Neutral Citation Number: [2024] EWHC 1 (Ch)

Case No: PT-2023-MAN-000130

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Friday, 5 January 2024

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

- -

Between :

IAA VEHICLE SERVICES LIMITED

Claimant

- and –

HBC LIMITED

Defendant

- -
- -

Miss Alice Hawker (instructed by **Freeths LLP**, Sheffield) for the **Claimant**
Mr Tim Calland (instructed by **Birketts LLP**, Ipswich) for the **Defendant**

Hearing date: 20 December 2023
Draft Judgment circulated: 31 December 2023
Judgment handed down: 5 January 2024

Approved Judgment

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

HIS HONOUR JUDGE HODGE KC

Remote hand-down: The court handed down this judgment remotely by circulation to the parties' legal representatives by email, by uploading it to CE-File, and by release to The National Archives. The time and date for hand-down is deemed to be 10:00am on 5 January 2024.

Vendor and purchaser *– Specific performance – Lessee's option to purchase reversion – Option providing that 'upon valid exercise of the option' a binding agreement 'shall come into existence' – Standard conditions of sale requiring purchaser to pay a deposit of 10% of the purchase price 'no later than the date of the contract' – Exercise of option without payment of deposit – Whether purchaser obliged to pay deposit on or before date of exercise of option – Whether time of the essence for payment – Whether non-payment of deposit constituted a repudiation of purchase contract – Whether vendor entitled to treat contract as discharged – Whether purchaser entitled to specific performance*

The following cases are referred to in the judgment:

Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, [2010] 3 EGLR 165, [2011] 2 All ER (Comm) 223
Federal Republic of Nigeria (The) v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), affirmed at [2019] EWCA Civ 1641, [2019] 2 CLC 559
Millichamp v Jones [1982] 1 WLR 1422
Peacock v Imagine Property Developments Ltd [2018] EWHC 1113 (TCC)
Rennie v Westbury Homes (Holdings) Ltd [2007] EWHC 164 (Ch), [2007] 2 EGLR 95
Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445, [2013] Ch 36

JUDGE HODGE KC:

I: Introduction

1. This is my considered judgment following the attended trial in Manchester, on Wednesday 20 December 2023, of a Part 8 claim issued as recently as 16 October 2023. The claimant is represented by Miss Alice Hawker (of counsel), instructed by Freeths LLP (Freeths), and the defendant by Mr Tim Calland (also of counsel), instructed by Birketts LLP (Birketts).

2. The claimant is the tenant under three separate leases of commercial premises at Bilsthorpe, Canvey Island, and Billingham, each for terms of ten years from and including 14 June 2013. The first two leases were granted on 14 June 2013, and the third on 5 August 2013. None of the leases excludes the security of tenure provisions contained in Part II of the Landlord and Tenant Act 1954 (as amended). By clause 7 (21) of each Lease (headed *'Option'*): *'The Landlord grants to the Tenant the Option'*. The *'Option'* is defined by clause 1 (16) as meaning *'the option to acquire the freehold interest from the Landlord as set out in Schedule 6'*. The defendant (formerly known as *'Holding & Barnes (CI) Limited'*) is the landlord. It is common ground that each of the three options was validly exercised by written notice dated, and given on, 7 June 2023, giving rise to contracts of sale between the parties, which changed their relationship to that of vendor and purchaser.

3. The principal relief sought by the claimant is a declaration that the three options were validly exercised and are binding on the defendant, and an order for specific performance of the three resulting sale contracts.

4. The defendant contests the claim. It says that the claimant repudiated the contracts by failing to pay the required 10% deposits by midnight on the date it exercised the options; and that it has accepted these repudiations, with the result that the contracts are at an end. By its acknowledgment of service, the defendant seeks a declaration that the three options are not binding on the defendant due to the claimant's failure to pay the deposits, and the defendant's subsequent termination of the contracts.

5. The claimant disputes that payment of the deposits was required no later than the date the options were exercised. It maintains that it is, and always has been, ready, willing and able to pay the deposits; and it has transferred the aggregate sum of those deposits to its solicitors' client account. The only obstacle to the claimant's ability to pay the deposits is the defendant's refusal to provide payment details for its conveyancer (to whom the deposits must be paid under the standard commercial property conditions of sale). In response, the defendant says that the claimant should have sought the payment details, or at least tendered payment of the deposits, no later than the date on which the options were exercised; and, in any event, that the lack of bank details is irrelevant in view of the claimant's continued denial that any deposits were payable.

6. The headline issues in this case are whether: (1) the claimant was obliged to pay the 10% deposits on or before the date of exercise of the options, (2) non-payment of those deposits constituted a repudiation of the resulting purchase contracts, and (3) the defendant is entitled to treat those contracts as discharged.

7. This hearing was originally listed to determine an application by the claimant, issued on 9 November 2023, for summary judgment on its claim. Sensibly, the parties agreed

that the hearing should be used finally to determine the claim. This was reflected in a consent order I approved on 30 November, which was sealed by the court on 10 December 2023. I commend the parties and their legal representatives for the constructive approach they have taken to the resolution of this dispute, which will result in a final determination (subject to any appeal) within less than three months after the issue of the claim form.

8. The evidence consists of two witness statements, both dated 12 October 2023, from Mr Thomas Charles Rumboll, a director of the claimant, and a single witness statement from Mr Terence Anthony Holding. In the interests of furthering the overriding objective of the Civil Procedure Rules of dealing with the case justly, and at proportionate cost, I have dispensed with the requirements of PD 57AC, governing the form of witness statements for trials in the Business and Property Courts, since the evidence in this case turns entirely on documents that are common to both parties, and the outcome depends entirely upon matters of legal argument. There was no cross-examination of either witness.

9. For structural reasons only, this judgment is divided into the following parts (although these are not self-contained, and the contents of any one part have informed the others):

I: Introduction

II: The options

III: Factual background

IV: Submissions

V: Analysis and conclusions

VI: Disposal

II: The options

10. The option to purchase the reversion is contained in Schedule 6 to each of the three leases. Paragraph 2 (headed *'Option'*) provides:

> (a) In consideration of the sum of ONE POUND (£1.00) now paid by the Tenant to the Landlord (the receipt of which is acknowledged) the Landlord grants to the Tenant an option during the Option Period to purchase the Freehold Interest at the Purchase Price.
>
> (b) Subject to paragraph 3 below, the Tenant may exercise the Option at any time during the Option Period by serving the Tenant's Notice on the Landlord.
>
> (c) The Option will immediately terminate on the Determination of the Term.

11. Miss Hawker points out that there is a peculiarity in relation to the Canvey Island lease. Despite the reference, in paragraph 4 (a) of Schedule 6, to the purchase of *'the Freehold Interest'*, the subject-matter of the lease consists of two leasehold titles,

expiring in 2032. However, she submits that any confusion is clarified by the following matters:

(1) The definition of *'the Freehold Interest'* in sub-paragraph 1.2 of paragraph 1 (a) of Schedule 6 refers expressly to the title number (EX 598837), thereby resolving any confusion.

(2) When read together with the particulars of the demised premises in Schedule 1 to the Canvey Island lease, it is clear that the parties intended to grant an option to purchase the landlord's reversionary interest.

(3) When read together with the contemporaneous Bilsthorpe lease, and the later Billingham lease, it is clear that the parties intended to transfer the defendant's reversionary interest upon exercise of the options.

Mr Calland has not sought to argue to the contrary. I accept this submission.

12. *'The Option Period'* is the full ten year terms of the Billingham and Bilsthorpe leases (from and including 14 June 2013 to 13 June 2023) and the last six years of the Canvey Island lease (from and including 14 June 2017 to 13 June 2023). *'The Purchase Price'* is £1.6 million for the Billingham lease, £210,000 for the Bilsthorpe lease, and £2.1 million for the Canvey Island lease.

13. Paragraph 3 is headed *'Option Conditions'* and provides:

> The Tenant's Notice will be of no effect unless it is given:
>
> (a) by, or on behalf of, each and every person who together constitute the Tenant at the date of exercise of the Option;
>
> (b) in accordance with the notice provisions contained in clause 7 (5) of this Lease;
>
> (c) in respect of the whole of the Freehold Interest; and
>
> (d) once all sums payable pursuant to the Vendor Loan Notes 2013 which were issued on or about the date of this Lease by HBCR Limited (Company Number 08561326) to Terence Anthony Holding have been paid in full.

It is common ground that these four pre-conditions were all fulfilled.

14. The consequences of exercising the Options are expressly set out in paragraph 4 of Schedule 6:

> 4. Contract
>
> (a) Upon valid exercise of the Option, a binding agreement shall come into existence and the Landlord will sell and the Tenant will buy the Freehold Interest for the Purchase Price on the terms of this schedule …
>
> (f) The said contract for sale shall incorporate the standard commercial property conditions of sale (2nd Edition)

> (g) The Part I conditions [of] the standard commercial property conditions of sale (2nd Edition) will be incorporated in this agreement so far as they:
>
> i. apply to a sale by private treaty;
>
> ii. relate to freehold property;
>
> iii. are not inconsistent with the other clauses of this agreement; and
>
> iv. have not been excluded by any of the other clauses of this agreement.

15. In her oral submissions, Miss Hawker placed considerable reliance upon the word *'shall'* in sub-paragraphs 4 (a) and (f). In my judgement, such reliance is misplaced. The word *'shall'* was used because the drafter of Schedule 6 was looking to a future event: the exercise of the option. In that context, the use of language of futurity is of no significance.

16. Paragraph 4 (i) expressly disapplies certain specified conditions of the standard conditions. These do not include standard conditions 2.1 (*'Date'*) or 2.2 (*'Deposit'*).

17. Paragraph 6 (headed *'Completion'*) provides that:

> The sale of the Freehold Interest is to be completed on the Completion Date, provided that the Landlord need not complete the sale unless the Tenant has paid all the Lease Rents and other sums payable under this Lease up to the date of actual completion.

18. *'The Completion Date'* is defined as meaning *'90 days after the expiry of the Tenant's Notice (or earlier by agreement)'*.

19. Schedule 7 to each Lease contains the form of option notice.

20. Condition 2.2 of the Standard Commercial Property Conditions of Sale (2nd Edition) is headed *'Deposit'*. It provides:

> 2.2.1 The buyer is to pay a deposit of ten per cent of the purchase price no later than the date of the contract.
>
> 2.2.2 Except on a sale by auction the deposit is to be paid by direct credit and is to be held by the seller's conveyancer as stakeholder on terms that on completion it is to be paid to the seller with accrued interest.

21. By standard condition 1.1.1 (g) *'direct credit'* is defined as meaning *'a direct transfer of cleared finds to an account nominated by the seller's conveyancer and maintained at a clearing bank'*.

