not a mere finding of fact incidental to a decision which PJP does not wish to challenge. This case is in this respect distinguishable from *Lake v Lake* [1955] p.336. As Waller LJ held in *Compagnie Noga d'Importation et d'Exportation SA v Australia & New Zealand Banking Group Ltd & Ors* [2002] EWCA Civ 1142

The loser in relation to a “judgment” or “order” or “determination” has to be appealing if the court is to have any jurisdiction at all. Thus if the

decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like.

- c. PJP was the “winner” with regard to the result of the summary judgment application but the District Judge’s decision with regard to the construction issue was a free-standing determination of law which could have been appealed.

57. It follows that District Judge’s determination that, on the correct construction of the Contract, PJP’s Completion Notice had be served before 29 November 2018 is binding on PJP.

(2) Is the Contract enforceable?

58. Given my conclusion that the condition as to service of the Completion Notice was not satisfied with the consequence that the Contract was determined, it is not necessary for me to address Mr Taylor’s other defences to PJP’s contractual claim or the relief that would have been appropriate, had the Contract been enforceable. I therefore propose to address these issues only briefly.

Estoppel

59. Counsel for Mr Taylor relied on the principle of forbearance in equity or promissory estoppel, as stated in *Hughes v Metropolitan Ry* (1877) 2 App. Cas. Lord Cairns held that if one party leads the other:

... to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

60. For the equitable doctrine to operate, there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party; see *Chitty on Contracts* 34th Ed para 6-94. The waiver or forbearance may have extinctive, rather than suspensory,

effect if it would be inequitable to allow the representor to rely on its original rights, see *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) per Stuart-Smith J at paras 123 -124.

61. Counsel for Mr Taylor submitted that PJP was estopped from insisting on performance of the Contract, on the following grounds:
 - a. By failing to reinstate the Property and by causing and accepting the surrender to the Lease, PJP knowingly caused Mr Taylor to believe that the commercial raison d'être of the business intended to be conducted utilising the Property was no longer possible and that the contractual arrangements were abandoned,
 - b. PJP represented or promised that it would not insist on its legal rights under the Contract with the intention that Mr Taylor would rely on this representation.
 - c. In reliance on this representation or promise, Mr Taylor acted to his detriment by taking no steps to compel PJP to reinstate or replace the Property following the fire.
62. An essential element of this case is the assertion that PJP represented, and Mr Taylor believed, that, following the fire and having regard to the failure on the part of PJP to reinstate the Property, the contractual arrangements were abandoned and that PJP would not insist on its right to sell the Property to Mr Taylor. I am not persuaded that there was any such implied representation or promise or that Mr Taylor had such belief, given that from 2016 onwards Mr Taylor's solicitors were negotiating with PJP's solicitors over a surrender of the Lease and a termination of the Contract.
63. If, therefore, contrary to my view, the Contract was not determined by reason of the failure to serve PJP's Completion Notice on time, PJP would not be estopped from enforcing its rights under the Contract.

Frustration

64. It was submitted on behalf of Mr Taylor that the Contract, if not determined, was frustrated by reason of the damage to the Property and the failure of PJP to reinstate it.
65. If, contrary to my view, the Contract was not determined, I do not consider that it was frustrated. It is doubtful whether the doctrine of frustration can ever apply to a contract for the sale of land; see *Chitty on Contracts* 34th Ed para 26-057. The fact that the

Property was seriously damaged by fire and not reinstated did not make the Contract, which included provision for insurance against fire damage, radically different or impossible to perform.

Termination

66. It was submitted on behalf of Mr Taylor that the Contract, if not determined, was terminated, either by implicit mutual agreement or by his acceptance of PJP's repudiatory breach of the Contract in failing to effect valid insurance and/or in failing to pay over the £100,000 received from on the Property.
67. Clause 16 of the Contract required PJP to insure the Property until completion in accordance with the terms of the Lease. As set out earlier in the judgment, PJP arranged insurance at the outset but Aviva avoided the policy and PJP subsequently agreed that Aviva had no liability in respect of the fire. By failing to arrange for effective insurance, PJP was in breach of the Contract. I am not, however, satisfied that Mr Taylor ever purported to accept a repudiation of the Contract. Nor am I satisfied that the Contract was ever terminated by implicit agreement. As already noted, following the fire the parties' solicitors negotiated on the basis that the Contract remained in force. I have found that Mr Taylor did not return the keys of the Property or otherwise conducted himself in such a way as to accept any repudiation.
68. It follows that, if, contrary to my view, the Contract was not determined, it was not terminated by any acceptance of PJP's repudiatory breach.

(3) Is PJP entitled to specific performance?