III: Factual background

22. On 29 March 2023, there was a Teams call during which the claimant's corporate director, Mr Jonathan Pervin, informed the defendant's agent, Mr Mike Wells, of its intention to exercise the options. This was followed up by an email sent to Mr Pervin at 10.40 am on 11 April 2023 in which Mr Wells confirmed that he had reported the

situation regarding the leases to the defendant, and that it was to be discussed at the next board meeting in Guernsey in the next few weeks. Mr Wells stated that he would *"update you again following the Board meeting"*. There is no evidence of any further communication between the parties, or their representatives, prior to the exercise of the options.

23. In his oral submissions, Mr Calland suggests that nothing turns upon this email. Both parties were aware of the options. The final opportunity for exercising them was approaching; yet details of the account to be nominated by the defendant's conveyancer to receive payment of the deposits were neither requested nor provided.

24. On 7 June 2023, notices exercising all three options were served on the defendant by the claimant's former solicitors, Walker Morris LLP (**Walker Morris**), by recorded delivery, special delivery, and first class post, and also by hand. The conditions set out in paragraphs 3 (a) to (d) of Schedule 6 to the leases were all satisfied prior to service of the notices. The defendant accepts that it received these notices, and that they operated as valid notice that were effective to exercise the options in all three leases. However, no 10% deposits were paid, or even tendered, to the defendant, whether on 7 June or at any time thereafter, until Freeths appeared on the scene as the claimant's new solicitors, and wrote the letter to Birketts dated 25 September 2023 referenced below. The claimant has offered no explanation for this omission. But nor has the defendant suggested that the claimant made a deliberate decision not to pay the deposits on or before the date the options were exercised in the knowledge that they were under any obligation to do so. The highest that the defendant puts the matter (in Birketts' letter of 21 July 2023) is that the failure to pay the required deposits *'is no doubt a direct consequent [sic] of them choosing to wait until the last minute to serve the option notices and dealing with it in a rush'*. The inference I would draw – although I make no finding to this effect since it formed no part of either party's case, and is not addressed in the evidence – is that the requirement of standard condition 2.2.1, requiring the payment of a 10% deposit no later than the date of each contract, was simply overlooked. What is common ground is that neither the claimant, nor its then solicitors, Walker Morris, had asked the defendant to identify its conveyancer, or to nominate a bank account into which the deposits were to be received; but nor had the defendant ever volunteered this information.

25. After the option period had expired on 13 June 2023, Birketts wrote, on behalf of the defendant, to Walker Morris on 22 June 2023. No admissions were made as to the validity of the option notices at that stage. Without prejudice to that, and on the assumption that the option notices were indeed valid, the letter proceeded to assert that, *'the failure to pay the deposits amounts to a repudiatory breach of each option entitling our client to now terminate'* each of the three contracts with immediate effect. This Birketts purported to do, writing: *'We consider the options contained in each of the leases to now have ended as a result. In the circumstances, our client will be taking no further action in connection with the Option Notices which you have served.'*

26. In oral submissions, Miss Hawker points out that this letter was written more than a week after the option periods had expired, when there was no longer any further opportunity to exercise the options afresh. From that letter, it was unclear whether the defendant accepted that the options had been validly exercised; but it was clearly asserting that the claimant was in repudiatory breach by failing to make payment of the deposits into a bank account of which it had no details. I would observe that if the

defendant's submissions are correct, and the failure to pay the deposits by no later than midnight on the date of exercise of the options amounted to a fundamental breach of contract, it would have been open to the defendant to elect to accept that repudiation as terminating the resulting sale contracts even before the expiry of the option periods on 13 June 2023. On this footing, whatever its forensic effect, Birketts' failure to alert the claimant to the non-payment of the deposits until after the option period had expired would seem to be devoid of any legal significance.

27. On 27 June 2023, Walker Morris sent Birketts a pre-action letter challenging the assertion that standard condition 2.2.1 had been incorporated into the contractual arrangements between the parties. Even if it had been, Walker Morris asserted that it must be read in the light of standard conditions 2.2.2 and 1.1.1 (g) such that it was clear that there could be no breach of the obligation imposed by standard condition 2.2.1 unless the seller's conveyancer had provided the claimant with details of the bank account into which the deposit monies were to be paid. For these reasons, Birketts' assertion that the claimant had acted in breach of contract was said to be misconceived. The defendant had no right to terminate any of the three contracts. It was arguable that Birketts' letter itself had amounted to a repudiatory breach of contract by the defendant; but the claimant confirmed that it did not accept the breach as terminating the contract. The letter continued: *'Our client is entitled to require (and does require) the performance by your client of its contractual obligation to transfer the reversionary interests under the [three leases] to our client. Should your client fail to discharge its contractual obligations our client will issue proceedings for specific performance and such further or other relief as may be appropriate, together with an order for costs'.*

28. Miss Hawker submits that it is clear from this letter that:

(1) The claimant was unsure whether the defendant admitted the validity of the option notices.

(2) The claimant was awaiting details of the bank account into which the deposit monies were to be paid.

(3) The claimant required specific performance of the option contracts, and (by implication) was ready, willing and able to perform its outstanding obligations under those contracts.

29. On 10 July 2023, Birketts responded confirming that the defendant's position remained unchanged. Its firm view *'remains that deposits were due on service of the option notices and the failure to pay entitled our client to terminate. None of the points in your letter are accepted and we disagree with them as a matter of law.'* Birketts maintained that it was patently clear that the contract for sale was only formed upon exercise of each option and not before. Birketts also rejected the assertion that any breach of the standard conditions could not occur without the claimant first being in receipt of the seller's conveyancer's bank details for the following reasons:

(1) The right to exercise an option is a unilateral act, entirely within the control of the claimant. It could choose if and when to exercise each option; and it was free to do so at any time over the ten-year option period.

(2) On exercise of each of the options, it was the claimant's obligation to pay the deposits.

(3) It followed that the claimant could (and should) have made contact with the defendant prior to exercising the options in order to request details of the defendant's conveyancer, and their relevant bank details.

(4) The suggestion that the defendant was somehow required to request payment by (in effect) supplying bank details in advance of even knowing that the options were being exercised made no logical sense, and Birketts disagreed with it.

The letter concludes:

> Further and in any event, your letter makes clear that your client had (and continues to have) no intention of paying the deposits. To the extent that our client was not entitled to terminate the contracts for sale before (which is not accepted) the position taken by your client as confirmed in your letter amounts to a further repudiatory breach of each contract entitling our client to terminate again now. Without prejudice to our primary position that the contracts have already been validly terminated, and as solicitors and duly authorised agents acting for and on behalf of our client, please therefore accept this letter as a further formal notice that our client hereby terminates each of the contracts with immediate effect.

30. Miss Hawker observes that it is implicit in the second paragraph of this letter that any issue as to the validity of the option notices seems to have evaporated. She stigmatises this letter as plain evidence of the cynical approach being taken by the defendant to seek every opportunity to wriggle out of the three purchase contracts.

31. Walker Morris responded by letter dated 12 July 2023. This makes the initial point that:

> The value of your client's interest has increased significantly since 2013 when the option price was fixed. As a result of this (a) it is very much in our client's commercial interest to secure the sale contemplated by the option agreement and (b) it is very much in your client's commercial interest to avoid that sale.

The other key points appear on the third page, as follows:

> Until such time as your client's conveyancer nominated the account into which the deposit should be paid, it was legally impossible for our client to pay the Deposit by Direct Payment – and, once that is understood, it follows that the relevant question is not whether your client was under some kind of obligation to nominate the bank account into which the money should be paid; rather, the relevant question is whether the option agreement should be construed in such a way as to allow your client (by not nominating any account) to side-step its obligation to transfer its property interest in return for the option price …
>
> If our client is under a contractual obligation to pay a Deposit then that is not an obligation our client would wish to shirk. We therefore invite

> your client to appoint a conveyancer (for the purpose of the option agreement) and for that conveyancer to nominate a bank account into which the Deposit should be paid.

Miss Hawker says that this makes explicit what was previously implicit in Walker Morris's earlier correspondence: Unless and until you provide the bank details of the defendant's conveyancer, the claimant cannot possibly make payment of the deposits.

32. On 21 July 2023, Birketts responded, stating that:

> The absence of any bank details does not excuse your client from the obligation to pay the deposits. All your client had to do was to request the details prior to exercising the options. They chose not to; again no doubt due to the decision to leave the exercise until the last minute. Your client can hardly be said to have complied with its obligation to have paid a deposit when it made no effort at all to do so. Ultimately, it was your client's obligation to ensure payment was made and the onus was on them to take steps to do so; not for our client to pre-empt it and offer bank details in advance which practically would not have worked given that they would then constantly need updating just in case your client chose to exercise at any given time.

Miss Hawker suggests that this is an entirely strained - indeed bizarre - position for the defendant to take. She points out that Birketts did not provide, and have at no point provided, any details of how the claimant might effect payment of the deposits. She recognises that, by this time, the parties have descended into litigation by correspondence, setting out their respective positions.

33. On 25 September 2023, Freeths appeared on the scene as the claimant's new solicitors. They wrote to Birketts to confirm that, without prejudice to the claimant's position that any deposits did not need to be paid at the point of service of the option notices, Freeths held funds in respect of the deposits. They confirmed that the claimant remained (as it always had been) ready, willing and able to complete in respect of all three options. They requested confirmation of the name of the defendant's conveyancer, and relevant payment details in respect of payment of the deposits and the balance of the relevant purchase prices.

34. In their response, dated 28 September 2023, Birketts again omitted to provide any payment details, and they confirmed that the defendant's position remained unchanged.

35. At paragraph 19.3 of his first witness statement, Mr Rumboll observes:

> What I consider to be the commercial *'elephant in the room'* is referred to in Walker Morris's letter to Birketts of 12 July 2023 - the value of [the defendant's] interests has increased significantly since 2013 when the option prices were fixed and it is very much in [the claimant's] interest to secure the sales to it pursuant to the option agreements whereas it is very much in [the defendant's] interest to avoid that.

Neither that observation, nor the earlier comment to similar effect at paragraph a of Walker Morris's letter of 12 July, have ever been challenged by the defendant. In her oral submissions, Miss Hawker emphasises that the option properties had increased

significantly in value since the parties had fixed upon the option prices, and the defendant is now seeking to avoid making a loss consequent upon a bad bargain. She stigmatises the defendant as opportunistically seizing upon an alleged repudiatory breach, even though the claimant had made it pellucidly clear that it was ready, willing and able to complete the purchase of all three properties. Miss Hawker emphasises that the principal repudiatory breach relied upon by the defendant is alleged to have occurred on the very same day that the claimant exercised the options.

36. In his short witness statement, Mr Holding makes it clear that the defendant agrees with the claimant that the Part 8 procedure is suitable for this claim as there is no dispute of fact, and the only issue in dispute appears to be about the interpretation of the options. He confirms that, to the best of his knowledge, the defendant did not supply the claimant with the details of any bank account to receive payment of the purchase prices or the deposits before the claimant sent the option notices. Equally, however, the claimant did not request any such details until after the defendant had terminated the contract (only doing so by its solicitors' letter of 12 July 2023). The defendant's position is that it is irrelevant whether or not the claimant could have breached its obligation to pay the deposits if the defendant had not previously supplied it with the relevant bank details. This is because the claimant responded to the defendant's later acceptance of the claimant's repudiatory breach by the non-payment of the deposits by denying that any deposits were payable. This is an entirely freestanding repudiation of the sale contracts that was accepted by the defendant's solicitors' letter of 10 July 2023.

IV: Submissions

(a) The claimant

(i) Skeleton argument

37. Miss Hawker begins her written skeleton argument by submitting that it is clear from the wording of Schedule 6, and by reference to case law authority, that the payment of the deposits is not a condition precedent to the valid exercise of the options. The claimant fulfilled the conditions precedent to exercising its options set out in paragraph 3 of Schedule 6. It is only once the options have been validly exercised that payment of the deposits becomes a term of the resulting sale and purchase contracts. For the defendant, Mr Calland does not seek to contend that the options have not been validly exercised.

38. Miss Hawker then turns to the timing of the payment of the deposits. Having validly exercised the options, Miss Hawker says that the claimant is ready, willing and able both to pay the deposits, and to complete the resulting sale contracts. She submits, in reliance upon observations of Henderson J in *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWHC 164 (Ch), [2007] 2 EGLR 95 at [40]-[43], that the law will imply an obligation to make the payment of the deposits within a reasonable time. On the evidence, the claimant is in a position to pay the deposits. The only obstacle preventing it from doing so is the defendant itself, which refuses to provide the necessary payment details.

39. Miss Hawker submits that the claimant is not in repudiatory breach of the sale contracts by its failure to pay the deposits. She took me to Stuart-Smith J's summary of law on repudiatory and renunciatory breach in *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC) at [73], as follows:

> The Court of Appeal has recently reviewed the principles applicable to repudiatory and renunciatory breach in *The Spar Capella* [2016] EWCA Civ 982 at [67]-[68] and [72]-[78]. The principles are not in dispute and the present case raises no new issue of principle. I therefore adopt the principles as there summarised without setting them out in full. I bear in mind at all times that:
>
> (i) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract: see *Spar Capella* at [67], [73];
>
> (ii) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory: see *Spar Capella* at [67];
>
> (iii) Repudiation is not lightly to be inferred. It is necessary for the Court to find a clear and unequivocal refusal to perform: see *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyds Rep 89, 93 per Moore-Bick J.

40. On the question whether the requirement to pay a deposit constitutes a fundamental term of the sale contracts, Miss Hawker relies upon observations of Warner J in *Millichamp v Jones* [1982] 1 WLR 1422 at 1431. The judge first held that there was nothing in the terms of the document itself, considered in the light of the circumstances as they were when it was executed, to take the case out of the general rule that the obligation to pay a deposit upon the exercise of an option is to be regarded as a fundamental term of the agreement. Warner J continued:

> What happened in 1980 suggests, however, another question, which is: what conduct on the part of the plaintiffs would constitute a breach of that fundamental term? In *Dewar v. Mintoft* [1912] 2 KB 373 there was an actual refusal to pay the deposit, as there was also in *Pollway Ltd. v. Abdullah* [1974] 1 WLR 493. In *Myton Ltd. v. Schwab-Morris* [1974] 1 WLR 331 the cheque for the deposit was dishonoured three times. Precisely what had happened in *Lowe v. Hope* [1970] Ch 94 is not clear from the report. Here, there was mere oversight and the question is whether that, by itself, constituted a sufficient breach of the term to entitle the defendant to treat the contract as discharged. I do not think it did. There are no doubt cases of contracts where the mere failure to pay on time a sum due under the contract is sufficient to entitle the party to whom the payment should have been made to treat the contract as repudiated. But I think that it would be unnecessarily harsh to hold that that was so in a case of the present kind. The only authority cited to me suggesting that I should so hold was *Hare v. Nicoll* [1966] 2 QB 130, but that was a case of an option to buy back shares, not land, under a contract so framed that if payment were not made by the specified date, the option would lapse. That was quite a different situation in my view from the situation in the present case. In my judgment, in the present case, it was incumbent on the defendant, before he could treat the plaintiffs' failure to pay the deposit as a repudiation of the contract, to

> tell them that he was minded so to do and to give them an opportunity of complying with their obligation. Only if they then showed in some way that they were unwilling or unable to comply with it would he become entitled to consider their conduct a sufficiently clear breach of the contract to entitle him to treat it as discharged.

41. Miss Hawker recognises that it might be argued that this leans against the ordinary principle that non-payment of a deposit constitutes an immediate breach of contract by the purchaser. As the editors of *Emmet and Farrand on Title* point out (at paragraph 2.05), however, *Millichamp* involved the exercise of an option, and whether that option had been validly exercised. That is said to be different from the breach of an ordinary contract for sale. The entire passage, from which Miss Hawker cites only the middle section, reads as follows:

> Where there is an express term for payment of a deposit but the purchaser fails to comply there is authority for the proposition that in general such payment constitutes a condition precedent to a binding contract: *Myton Ltd v Schwab Morris* [1974] 1 WLR 331 (where the purchaser's cheque was not met). However, in that case, Goulding J also held in the alternative that non-payment merely entitled the vendor to rescind for breach of a fundamental term (see also *Pollway Ltd v Abdullah* [1974] 1 WLR 493 CA indirectly supporting this view) … These cases have now been reconsidered by Warner J and the conclusion reached that a provision for payment of a deposit is not a condition precedent but in general a fundamental term: *Millichamp v Jones* [1982] 1 WLR 1422. However on the facts of that case, concerning exercise of an option, his lordship found that the non-payment of the deposit had been an oversight amounting to a breach of contract, and the vendor should have notified the purchaser and allowed him an opportunity for payment before treating the contract as discharged. Nevertheless, in an ordinary contract for sale, non-payment of a deposit should simply constitute an immediate breach of contract on the part of the purchaser. This decision was applied by the Court of Appeal in relation to a sale of ships in *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 WLR 435, which has now itself been approved and followed by the Court of Appeal in relation to a sale of land in *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch 36.

42. I shall need to return to *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch 36 in due course since it forms the foundation of Mr Calland's submissions. At this stage, it is sufficient to note the following comments in *Emmet & Farrand on Title*:

> The issues in the *Samarenko* case were simply stated by Lewison LJ (at para.1):
>
> *'i) Is a failure to pay a deposit on time under a contract for the sale of land necessarily a repudiatory breach of contract entitling the seller to terminate the contract;*
>
> *ii) if the answer is no, was time successfully made of the essence of payment in this case with the consequence that, on the facts, the seller was entitled to terminate the contract?'*

> The first of these issues is of general importance in conveyancing. After considering the authorities, his conclusions were affirmative (paras 24 and 25):
>
> *"Since the payment of a deposit at the executory stage of the contract is an earnest (or guarantee) of further performance, it is no surprise that a failure to pay the deposit on time is taken to demonstrate that the buyer is unwilling to perform the contract as a whole. In addition without actual receipt of the deposit the seller does not know where he stands. Is the buyer serious about the contract or not? A right to call off the contract for failure to pay the deposit on time restores to the seller his freedom to market the property. In the case of late completion, the seller at least has the deposit in his hands as part compensation for any loss. If the deposit itself is not paid, he has nothing except a fetter on his freedom to deal with his property.*
>
> *That is why in my judgment failure to make timely payment of a deposit amounts to a repudiatory breach of contract. Any presumption that time is not of the essence is rebutted."*
>
> In the alternative, he would also have decided as to the second issue that, on the particular facts of the case, time had been made of the essence so that the seller was entitled to terminate the contract.
>
> The other members of the court agreed as to both issues …

43. Miss Hawker submits that in the present case, the position is as follows:

(1) For the reasons previously set out, the claimant validly exercised the options on 7 June 2023. Thereafter, sale and purchase agreements arose which incorporated the standard conditions, and included an obligation to pay the deposits.

(2) It was incumbent on the defendant to tell the claimant that it was minded to treat its failure to pay the deposits as a repudiatory breach, and give them an opportunity to do so by providing payment details. Only then would the defendant be entitled to treat the contracts as discharged if the claimant were unwilling or unable to do so.

(3) The defendant now seeks to rely upon its own refusal to provide payment details to say that the claimant is in repudiatory breach. This is plainly wrong and unjust.

(ii) Oral submissions

44. Miss Hawker begins her oral submissions by identifying five areas of common ground:

(1) A deposit was payable under each option contract in principle.

(2) The defendant now accepts that the option notices were validly served.

(3) After the valid service of each option notice, a second contract for the sale and purchase of each of the option properties arose.

(4) Once those contracts had arisen, the payment of a deposit was a fundamental term of each of the resulting purchase contracts.

(5) If the claimant did not repudiate the purchase contracts, then it is entitled to specific performance.

45. Miss Hawker then identifies four areas of dispute:

(1) The timing of the sale and purchase contracts, and when the obligation to pay the deposits arose.

(2) Whether, in the specific contractual context of this case, time was of the essence of the payment of the deposits when the obligation to pay them arose.

(3) Whether the failure to pay the deposits by midnight on 7 June 2023 (the day the options were exercised) constituted a repudiatory breach of contract.

(4) Whether Walker Morris's letter of 27 June constituted a separate repudiatory breach in its own right.

46. Miss Hawker emphasises that, on the defendant's case, the claimant was in repudiatory breach of contract on the very same day that it exercised the options by its failure to make payment of the deposits in circumstances where the defendant knew that it was unable to do so. She submits that that cannot be right as a matter of common sense, equity, or practicality.

47. On the first area of dispute, Miss Hawker submits that since the deposits were to be paid into a nominated bank account belonging to the defendant's conveyancer, the parties must have envisaged a period of correspondence following the exercise of the options during which the defendant would identify its conveyancer and their nominated bank account. She relies upon the following observations of Warner J in *Millichamp* (at page 1432):

> I observe, though I think of this only as reinforcing my view, that under clause 5 of the option agreement the deposit was to be paid to the defendant's solicitors. That, as it seems to me, necessarily envisaged some communication between the plaintiffs and the defendant about the deposit after the option had been exercised. It envisaged at least that the defendant would tell the plaintiffs who his solicitors were … I do not think that what matters is what the plaintiffs in fact knew or did not know in 1980. What matters is what clause 5 was intended to mean when the option agreement was signed in 1970. The parties cannot then have been certain that the plaintiffs would know, and know for sure, who the defendant's solicitors would be in 10 years' time. They must have envisaged that there would be some communication between the plaintiffs and the defendant about it.