69. Given my findings that the Contract was determined by reason of the failure to serve the Completion Notice in time and that, even if not determined, is not enforceable, the issue of the appropriate relief to be granted to PJP does not arise.
70. Had I concluded that the Contract had not been determined and that it was enforceable, I would nevertheless have refused to grant specific performance on the ground that PJP was in serious breach of the Contract in failing to arrange for effective insurance of the Property. PJP would therefore have been left to its remedy in damages. Those damages would in principle have comprised the purchase price of the Property payable by Mr Taylor, less an amount reflecting the diminution in the value of the Property resulting from PJP's breach of contract in failing to obtain insurance and to reinstate the Property, less the current value of the Property, together with compensation for any costs which PJP had reasonably incurred in maintaining the Property since 19

The Lease

The parties' contentions

71. PHP's case was that Mr Taylor was liable as guarantor under the Lease for arrears of rent in relation to the period 2015 to 2018, amounting to £93,750.
72. Mr Taylor's response was that he denied owned any rent on the following grounds:
 - a. PJP is estopped from claiming any rent;
 - b. Pursuant to the Lease, the liability for the payment of rent was suspended for three years from 12 February 2014 as a consequence of the fire;
 - c. Pursuant to the Lease, no rent is payable following the disclaimer of the Lease.
 - d. The Lease was frustrated;
 - e. The Lease was terminated by the surrender of the Property and/or by Mr Taylor's acceptance of PJP's repudiatory breach.
73. The issues arising from these contentions are addressed below.

Waiver/estoppel

74. Mr Taylor alleged that PJP waived its right to claim rent by reason of its failure to make any demand for rent after the Fire, thereby representing and leading Mr Taylor to believe that the obligation to pay rent under the Lease would not be enforced and causing him to act to his detriment to take no steps to compel PJP to reinstate the Property or enforce its rights under the Lease. It relied on the principles of law summarised at paragraphs 59 and 60 above
75. In my view, the necessary elements of waiver or estoppel were made out in relation to the Lease. By failing to demand any rent for several years despite its non-payment, PJP impliedly represented to Mr Taylor that it was waiving its entitlement to rent. Mr Taylor understandably believed that no rent was payable, given the state of the Property and the absence of any demand. Mr Taylor did not take steps to enforce its rights under the Lease by pursuing PJP for its failure validly to insure the Property or by requiring it to repair the Property. It would be highly inequitable for PJP now to rely on any entitlement to rent.

76. It follows that PJP is estopped from claiming any rent.

Suspension

77. Clause 12.1 of the Lease provides as follows:

12.1 If the whole of the Property or any part which the Landlord is obliged to insure or the means of access to the Property or utilities to the Property are damaged or destroyed by an Insured Risk or an Uninsured Risk so that the Property is unfit for occupation or use then the Rent (or a fair proportion of it determined by the Landlord's Surveyor according to the nature and extent of the damage) will be suspended from the date of damage or destruction for a period of three years, or, if sooner, until the Property is fit for occupation and use.

78. "Insured Risk" is defined to include "fire". "Permitted Use" is defined as meaning:

"a public house licensed for the sale by retail off alcoholic drinks and the ancillary provision of accommodation, food and other refreshment and recreation ..."

79. The damage to the Property and the utilities from the fire was, in my view, such that the Property was rendered unfit for occupation or for use as a public house. The partial extent of the damage does not detract from the fact that the building as a whole was left in a condition that made it unsuitable to be used as public house or to be occupied. As set out above, there was serious damage to the roof which was left in a dangerous condition, there was extensive water damage to the fabric of the building, there were no utilities. Mr Taylor could not reasonably have been expected to carry on business in any part of the building and the fact that Mr Foster and Mr Hughes did not seek payment of any rent after the fire indicates their acceptance that it was not feasible to do so.

80. It follows, in my judgment, that, even if PJP was not estopped from claiming rent, no rent would be payable for a period of three years from 12 February 2014.

Disclaimer

81. Clause 20.1 of the Lease provides as follows:

20.1 The Guarantor covenants with the Landlord:

20.1.1 that the Tenant will pay the Rent and comply with all the Tenant's obligations in this lease and in any authorised guarantee agreement given by the

Tenant in relation to this lease. In any case of default by the Tenant the Guarantor will pay the Rent and comply with those obligations and will on demand make good to the Landlord on a full indemnity basis all liability caused to the Landlord by any such default

20.1.3 that if this lease is disclaimed or is forfeited and if within three calendar months of that disclaimer or forfeiture the Landlord serves notice in writing on the Guarantor requiring that clause 20.1.4 is implemented, the Guarantor will comply with that clause the Guarantor must, at its own cost, accept (and execute and deliver a counterpart of) a lease of the Property for a term commencing on and taking effect on the date of such disclaimer or forfeiture (as appropriate) of this lease and expiring on the date when this lease would have expired had it not been disclaimed or forfeited, at the same rents and on the same covenants and conditions in this lease.