I note that clause 5 of the contract in the *Millichamp* case provided that:

> Upon the exercise of the said option the intending purchasers shall pay to the intending vendor's solicitors as stakeholders by way of deposit £1,457 10s.

48. Miss Hawker acknowledges that special condition 2.2.1 envisages payment of the deposits *'no later than the date of the contract'*. But that begs the question: when does the contract come into existence? Miss Hawker submits that, mirroring *Millichamp*,

the wording in paragraph 4 (a) of Schedule 6 – *'a binding agreement shall come into existence'* – envisages a process of identifying, through an exchange of correspondence, both the defendant's conveyancer, and their nominated bank account. A contract of sale and purchase only comes into existence once a reasonable period of time has elapsed for that process to be completed. Miss Hawker derives support for that submission from observations of Henderson J in *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWHC 164 (Ch), [2007] 2 EGLR 95 at [40]-[43] that the law will imply an obligation to make payment of the deposits within a reasonable time. She submits that no contract of sale can arise unless and until the defendant has: (1) accepted that valid notice of exercise of each option has been given, and (2) the defendant's conveyancer has nominated a bank account to which the deposit monies are to be transferred. Since this second requirement is still outstanding, Miss Hawker says that all the other points in dispute simply fall away. That is because a party cannot breach a contract that has not yet come into existence.

49. In her oral reply, Miss Hawker submits that in circumstances where, initially, the defendant had declined to accept the validity of the notices exercising the options, no secondary contracts of sale, and thus no obligation to make payment of the deposits, could arise until that issue had been resolved, irrespective of the need for the defendant's conveyancer to nominate a bank account into which the deposit monies were to be paid. Given the failure to nominate such a bank account, however, it seems to me that the initial reservation of the defendant's position as to the valid exercise of the options is of no real significance. Miss Hawker also points to possible difficulties in identifying precisely when each option should be treated as having been exercised due to the alternative methods for the service of notices contained in clause 7.5 of each lease (which were incorporated by paragraph 3 (b) of Schedule 6), and also the provision deeming any notice sent by post to have been duly served at the expiration of 48 hours after the time of posting. However, standard condition 2.2.1 requires the 10% deposit to be paid *'no later than the date of the contract'* so, in my judgement, there would be no difficulty in effecting payment at the same time as posting any notice exercising the option.

50. In case she is wrong on the first point in dispute, Miss Hawker moves on to consider whether, in the specific contractual context of this case, time was of the essence of the payment of the deposits when the obligation to pay them arose. She disputes Mr Calland's submission that the *Samarenko* case is determinative of this issue, and that the non-payment of a deposit on exchange of contracts for the sale of land is invariably a repudiatory breach of contract. Miss Hawker submits that that authority is littered with qualifications which reflect the myriad contexts in which this issue can arise. She points to the head-note, which reads:

> … **in the ordinary case** the requirement to pay a deposit, including the time of payment, was a condition of a contract in respect of the sale of land; that, **where there was nothing to take the contract out of the ordinary run**, failure to make timely payment of the deposit amounted to a repudiatory breach of contract and any presumption that time was not of the essence was rebutted **[emphasis supplied]**

Miss Hawker took me to the following passages in the leading judgment of Lewison LJ which support the reporter's summary of the decision:

> 25 … I would hold therefore that in the ordinary case the requirement to pay a deposit, including the time of payment, is a condition of the

> contract or, to use the phrase used in courts of equity, that time is of the essence of the date for payment.
>
> 26 Mr Small QC drew a distinction between deposits required to be paid at the inception of the contractual relationship and deposits required to be paid (as this one was) part way through the contractual relationship. I do not consider that this distinction changes the fundamental nature and purpose of a deposit, although I do not exclude the possibility that a special contractual context might do so; and might lead to the conclusion that time was not of the essence of the date for payment … I do not find anything on the facts of the present case to take this contract out of the ordinary run of contracts for the sale of land; and I am unpersuaded that there is a real prospect that a trial would alter that conclusion.

51. Miss Hawker submits that in the present case, the time for payment of the deposit was not a fundamental condition of the contract for the following two, key reasons: First, the sale contracts arise out of the service of a valid option notice. The payment of the deposit is not part of the first step towards the conclusion of the sale contract; it is not the first firing of the gun. The seller will already have the option notice. Miss Hawker relies upon the distinction drawn at paragraph 2.057 of *Emmet & Farrand on Title* between, on the one hand, the consequences of the non-payment of a deposit on the exercise of an option and, on the other, its non-payment in the case of an ordinary contract for sale. She also points to the factual differences between the present case and *Samarenko*: There the re-negotiated contract had provided for the 10% deposit to be payable on a fixed date 60 working days after the grant of planning permission, and a significant time before the contractual completion date; and there had also been reminders from the seller's solicitor about the date for payment of the deposit, and, when it was not paid on time, a further letter expressly making time of the essence for payment: see [3] and [4]. Miss Hawker points out that this is reflected in Etherton LJ's concurring judgment, at [53]-[54], which reads:

> 53 The question raised in the present case is what place, if any, is there in the context of an obligation to pay a deposit in a contract for the sale of land for the historical intervention of equity in certain cases (which include contracts for the sale of land) to prevent the innocent party insisting on his or her strict legal rights. The failure to pay the deposit on or by the stipulated time will always be a breach of contract. The intervention of equity does not convert the contractual term into one to pay at the stipulated time or within a reasonable period after it. The question is whether the effect of equity's rule not to insist in all cases on strict time limits precludes the vendor from treating the contract as at an end as soon as there has been non-compliance by the purchaser with the contractual term for payment of the deposit. In my judgment, as a general rule, the obvious commercial and legal importance of a deposit at the inception of a contract will preclude the intervention of equity in cases where the contract requires the purchaser to pay the deposit on or within some specified short period of time after the contract has been entered into and the purchaser fails to do so. In such a case, subject to exceptional circumstances (which I presently find difficult to envisage), the time for compliance is strict.
>
> 54 The position is not quite so clear cut, in my view, when the contractual obligation is to pay a deposit some considerable time after the contract

> has been entered into. That, in itself, is an unusual situation. In such a case, it will be necessary to examine all the legally admissible facts to assess whether it is a case in which equity would preclude the vendor treating the contract as at an end immediately upon non-payment of the deposit by the purchaser. If there is nothing to indicate that the deposit is any less commercially and legally important at that stage than if it had been required at or within a short time after the contract was made, then the usual rule will apply that the time for compliance is strict. Certainly, it would require very little to indicate that a stipulated time should be strictly adhered to. In the present case, the judge was entitled to conclude that the deposit, albeit payable some considerable time after the original contract and indeed the revised contract were made, was just as important as if had been contractually required at the outset. In any event, I consider that is sufficiently indicated by the stipulation in the varied contract that the deposit be paid by a specific date, namely 3 March 2011, rather than, as had been the case under the original contract, *'60 working days from the date of the planning permission or . . . the said relevant consent from the Wentworth Estate Roads Committee'*.

Miss Hawker submits that the payment of the deposit required in the present case is more analogous with the second of the situations postulated by Etherton LJ than the first.

52. Miss Hawker's second key reason is that the defendant had not provided the necessary payment details. She says that it lies ill in the mouth of the defendant to say that time was of the essence of payment of the deposits when it well knew that the claimant was in no position to make the required payments. She relies upon the following passage from Warner J's judgment in *Millichamp* (at 1431-2):

> In my judgment, in the present case, it was incumbent on the defendant, before he could treat the plaintiffs' failure to pay the deposit as a repudiation of the contract, to tell them that he was minded so to do and to give them an opportunity of complying with their obligation. Only if they then showed in some way that they were unwilling or unable to comply with it would he become entitled to consider their conduct a sufficiently clear breach of the contract to entitle him to treat it as discharged.

Miss Hawker contends that the effect of the failure to provide the payment details required to pay the deposits was not a point determined in *Samarenko* because there the seller's solicitors had been endlessly chasing the buyer for payment.

53. In her oral reply, Miss Hawker emphasises that her primary submission is not that any breach of contract was not *'sufficient'* to entitle the defendant to treat the contract as repudiated. Rather, she submits that: (1) no secondary contracts of sale had come into existence before the two occasions when the defendant purported to terminate them; alternatively (2) in all the circumstances of this case, time was not of the essence of the payment of the deposits. She points out that *Samarenko* was not a case concerning the exercise of an option; and that in that case the seller's solicitors had taken a pro-active role in chasing payment of the deposits whereas here the defendant had failed to provide the information required to enable the deposits to be paid over to it.

54. On the third point in dispute, Miss Hawker submits that the claimant's failure to pay the deposits by midnight on 7 June did not constitute a repudiatory breach of the contracts that arose following the exercise of the options. She first reminds me of Stuart-Smith J's summary of the law on repudiatory and renunciatory breach in *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC) at [73] (previously cited). Miss Hawker then refers me to Etherton LJ's review of the authorities on repudiation in *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2010] 3 EGLR 165, [2011] 2 All ER (Comm) 223. Speaking with the agreement of Sullivan and Mummery LJJ, Etherton LJ said this (at [61]-[64]):

> 61 I would make the following general observations on all those cases. First, in this area of the law, as in many others, there is a danger in attempts to clarify the application of a legal principle by a series of propositions derived from cases decided on their own particular facts. Instead of concentrating on the application of the principle to the facts of the case in hand, argument tends to revolve around the application of those propositions, which, if stated by the Court in an attempt to assist in future cases, often become regarded as prescriptive. So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, *'perspicuous'*. It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact.
>
> 62 Secondly, whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in *The Nanfri*.
>
> 63 Thirdly, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in *Woodar* (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.
>
> 64 Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in *Woodar* itself.

55. Miss Hawker emphasises that whether or not there has been a repudiatory breach of contract is highly fact sensitive, which is why comparisons with other cases are not particularly illuminating. The question is whether the party in breach has demonstrated a clear intention not to perform its obligations going forward; and this is something which is not to be lightly inferred. Looking at all the circumstances in their particular context, would the innocent party have considered that the claimant had

shown a clear intention to abandon and altogether refuse to perform the sale contacts? Miss Hawker relies upon the statement at paragraph 17-038 of *Snell's Equity* that: *"Trivial breaches, such as a purchaser's omission, by a mere oversight, to pay a deposit on time will not necessarily debar a claimant from obtaining specific performance."* I note that the sole authority cited in support of this proposition is the case of *Millichamp*.

56. Finally, Miss Hawker disputes that Walker Morris's letter of 27 June constituted a separate repudiatory breach in its own right. She points out that that letter was written in response to Birketts' letter of 22 June, which had made no admissions as to the validity of the option notices, asserted that the failure to pay each deposit amounted to a repudiatory breach of the relevant option, and elected to terminate each of the sale contracts with immediate effect. Walker Morris were simply making the obvious point that there could be no breach of the obligation imposed by standard condition 2.2.1 unless the seller's conveyancer had previously provided the claimant with details of the bank account into which the deposit monies were to be paid. If Birketts had not been engaged in a cynical ploy, they would have responded to this letter by supplying the required payment details. Instead, they purported to treat Walker Morris's letter as a further repudiatory breach, affording the defendant a further opportunity to terminate each of the sale contracts. Miss Hawker submits that it was not open to Birketts to seize upon this opportunity, rather than supplying the necessary payment details. She relies upon Etherton LJ's articulation of the following propositions, taken from earlier authorities, in his judgment in *Eminence* at [55]:

> (a) Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of a refusal to perform contractual obligations in a respect or respects going to the root of the contract.
>
> (b) The refusal must not only be clear, but must be absolute. Where a party declares his intention to act or refrain from acting in a particular way on the basis of a particular appreciation of his obligations, either as a matter of fact or of law, the declaration gives rise to a right of dissolution only if in all the circumstances it is clear that it is not conditional upon his present appreciation of his obligations proving correct when the time for performance arrives.
>
> (c) What does or does not amount to a sufficient refusal is to be judged in the light of whether a reasonable person in the position of the party claiming to be freed from the contract would regard the refusal as being clear and absolute? …
>
> (d) [T]he conduct relied upon is to be considered as at the time when it is treated as terminating the contract, in the light of the then existing circumstances. These circumstances will include the history of the transaction or relationship. Later events are irrelevant, save to the extent that they may point to matters which the parties should have considered as hypothetical possibilities at the relevant time.

57. In her reply, Miss Hawker disagrees with Mr Calland that the letter of 27 July amounted to a refusal to remedy any mistake in failing to pay the deposits. It did not state, in terms, that no deposit would be paid; rather, it made the point *"that there can be no breach of the obligation imposed by Standard Condition 2.2.1 unless the*

seller's conveyancer ... has provided our client with details of the bank account into which the Deposit monies are to be paid". The letter did not indicate a refusal to complete the purchases on the part of the claimant. Rather, the letter makes it clear that:

> Our client is entitled to require (and does require) performance by your client of its contractual obligation to transfer the reversionary interests under the First Lease, Second Lease and Third Lease to our client. Should your client fail to discharge its contractual obligations our client will issue proceedings for specific performance and such further or other relief as may be appropriate, together with an order for costs.

(b) The defendant

(i) Skeleton argument

58. Mr Calland begins his written skeleton argument by acknowledging that the following is common ground between the parties:

(1) The notices exercising the options were valid notwithstanding various formal defects, and they were served in accordance with the option agreements.

(2) If the contracts of sale have not been terminated, then the claimant is entitled to an order for specific performance of them.

59. He submits that the court will have to decide the following three questions:

(1) Under each option agreement (which were in materially the same terms), was the claimant obliged to pay a deposit on exercising the option?

(2) If so, was a failure to pay the deposits a repudiation of each of the contracts of sale?

(3) Have the contracts of sale been terminated by the defendant's acceptance of the claimant's repudiation?

60. As to the first of these questions, in his skeleton, Mr Calland submits that on the plain wording of paragraphs 2 (b) and 4 (a) of the Schedule 6 to each lease, and standard condition 2.2.1, the deposits were payable on the date each of the options was exercised. On the plain construction of each option agreement, a contract of sale was treated as arising upon the valid service of notice exercising the relevant option. The parties had deliberately chosen to provide that a new contract of sale should arise (or be treated as arising) *'upon the valid exercise of the option'*, and they had chosen to regulate their rights and obligations accordingly. Upon the valid exercise of each option, the relationship between the parties changed from one of landowner and option-holder to one of vendor and purchaser, and all the incidents of a contract of sale existed between them from that moment. The date of service of each option notice therefore supplied the date of the relevant sale contract; and the deposit of 10% of the purchase price became payable no later than the date each of the options was exercised.

61. As to the second question, Mr Calland submits that the claimant repudiated the purchase contracts, either by failing to pay the deposits on their due date, or later by indicating they would not pay them even if it was provided with the payment details.

62. Mr Calland relies upon the principle that, ordinarily, a term of a contract requiring the payment of a deposit will amount to a condition of a contract for the sale of land, in the sense that breach of it will entitle the counterparty to treat itself as discharged. This arises out the deposit's nature as security for future performance: see Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445, [2013] Ch 36. Mr Calland says that there is no reason to construe the requirement for a deposit in the option agreements in this case any differently: the terms of standard condition 2.2.1 strongly indicate both that it is a condition and that time is of the essence: "*The buyer is to pay a deposit … no later than the date of the contract*" (emphasis added). It follows that the defendant was entitled to treat itself as discharged from the contracts when the claimant failed to pay the deposits in time.

63. The claimant's reliance upon the mechanics for payment of the deposits is said to be misconceived. The claimant has argued that the claimant was not in breach of its obligation to pay the deposits because, had it wanted to pay (which, Mr Calland says, was not the case), it did not know where to send the payment. Standard conditions 1.1.1 (g) and 2.2.2 require the direct transfer of cleared funds to the defendant's conveyancer's nominated bank account. The claimant argues that, without knowing the defendant's conveyancer's bank details, the claimant could not be in breach of the term requiring payment. Further, the claimant argues that it was under no obligation to do anything to find out where to send the payment.

64. Mr Calland submits that this is obviously wrong: an obligation to do something necessarily carries with it an obligation to take the necessary steps that allow one to do that thing. The claimant cannot successfully contend that the obligation to pay the deposits was impossible to perform when it had not even asked the defendant where to send the payments. Clearly, it was up to the claimant to ask for this, for the following reasons:

    (1) The leases were executed, and the options granted, in 2013, so, unlike the position of an ordinary contract of sale, the defendant's conveyancer's details would not be known (or the information might be up to ten years out of date).

    (2) Two of the options could have been exercised at any time of the claimant's choosing over the 10 year term of each relevant lease, and the other at any time over a six-year period. So, whilst the claimant could be expected to have examined the option agreements before they were exercised, and to have ensured that all arrangements were in place for their exercise, it could not be expected that, throughout the option periods, the defendant would remain poised to receive the notices, and to respond the same day.

    (3) Ultimately, the payment of the deposits no later than the date of the contracts was the claimant's obligation to perform.

    (4) The consequences of not paying them ought to have been clear.

65. If asked for the payment details, Mr Calland accepts that the defendant could not have refused them (because of the implied duty not to prevent performance by the counterparty). And, if the defendant had refused them, or if it had delayed unreasonably such that payment could not be made on the date of the contracts, it could not have treated the contracts as discharged for non-payment (because of the implied duty not to rely upon its own wrong).

66. The claimant's argument amounts to saying that, notwithstanding the clear terms of standard condition 2.2.1, the claimant was entitled to remain entirely passive and not even offer to make payment until supplied with the payment details. Mr Calland submits that that argument should be rejected. In her reply, Miss Hawker responds that the claimant was not entitled to remain entirely passive, but it had to take reasonable steps to bring about a binding sale contact within a reasonable time.

67. The defendant's primary contention is that the claimant had to pay the deposits on the date of each contract, subject only to being excused by the defendant's refusal to provide, or its unreasonable delay in providing, the payee details. In the absence of such excuse, the claimant has repudiated the contracts.

68. However, even if the obligation to pay the deposits was not as absolute as that, the claimant was still in repudiatory breach of the contracts. Its position, in response to the defendant's termination, was not that it was waiting to be given the payment details, but rather that it had no obligation to pay the deposits at all. So, the mechanics of payment had nothing to do with the decision not to pay the deposits: rather, the claimant refused to pay them because it believed (mistakenly the defendant says) that it did not have to do so.

69. If, as the claimant says, it was entitled to do nothing, and wait for the defendant to supply the payment details, the time for paying the deposits lay in the future. Relying upon the observations (previously cited) of Etherton LJ in *Eminence* at [61]-[64], Mr Calland submits that a party's conduct will operate as a repudiation if, looking at all the circumstances objectively, that party has shown an intention to abandon the contract, or to refuse to perform it according to its terms. When the defendant's solicitors wrote to terminate the contracts on 22 June 2023, more than two weeks after the date of the sale contracts, the claimant's response (through its then solicitors) was to argue that no deposits were payable at all. The mechanics of payment were referred to, but only as a secondary ground for denying any breach of contract. Crucially, there was no offer to pay the deposits. Objectively, so Mr Calland submits, the claimant was saying that it would not be paying any deposits, even if payment details were supplied. That was a repudiation, which the defendant accepted on 10 July 2023. Admittedly, the claimant changed its position only two days later (on 12 July), offering to pay the deposits, albeit without conceding that it was obliged to do so. But, by then, Mr Calland says, it was too late.

70. As for the third question, whilst Mr Calland acknowledges that this does not appear to be common ground in the materials which set out the parties' respective positions, he submits that there can be no doubt that the defendant has terminated the contracts if it was entitled to do so.

(ii) Oral submissions

71. Mr Calland begins his oral submissions by emphasising that there is nothing cynical about a party standing upon its legal rights if such indeed they are. It is always open to parties to take advantage of the legal opportunities properly available to them.

72. On the first of the disputed issues, Mr Calland submits that the terms of paragraph 4 (a) of Schedule 6 to each lease make express provision for the time when each sale contract comes into existence: this is *"Upon valid exercise of the option"*. It is not in any way dependent upon the nomination of a bank account to receive the deposits by the defendant's conveyancer. Whether or not the options have been validly exercised

is a question of fact: it is in no way dependent upon the defendant's acceptance or otherwise of that fact. By making no admissions as to the validity of the option notices, the defendant's solicitors did not operate to postpone the sale contracts coming into existence. Likewise, standard condition 2.2.1 is clear as to when each deposit falls to be paid: *"no later than the date of the contract"*; and thus no later than the date each option is exercised. The wording of both provisions could not be any clearer; and it admits of no room for any flexibility .