20.1.4 if the Landlord does not require the Guarantor to take a new lease, the Guarantor must on demand pay to the Landlord a sum equal to the rents and other sums that would have been payable under this lease but for the disclaimer or forfeiture from and including the date of disclaimer or forfeiture for the period of 6 months or if sooner the date this lease would expire by effluxion of time or the date on which the full open market rent becomes payable under a lease or underlease of the Property granted to a third party,

82. It was submitted by Counsel on behalf of Mr Taylor that the effect of these provisions is that, following the disclaimer of the Lease, PJP's options *vis-à-vis* Mr Taylor were restricted to either requiring Mr Taylor to enter into a new lease or to pay rent for 6 months from the date of disclaimer. The covenant to pay and to comply with the Tenant's obligations in Clause 20.1.1 can only have effect up until the point of disclaimer/forfeiture, otherwise the provisions of Clause 20.1.3 to 20.1.3.5 would be pointless. PJP made no election under 20.1.4) PJP's only remedy is therefore for any rent payable for the period of six months from the date of disclaimer (15 October 2015), which on the footing that the obligation to pay rent had been suspended, was nil.

83. Counsel for PJP submitted as follows:

- a. The effect of disclaimer is set out in section 1015 of the Companies Act 2006. The rights, interests and liabilities of the company are determined from the date of disclaimer. However, disclaimer does not release any other person from liability. As regards such a person (which includes a guarantor), the landlord can elect to treat the lease as continuing notwithstanding disclaimer. If the landlord actually takes possession of the premises, this terminates the liability of the guarantor; see *Woodfall: Landlord and Tenant*, para 16.208.2; *Hindcastle v Barbara Attenborough Associates* [1997] AC 70 It is not alleged that PJP took possession of the Property.

- b. Clause 20.1.1 creates an obligation to pay rent without the need for any demand. Although clause 20.1.5 requires the guarantor to pay on demand rent which accrues within six months of disclaimer, it does not purport to limit the) is one which a party does not wish to challenge in the result) is one which a party does not wish to challenge in the result) is one which a party does not wish to challenge in the result sum which would otherwise be payable under clause 20.1.1. and is intended to be an additional obligation upon the guarantor. If clause 20.1.5 were intended to take priority over clause 20.1.1, then the landlord would be required to demand rent after a disclaimer. The landlord might be ignorant of disclaimer for a long period. If the landlord were to re-enter after disclaimer, then the effect of clause 20.1.5 would be to entitle him to claim rent for an additional six months.
84. I consider that the construction contended for on behalf of Mr Taylor is correct. In construing a contract, the courts presume that its provisions are intended to be operative; see *Lewison: The Interpretation of Contracts* 7th Edition para 7.24. On PJP's construction, Clause 20.1.3 to 20.1.5 would be otiose. I do not consider that the function of Clause 20.1.5 is to override the common law by entitling the Landlord to claim rent after re-entering the Property, given that no reference is made in the Clause to re-entry.
85. It follows that the effect of the disclaimer was that from 14 October 2015 Mr Taylor's only liability was to pay the rent that would have been payable under the Lease for a period of six months from that date. Even if, contrary to my view, PJP was not estopped from claiming rent, no rent was for this period because of the three- year suspension of rent following the fire.
86. It follows that, even if, contrary to my view, PJP was not estopped from claiming rent, PJP's claim for rent fails in its entirety.

Surrender

87. It was submitted on behalf of Mr Taylor that the Lease was surrendered by the delivery up of the keys to the Property. As set out earlier in this judgment, I do not accept Mr Taylor's evidence as to the return of the keys or that he otherwise surrendered the Lease. It follows that the Lease was not terminated by surrender.

Frustration

88. It was submitted on behalf of Mr Taylor that the Lease was frustrated. I do not consider that the Lease was frustrated, essentially for the same reasons as led me to conclude that the Contract was not frustrated.

The Counterclaim

89. It was submitted on behalf of Mr Taylor, in summary, as follows:

- a. the sum of £8,629.62 paid to PJP by Aviva by way of repayment of insurance premium and the sum of £100,000 paid to PJP by Henderson in settlement of PJP's negligence claim unjustly enriched PJP;
- b. The enrichment was at the expense of Mr Taylor who should have benefited from the payments.
- c. Mr Taylor is entitled to the payments as money had and received and/or as money held on trust for him.

90. An essential ingredient of the claim is the assertion that the two payments to PJP were at the expense of BHLL, and/or at the expense of Mr Taylor as BHLL's guarantor, on the footing that BHLL allegedly paid for the insurance of the Property and was therefore entitled to the return of premium and settlement monies. I have, however, found that the insurance of the Property was in fact paid for by PJP, not BHLL. The refund was therefore due to PJP not BHLL. Similarly, the compensation paid by Henderson was paid to PJP because PJP had a claim against Henderson. It was not paid to BHLL or Mr Taylor, because they had no claim against Henderson.

91. The fact that PJP has, in a loose sense, been unfairly enriched by the payments in the sense that it has profited from them and BHLL has suffered detriment as a result of PJP's failure to effect valid insurance of the Property, is not a sound basis for fashioning a restitutionary remedy in relation to these payments. There is no sufficient linkage between, on the one hand, the payments to PJP and, on the other, the detriment to BHLL and Mr Taylor. Accordingly, Mr Taylor is not entitled to any relief in relation to the payments.

Conclusion

92. The claim and counterclaim are dismissed.