73. Miss Hawker's submission that each contract of sale only arises when the defendant's conveyancer nominates a bank account into which the deposit monies are to be paid is contradicted by the clear wording of paragraph 4 (a) of Schedule 6. It gets matters entirely the wrong way round, and is a clear instance of the tail seeking to wag the dog. Each deposit should have been paid no later than the date each option was exercised, and thus some two weeks before Birketts' letter of 22 June.

74. Mr Calland accepts that the claimant could not make payment of the deposits without knowing the details of the defendant's conveyancer's bank account; but he says that it was up to the claimant to undertake the necessary preparatory steps to enable it to perform its obligation to make payment of the deposits, by asking for the necessary payment details. On the claimant's case, in the absence of those details, the claimant would be entitled to remain entirely passive, and do nothing at all. That cannot be right. What if Birketts had not initiated the correspondence between the parties' solicitors? Would the claimant have been relieved of the obligation to make payment of the deposits? Surely not.

75. Mr Calland also accepts that if the claimant had asked for the necessary payment details, and the defendant had declined to provide them, then the defendant could not have sought to terminate the sale contracts for non-payment of the deposits. That is because the defendant could not rely upon the consequences of its own conduct if that should prevent the claimant from complying with its own contractual obligations. But the claimant should first have asked for the payment details. Mr Calland draws an analogy with the defence of tender. The claimant should first have offered to make payment of the deposits before seeking to excuse itself from the consequences of its failure to make payment.

76. On the second of the disputed issues, Mr Calland submits that time was of the essence of the payment of the deposits. He contends that *Millichamp* is authority for two propositions, as Lewison LJ explained in *Samarenko* at [17]:

> The buyers were the holders of an option to buy land. The terms of the option provided for the payment of a deposit *'[upon] the exercise of the said option'*. The option was exercised, but the deposit was not paid. Warner J declined to follow Goulding J [in *Myton Ltd v Schwab-Morris* [1974] 1 WLR 331] on the question whether payment of a deposit was a condition precedent to the formation of a binding contract; and on that point he was right. However, he went on to consider the classification of the contractual requirement to pay the deposit and the consequences of not paying it in time. On that part of the case I think, with great respect, that his reasoning is unsatisfactory.

77. Mr Calland points out that Lewison LJ developed his own reasoning at [17]-[24], leading to the conclusion (at [25]) that *'failure to make timely payment of a deposit amounts to a repudiatory breach of contract'*. In doing so, Lewison LJ expressly

considered those passages in the judgment of Warner J which form the lynch-pin of Miss Hawker's argument, describing his decision on that aspect of the case as *'suspect'*.

78. At this point in Mr Calland's submissions, it is convenient for me to deal with the judgments in Samarenko. It is well worth reading the whole of Lewison LJ's closely reasoned analysis; but, in the interests of brevity, I shall limit my citation to two key passages. The first (at [20]) is a critique of Warner J's judgment in *Millichamp*:

> Although the question that Warner J asked himself was whether there was *'a breach'*, the answer he gave was that there was no *'sufficient breach'*. The question and the answer do not therefore match. On the basis that the term in question was a fundamental term (or condition) the question posed was the right question; but one that did not receive an answer. Moreover although Warner J disagreed (rightly) with Goulding J on the question whether payment of the deposit was a condition precedent to the formation of a binding contract, he did not in terms deal with Goulding J's alternative ground; viz that the payment of the deposit (including the time of payment) was a condition of the contract, any breach of which would amount to a repudiation. The only reason he gave for not holding that time was of the essence of payment was that it would be *'unduly harsh'*. But that is a conclusion; not a principle. Nor was the *Portaria Shipping* case cited to him, so he did not have the benefit of the view of Robert Goff J. In my judgment all these factors make the decision in *Millichamp v Jones* suspect.

The second passage (at [24]) follows on from a discussion of an earlier Court of Appeal decision, concerning a contract for the sale of ships, in which the court relied on both ship contract and land contract cases:

> That decision is entirely consistent both with the nature of a deposit and with the general approach of the law to repudiation and renunciation of contracts. Since the payment of a deposit at the executory stage of the contract is an earnest (or guarantee) of further performance, it is no surprise that a failure to pay the deposit on time is taken to demonstrate that the buyer is unwilling to perform the contract as a whole. In addition without actual receipt of the deposit the seller does not know where he stands. Is the buyer serious about the contract or not? A right to call off the contract for failure to pay the deposit on time restores to the seller his freedom to market the property. In the case of late completion, the seller at least has the deposit in his hands as part compensation for any loss. If the deposit itself is not paid, he has nothing except a fetter on his freedom to deal with his property.

79. In his concurring judgment, Etherton LJ (at [50]) expressly confined his comments to *'contracts for the sale of land'*. He did not refer either to options or to the *Millichamp* decision. In view of the importance of a deposit, he found it difficult to imagine that a contractual obligation to pay a deposit would ever be anything other than *'a term which would be regarded at common law as a fundamental term or condition, rather than a warranty or an innominate term'*, with the consequence that *'any breach of it would entitle the innocent party to treat the contract as at an end'*: see [52]. At [53], Etherton LJ concluded as follows:

> In my judgment, as a general rule, the obvious commercial and legal importance of a deposit at the inception of a contract will preclude the intervention of equity in cases where the contract requires the purchaser to pay the deposit on or within some specified short period of time after the contract has been entered into and the purchaser fails to do so. In such a case, subject to exceptional circumstances (which I presently find difficult to envisage), the time for compliance is strict.

80. Rix LJ agreed that the appeal should be dismissed, stating at [63] that he too would view *Millichamp* (and a later decision in which Whitford J had followed it) as *'unsatisfactory on this issue'*. He agreed that both decisions *'should be regarded as overruled'*. He observed that even in those cases, the requirement for payment of a deposit had been described as a *'fundamental term'*. In my judgement, the head-note to *Samarenko* is right to conclude that this aspect of Warner J's decision in *Millichamp*, in which he had declined to characterise the payment of a deposit (including the time of payment) as a condition of a contract for the sale of land, any breach of which would amount to a repudiation, was *'overruled'* by the Court of Appeal.

81. Returning to Mr Calland's oral submissions, adopting the language of Etherton LJ at [51]-[52] of *Samarenko*, he contends that the importance of a deposit as an indication of the commitment of the purchaser to carry through the contract, and, since a deposit is forfeitable, its status as a form of security for the seller's performance and thus, in a loose commercial sense, a guarantee, make it a fundamental term or condition of any contract for the sale of land, with the consequence that any breach of it will entitle the innocent party to elect to treat the contract as at an end. Mr Calland points out that had the parties understood the deposits in the present case to perform any different function, it would have been open to the claimant to have adduced evidence to that effect; but the claimant has led no such evidence in the present case. As Lewison LJ pointed out in *Samarenko* at [26]: *"If the buyer had wanted to argue for a particular reason, evidence should have been led."*

82. Mr Calland submits that the resolution of the third disputed issue is really simple: The obligation on the claimant was to make payment of the deposits no later than the date of each contract, and thus on the date each option was exercised. Unless this was impossible, the claimant was in repudiatory breach when it failed to make payment of the deposits on that date. On this analysis, the failure to make payment of each deposit by midnight on 7 June constituted a repudiatory breach of the relevant sale contract; and the fourth issue strictly does not arise for decision.

83. On the fourth disputed issue, Mr Calland distinguishes a repudiation - namely, the breach of an existing obligation - from a renunciatory breach, which involves a prospective breach of contract. The latter is indicated by conduct connoting an intention not to perform a fundamental term of the contract at some time in the future. If he is right about the timing of the obligation to pay the deposits, then, so Mr Calland says, we are not in the territory of renunciatory breach. It is only if the obligation to make payment of the deposits was postponed until the nomination of an account by the defendant's conveyancer that the court would be in that territory.

84. Mr Calland recognises that he reads Walker Morris's letter of 27 June in a different way to Miss Hawker. He construes numbered paragraphs 2 to 4 (a) as an assertion that no deposit is payable at all. Paragraph 4 (b) merely develops that argument by reference to any payment obligation that may exist, asserting that there could be no

breach of any such obligation without the required payment details. However, the letter contains no request for any payment details, and no offer to make payment of the deposits. When coupled with the denial of any payment obligation, this letter cannot be read as an implicit offer to pay the deposits. In response to the court's observation that the letter does not state, in terms, that any required deposit will not be paid, Mr Calland responds that that is the clear implication of the letter. That amounts to a renunciation of the sale contracts. It is only when Birketts reply, treating the letter of 27 June as a further repudiation, that Walker Morris change their minds and refer, for the first time, to payment of the deposits; but that is two days later, on 12 July. Even then, the letter of 12 July reiterates that there is *"a real dispute whether the contract (correctly interpreted) obliges our client to pay any deposit"*.

85. Mr Calland invites the court to contrast Walker Morris's letter of 27 June with the facts of the *Eminence* case, as summarised by Lewison LJ in his judgment in *Samarenko* at [44] thus:

> The facts of that case are instructive. Sellers of property served notice to complete purportedly in accordance with the contract. In fact they miscalculated the length of notice required by the contract; and that mistake was obvious on the face of the notice. Not only was the mistake obvious but the buyer's solicitors realised that the mistake had been made. The sellers purported to terminate the contract on the date on which the notice to complete was expressed to expire; but it was in fact a few days premature. They did so because they made the same mistake again, which according to the judge at first instance was *'screamingly obvious'*. A reasonable person in the position of the buyer would have realised that the mistake had been made. It was in those circumstances that this court held that purported reliance on the terms of the contract itself did not amount to a repudiation of the self-same contract. In my judgment the facts of that case are far removed from this one.

86. Mr Calland also refers the court to the reasons given by Etherton LJ for holding, at [65], that the seller's rescission notices in *Eminence* did not constitute a repudiatory breach of the sale contracts. As Etherton LJ observed (at [65 (5)]), it was:

> … impossible clearly to find on those facts an intention by Eminence to abandon and altogether to refuse to perform the contacts, which, in view of the state of the market, had become highly advantageous to Eminence and onerous to Mr Heaney. On the contrary, the obvious inference from those facts is that Mr Heaney and his solicitors were only too well aware that Eminence very much wanted to enforce the contracts, either by completing them or by rescinding them and exercising the other remedies conferred by them, in either case in accordance with the contractual terms.

87. Even if the rescission notices in that case were looked at in isolation, they did not clearly show an intention by the seller to abandon and altogether refuse to perform the contact. Rather, they showed an intention to implement the contractual procedure for bringing the contracts to an end, and exercise the remedies specified in the contracts. Their service was, however, inconsistent with those contracts in that they were premature. From the perspective of a reasonable person in the buyer's position, that left unclear whether the intention of the seller was to insist on the effectiveness of the notices of rescission, notwithstanding the terms of the contracts, or, if the error as to

the contractual terms was pointed out, to abide by those terms. In that case, as a reasonable person in the buyer's position would have realised, there was a simple error of calculation by the seller's solicitors, analogous to a clerical error, which, once pointed out, would have been (as it was) conceded immediately.

88. Mr Calland contrasts that with the position in the present case, where the claimant, with the benefit of valuable commercial contracts, and advised by well-known and reputable solicitors, did not acknowledge its mistake when it was pointed out, and ask for payment details. Instead, the claimant contended that no deposits had ever been payable at all, thereby refusing to provide the security to which the defendant was entitled. Through its then solicitors, the claimant doubled down, and said that it was not going to perform the contracts according to their terms. That was a straightforward renunciation.

89. So, whether the deposits were payable by the date when the options were exercised – as is Mr Calland's primary submission – or the payment obligation only arose when the defendant's conveyancer provided their bank details, there was a clear repudiation on 7 June or, alternatively, a straightforward renunciation on 27 June, which the defendant elected to accept, as terminating the sale contracts, by Birketts' letters of 22 June and 10 July 2023. On either analysis, the court should dismiss the claim, and grant a declaration in terms of the defendant's acknowledgment of service.

V: Analysis and conclusions

90. I am grateful to both counsel for the clarity, and the relative brevity, of their written and oral submissions. I do not propose to address all of the many points they have raised, but only those which form an essential part of my reasoning. That does not mean that other points have been overlooked. I should, however, record that this is not a case where any issues of waiver or of estoppel arise.

91. I cannot agree with Miss Hawker's submissions as to when the contracts for the sale and purchase of the properties came into existence, and the obligation to pay the deposits therefore arose. On the first of the disputed issues, I have no hesitation in preferring the competing submissions of Mr Calland.

92. In her written skeleton argument, Miss Hawker refers to the concise summary of the modern approach in English law to contractual interpretation, as set out in the judgment of Professor Andrew Burrows QC, sitting as a Judge of the High Court, in *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) at [32]:

> The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not

> to rewrite the contract so as to protect one of the parties from having entered into a bad bargain.

When affirming the decision of the deputy judge, the Court of Appeal described this analysis as *"entirely correct"*: see [2019] EWCA Civ 1641, [2019] 2 CLC 559 at [29] per Rose LJ.

93. Applying this approach, I agree with Mr Calland that the terms of paragraph 4 (a) of Schedule 6 to each lease make express provision for the time when each sale contract comes into existence: This is *"Upon valid exercise of the option"*. It is not in any way dependent upon the nomination by the defendant's conveyancer of a bank account to receive the deposits. Whether or not the options have been validly exercised is a question of objective fact: it is in no way dependent upon the defendant's acceptance or otherwise of that fact. By making no admissions as to the validity of the option notices, the defendant's solicitors did not operate to postpone the sale contracts coming into existence. Likewise, standard condition 2.2.1 is clear as to when each deposit falls to be paid: this is *"no later than the date of the contract"*, and thus no later than the date each option is exercised. The wording of both provisions could not be any clearer; and they admit of no room for any flexibility .

94. Miss Hawker's submission that each contract of sale only arises when the defendant's conveyancer nominates a bank account into which the deposit monies are to be paid is contradicted by the clear wording of paragraph 4 (a) of Schedule 6. I agree with Mr Calland that it gets matters entirely the wrong way round, and is a clear instance of the tail seeking to wag the dog. On the clear wording of Schedule 6, and standard condition 2.2.1, each deposit is required to be paid no later than the date each option is exercised, and thus, in the event, by no later than midnight at the end of 7 June. There is neither any need, nor any scope, for the law to imply any obligation to make payment of the deposits within a reasonable time of the nomination of the defendant's conveyancer's bank account. I note that in *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWHC 164 (Ch), [2007] 2 EGLR 95 at [43], Henderson J expressly recognised that *'every case turns on the precise wording that the Court has to consider'*.

95. I acknowledge that the claimant could not make payment of the deposits without knowing the details of the defendant's conveyancer's bank account; but I agree with Mr Calland that it was up to the claimant to undertake the necessary preparatory steps to enable it to perform its obligation to make payment of the deposits, by asking for the necessary payment details a reasonable time before it elected to exercise the options. It had plenty of time to do so, provided it did not leave this until the last moment. On the claimant's own evidence, it was clearly intending to exercise the options by 29 March 2023, when Mr Pervin had his Teams call with Mr Wells. There is no reason why the claimant should not have requested details of the defendant's conveyancer, and their bank account, during that conversation, or at any time during the period of more than two months thereafter, before it exercised the options on 7 June.

96. I agree with Walker Morris (in their letter of 12 July) that, strictly, the claimant was under no contractual obligation to ask the defendant to identify its conveyancer, or to ask that person (once identified) for their relevant bank details so that a *'direct credit'* could be made. But, if this information was not volunteered by the defendant, the claimant was under a practical necessity to ask for it, if the claimant wished to comply with its contractual obligation to pay the deposit of 10% of the purchase price no later

than the date the sale contracts came into existence upon the valid exercise of the options. It was for the claimant to take the necessary steps to get all its ducks laid out in a row before it served notice exercising the options. Had the defendant refused to provide the necessary payment details, or delayed unreasonably in doing so, such that payment could not be made on or before the date the options were exercised, Mr Calland rightly accepts that the defendant could not have elected to treat itself as discharged from completing the sale contracts by reason of non-payment of the deposits. This is because of the implied duty upon the defendant not to rely upon its own wrong.

97. I move then to the second of the disputed issues: whether time was of the essence of the payment of the deposits by midnight on 7 June 2023? On this issue, I attach no significance to the defendant's omission to provide any details of its conveyancer, or their bank account, because the claimant had never requested these. In any event, the state of affairs at the time the options came to be exercised is not relevant to this issue. As Warner J observed in *Millichamp* (at page 1431): *'The question has to be answered ... by reference to the terms of the document itself, considered in the light of the circumstances as they were when it was executed.'* By that test, Warner J saw nothing to take *Millichamp* out of the general rule that payment of the deposit was to be regarded as a fundamental term of the option agreement in that case. Admittedly, he then went on to hold that, in the particular circumstances of that case, non-payment of the deposit by the due date, due to mere oversight, did not constitute a *'sufficient'* breach of that term to entitle the seller to treat the contract as discharged; but that aspect of his decision was overruled by the Court of Appeal in *Samarenko*.

98. In my judgement, that Court of Appeal decision constitutes a formidable obstacle in the way of the acceptance of Miss Hawker's submissions on this second issue. I have already cited extensively from all three judgments (of Lewison, Etherton and Rix LJJ). As explained by Lewison at [1], the appeal in that case raised two issues:

> (1) Is a failure to pay a deposit on time under a contract for the sale of land necessarily a repudiatory breach of contract entitling the seller to terminate the contract; (2) If the answer is no, was time successfully made of the essence of payment in this case with the consequence that, on the facts, the seller was entitled to terminate the contract?

In the event, the Court of Appeal answered both questions in the affirmative. I recognise that it would have been sufficient to result in the dismissal of the appeal for the Court of Appeal to have decided the case simply on the basis that time had successfully been made of the essence of payment of the deposit in that case, with the consequence that, on the facts, the seller had been entitled to terminate the contract. However, I am satisfied that the Court of Appeal expressly decided the case on alternative grounds, and that both are equally binding upon me as a judge of first instance. Thus, at [27]-[28], Lewison LJ said this:

> 27 Accordingly I would hold, on the first issue, that by failing to pay the deposit on 3 March the buyer committed a repudiatory breach of contract.
>
> 28 If I am wrong on the first issue, I must go on to consider the effect of making time of the essence of payment of the deposit …

99. I therefore regard *Samarenko* as binding authority for the proposition *'that in the ordinary case the requirement to pay a deposit, including the time of payment, is a condition of the contract or, to use the phrase used in courts of equity, that time is of the essence of the date for payment'*: see per Lewison LJ at [25]. The question therefore becomes whether there is sufficient to take the present case out of the ordinary run of cases for the sale and purchase of land. I have not found this to be an easy question; and it is the principal reason why I reserved judgment at the end of counsel's submissions. Since then, I have read, and read again, the whole of the report of the *Samarenko* case.

100. I have already rejected the second of Miss Hawker's key reasons for distinguishing the present case from *Samarenko*: that the defendant had not provided the necessary banking details to enable the claimant to effect payment of the deposits. That leaves the first of her key reasons: that this case is concerned with the payment of deposits following the exercise of options, rather than the payment of a deposit upon the entry into an ordinary contract for the sale of land. The difficulty with that submission is that *Millichamp* concerned an option to purchase land, yet the Court of Appeal in *Samarenko* did not consider that that made any difference to the result; and they proceeded to overrule that aspect of Warner J's decision, holding (at [17]) that his reasoning concerning *'the classification of the contractual requirement to pay the deposit and the consequences of not paying it in time'* was *'unsatisfactory'*. However, I note that the option in *Millichamp* was not an option contained in a lease, nor one granted to an occupational tenant, to purchase the landlord's reversionary interest. In my judgement, that is a relevant consideration; but, of itself, it is not determinative.

101. Lewison LJ began his consideration of the legal issues in *Samarenko* by recognising (at [9]) that: *'Whether a time limit is of the essence of a contractual provision is a question of interpretation.'* He proceeded (from [12]) to consider the nature of a deposit, emphasising its role as a guarantee that the contract would be performed, or that *'the purchaser means business'*. It was this that led him to conclude (at [25]) *'that in the ordinary case the requirement to pay a deposit, including the time of payment, is a condition of the contract or, to use the phrase used in courts of equity, that time is of the essence of the date for payment'*. In order to succeed, Miss Hawker must point to factors that take the present case outside the ordinary run of such cases.

102. In my judgement, but with some hesitation, I am persuaded that the present case does indeed fall outside the ordinary run of cases, and that time was not of the essence of payment of the deposits. However, I consider that the reasons advanced by Miss Hawker, in support of this outcome, require some further elaboration and explanation. In summary, I conclude that the circumstances of the present case fall outside the ordinary run of cases for two principal reasons: (1) This is not the case of the payment of a deposit on an ordinary contract for the sale and purchase of land, but rather upon the exercise of a tenant's option to purchase the landlord's reversionary interest. (2) On the true interpretation of the option provisions, time should not be treated as being of the essence of the time for payment of the deposits. It is the cumulative effect of these two factors which leads me to the conclusion that the present case is extraordinary.

103. First, this is not the case of a deposit payable upon the entry into an ordinary contract of sale. It is not even the case of an option to purchase property granted to a party with whom there was no existing contractual or proprietary relationship. The options here were contained in leases. The grantee was the grantor's tenant. The options could

only be exercised during the ten year terms of the Billingham and Bilsthorpe leases, and the last six years of the term of the Canvey Island lease. Although, in the event, the options were in fact exercised only during the last week of the term of each of the three leases, they could have been exercised much earlier. The mere exercise of the options did not impose any new fetter upon the landlord's ability to dispose of, or to deal with, any of the three properties, because they were already encumbered by the remaining terms of the three leases, and any statutory continuation of those tenancies under the provisions of Part II of the 1954 Act. In his judgment in *Samarenko* Lewison LJ considered (at [24]), the nature of a deposit, and the general approach of the law to the repudiation and renunciation of contracts. He explained;

> Since the payment of a deposit at the executory stage of the contract is an earnest (or guarantee) of further performance, it is no surprise that a failure to pay the deposit on time is taken to demonstrate that the buyer is unwilling to perform the contract as a whole. In addition without actual receipt of the deposit the seller does not know where he stands. Is the buyer serious about the contract or not? A right to call off the contract for failure to pay the deposit on time restores to the seller his freedom to market the property. In the case of late completion, the seller at least has the deposit in his hands as part compensation for any loss. If the deposit itself is not paid, he has nothing except a fetter on his freedom to deal with his property.

104. In my judgement, such considerations carry much less weight when one is dealing with the failure to pay a deposit on the exercise of a tenant's option to purchase the landlord's reversion. In that situation, there is a pre-existing contractual, and, indeed, proprietary, relationship between the parties, over and above the option itself, which is absent even in the case of the grant of an option between strangers, as was effectively the case in *Millichamp*, where the only continuing contractual relationship was that created by the grant of the option itself. In the case of an option granted to a tenant to purchase the landlord's reversion, because of the continued existence of the lease, or any statutory continuation thereof, any right to call off the sale contract for failure to pay the deposit on time does not restore to the seller, as landlord, his freedom to market the property. Because of the continuing obligation to pay rent under the lease, or any statutory continuation thereof, in the case of late completion the seller, as landlord, at least has the continuing entitlement to rent as compensation for any loss. (Indeed, in the present case it is worth recalling that, by the proviso to paragraph 6 of Schedule 6 to each lease, the defendant is not required to complete the sale unless the claimant has paid all the lease rents and other sums payable under the lease up to the date of actual completion.) In such a case, the exercise of the option does not create any material additional fetter upon the landlord's ability to deal with the property.

105. As for the point that, without payment of the deposit, the landlord does not know where it stands – whether the tenant means business – where, as here, the option is to purchase the reversion at an historic price – fixed up to ten years earlier – it is reasonable to anticipate that the option will only be exercised if the value of the reversion has increased since the option price was fixed. As Walker Morris pointed out, when beginning their letter of 12 July 2023, in such a situation, it is very much in the tenant's commercial interests to secure the sale contemplated by the option agreement, and it is very much in the landlord's commercial interests to avoid that

sale. The tenant exercising the option clearly means business, irrespective of payment of the agreed deposit.

106. In my judgement, in the case of a tenant's option to purchase the reversion, all of these considerations militate against any need for the timely payment of the deposit to be treated as a fundamental condition of the option agreement, as to which time is of the essence. However, I recognise that whether or not a time limit is of the essence of a contractual provision is always a question of the true interpretation of the relevant contract. I must therefore now turn to the precise terms of these particular option agreements.

107. By paragraphs 4 (f) and (g) of Schedule 6 to each lease, the parties incorporated the Part I standard commercial property conditions of sale (2nd edition) into the contract of sale which came into existence upon the valid exercise of each option. Because standard conditions 2.2.1 and 2.2.2 were not expressly disapplied by paragraph 4 (i), the claimant was required to pay a deposit of 10% of the relevant purchase price, by direct credit, no later than the date each option was exercised. But the option agreement says nothing, in terms, about whether time is of the essence of such payment.

108. However, paragraph 3 of Schedule 6 (headed *'Option Conditions'*) does set out certain pre-conditions to the valid exercise of the options. These include, at sub-paragraph (d), the prior re-payment of all sums payable pursuant to certain identified loan notes. Had the parties intended the valid exercise of each option to be conditional upon the payment of the 10% deposit no later than its date of exercise, I would have expected this to have been stated expressly in paragraph 3 of, or perhaps elsewhere within, Schedule 6 to each of the leases. It is not. When considered in conjunction with the various factors I have already indicated, which all point against any need for the timely payment of the deposit to be treated as a fundamental condition of these option agreements, I am drawn to the conclusion that the present case falls outside the ordinary run of cases considered in *Samarenko*, and that time was not of the essence of payment of these deposits.

109. The resolution of the third disputed issue follows on automatically from the determination of the second. If I am wrong on the second issue, and the obligation to make payment of the deposits no later than the date each sale contract came into existence, and thus on the date each option was exercised, was a condition of each sale contract, so that time was of the essence of the date for payment, then, since it was not the defendant which had made such payment impossible, the failure to pay each deposit by midnight on 7 June constituted a repudiatory breach of the relevant sale contract. By Birketts' letter of 22 June 2023, the defendant clearly elected to treat any such breach as terminating each of the sale contracts with immediate effect. There can be no doubt that the defendant terminated the sale contracts, provided it was entitled to do so. On this analysis, since the sale contracts would be at an end, the fourth issue would not arise for decision.

110. For the reasons I have given, however, I have concluded that the obligation to make payment of the deposits no later than the date each contract came into existence, and thus on the date each option was exercised, was **not** a condition of each sale contract, so that time was **not** of the essence of the due date for payment. It follows that the claimant's failure to make payment of the deposits on the due date did **not** amount to a repudiatory breach of contract. I must therefore proceed to consider whether Walker Morris' letter of 27 June constituted a separate, and discrete, repudiatory breach of

contract, which was accepted by Birketts' letter of 10 July. That turns upon the true meaning and effect of the earlier letter. Like many questions of construction, the matter is largely one of impression.

111. I have already set out the respective contentions of Miss Hawker and Mr Calland as to how one should read, and understand, Walker Morris's letter of 27 June. I cannot accept Mr Calland's submission that it is the clear implication of that letter that no deposit will be paid, even if the defendant's conveyancer should nominate a bank account into which cleared funds might be transferred by way of direct credit. I do not find Mr Calland's attempt to contrast Walker Morris's letter of 27 June with the facts of the *Eminence* case particularly helpful. This is because, as Etherton LJ observed in that case (at [62]), *'whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value.'* Rather, I prefer the competing analysis, and submissions, of Miss Hawker.

112. In my judgement, the over-arching impression created in the mind of its reader is that Walker Morris's letter of 27 June is requiring specific performance by the defendant of its asserted contractual obligation to transfer the reversionary interest under each of the three leases to the claimant; and that, should the defendant fail to discharge that contractual obligation, legal proceedings for specific performance will ensue. True it is that an earlier section of the letter disputes that there was any contractual obligation to make payment of the deposits; but it also makes the alternative point that even if there were, there could be no breach of that obligation unless the seller's conveyancer had provided the claimant with details of the bank account into which the deposit monies were to be paid. In my judgement, the letter does not expressly state, or even suggest (by implication), that if such details were to be forthcoming, the claimant would not pay over the deposit monies. The whole tenor, and thrust, of the letter is to deny any suggestion that the claimant has acted in breach of contract, and to dispute the defendant's entitlement to terminate the sale contracts. The letter makes it absolutely clear that it declines to accept any repudiatory breach of contract by the defendant as terminating the sale contracts. In short, I cannot agree with the assertion (in Birketts' letter of 10 July 2023) that Walker Morris's letter of 27 June *'makes clear that your client had (and continues to have) no intention of paying the deposits'*.

113. Looking at all the circumstances objectively - that is from the perspective of a reasonable person in the position of the defendant - I find it impossible to conclude that the letter of 27 June clearly demonstrates any intention to abandon, and altogether refuse to perform, the sale contacts constituted by the exercise of the three options. I find that that letter fails to manifest any clear and unequivocal refusal to perform the claimant's obligations, as the contracting purchaser of the three properties. At the very best (from the defendant's perspective), it is equivocal. I therefore determine the fourth of the disputed issues in favour of the claimant.

VI: Disposal

114. For all these reasons, I hold, and declare, that the three options were validly exercised on 7 June 2023, and are binding on the defendant. I propose to make an order, in appropriate form, for specific performance of the three resulting sale contracts.

115. At the conclusion of oral argument on 20 December, I reserved my substantive judgment, stating that I proposed to hand down a written judgment at a remote hearing on Friday 5 January 2024, without the need for any attendance by the parties or their legal representatives. Since there were no admissible offers to settle, and

given the shortness of the hearing, and the binary nature of the issue in dispute, both parties were in agreement that costs should follow the event. In the interests of avoiding the need for any future submissions on the amount of costs, I proceeded to undertake a summary assessment, on the basis of counsel's oral submissions, and by reference to the costs statements (in form N260) that both parties had exchanged and filed prior to the hearing. Given that both parties costs were relatively modest (relative to the amount in issue on the claim) and (apart from the fees of counsel) they were very much in line with each other, this proved to be a relatively short, and trouble-free exercise, particularly since neither party knew which would be the paying, and which the receiving, party. I assessed the claimant's costs in the full amount claimed of £35,930.70. I assessed the defendant's costs in the round sum of £40,000 (reduced from a grand total of £43,377.77). This reduction reflected a disallowance of part of the fees attributed to counsel, in order to bring Mr Calland's total fee down to one more in line with the aggregate fee agreed for Miss Hawker (albeit recognising Mr Calland's greater seniority in terms of call). Those fees are exclusive of VAT. Both parties agreed that payment should be effected within the usual period of 14 days from hand down, i.e. by 4.00 pm on Friday 19 January 2024.

116. I indicated that I would extend the time for appealing to 49 days after hand down (i.e. to 4.00 pm on Friday 23 February 2024). I direct that written submissions in support of any application for permission to appeal, with concise draft grounds of appeal, are to be filed and served within 21 days after hand down (i.e. by 4.00 pm on Friday 26 January 2024). Unless I direct otherwise, I will determine any such application on paper.

117. I would invite the parties to seek to agree a substantive order to give effect to this judgment. If the parties cannot agree on the form of order, they should provide a draft composite order, together with brief written submissions, which should be no longer than necessary and, in any event, no longer than five pages in length. Unless I direct otherwise, I will proceed to determine the outstanding matters on paper.

118. I conclude by reiterating my thanks to both counsel (and their respective solicitors) for their considerable assistance in facilitating the speedy determination of this case.

119. That concludes this reserved judgment.