IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2010: No. 68

B E T W E E N:

LANCASHIRE INSURANCE COMPANY LIMITED

Plaintiff

and

MS FRONTIER REINSURANCE LTD.

Defendant

JUDGMENT

(in Court)

Date of Trial: September 21-22, 2010
Date of Judgment: October 7, 2010

Mr. Narinder Hargun, Conyers Dill & Pearman,
for the Plaintiff

Mr. David Kessaram, Cox Hallett Wilkinson,
for the Defendant

Introductory

1. The present action arises out the Defendant's decision not to take up an assignment of the Plaintiff's lease of commercial premises situated at Floors 5 and 6, 8 Mintflower Place on Par-la-Ville Road in the City of Hamilton ("the Premises"). It appears that this decision was influenced at least in part by a decline in rental values between the date when the agreement for a lease was entered into between the parties and the Landlord (October 16, 2008) ("the Agreement") and the date when the Plaintiff notified the Defendant that it was in a position to complete the proposed assignment of the Plaintiff's lease (December 18, 2009) ("Fit Out Completion Notice").

2. On January 13, 2010 the Defendant served a Notice of Termination purportedly terminating the Agreement on the grounds that it was entitled to terminate because the "Condition Date", which it equated with completion, had not occurred on or before December 31, 2009. The sole issue at trial was whether, on a true construction of the Agreement, the Defendant was or was not entitled to terminate the Agreement on the asserted grounds. The Plaintiff primarily sought specific performance of the Agreement.

3. It is common ground that the Plaintiff was unable to serve the Notice to Complete until it did because the premises it was intending to move into were not themselves granted an occupancy certificate until on or about December 17, 2009. It was originally hoped that the assignment would be completed on or about April 1, 2009. But for the delay in the fitting out of the Plaintiff's new premises at Floors 5 and 6, 7 Par-la-Ville Road ("the Power House Premises") across the street from the Premises, there seems no reason to doubt that the assignment contemplated in the Agreement would duly have taken place.

4. The Plaintiff's initial case set out in its February 2, 2010 Specially Indorsed Writ was that on a true construction of the Agreement, the Defendant was not entitled to terminate. By its Amended Specially Indorsed Writ dated June 10, 2010, it was alleged in the alternative that the Defendant by its conduct had *waived* the right to terminate. These new averments only triggered bare denials in the Amended Defence. At trial the Plaintiff applied to re-amend its Statement of Claim to allege in the further alternative (but supported by the previously pleaded particulars under paragraph 12A of the Amended Statement of Claim), that because the parties had agreed to complete the assignment on December 31, 2009 and/or otherwise, the Defendant was *estopped* from serving the Notice of Termination. This application was granted without opposition.

5. Accordingly, the principal legal issue to be determined is whether in light of the terms of the Agreement and the essentially agreed facts the Defendant was entitled to terminate the Agreement. The principal factual issues are whether, assuming this question of construction is resolved against the Plaintiff, the Defendant by its conduct was not entitled to validly terminate by virtue of having waived the right so to do or because it is estopped from doing so.

Legal findings: was the Defendant entitled to serve its Notice of Termination on January 13, 2010

Overview of the terms of the Agreement

6. The central plank of the Agreement (to which the Plaintiff as Tenant, the owner of the Premises as Landlord, and the Defendant as Assignee are parties) is clause 2 which provides as follows:

> "*2.1 In consideration of the Tenant's obligations under this Agreement the Landlord will grant to the Tenant the Lease and the Tenant will accept from the Landlord the Lease on the terms set out in this Agreement.*
>
> *2.2 In consideration of the agreement by the Tenant contained in clause 2.1 above the Landlord consents to an assignment of the Lease to the Assignee on the Condition Date and the Tenant will assign to the Assignee the Lease on the Condition Date and the Assignee will accept an assignment of the Lease on the terms set out in this Agreement.*"

7. Clause 3 provides for completion of the Lease on the "*Completion Date*" and explains what it is to occur on such date. Clause 1.2 fixes the Completion Date in time by further defining it as "*1 January, 2009*". This is linked to clause 4 which provides that the term of the Lease and the Tenant's rent obligations shall also commence on January 1, 2009. Clause 3.4 provides for either Landlord or Tenant to serve a Notice to Complete on or after the Completion Date while clause 3.5 states: "*The Lease shall be completed within 20 Working Days after service of the Notice to Complete (excluding the day of service) and time shall be of the essence of* [sic] *this provision.*" These provisions have no direct impact on the parties to the present dispute, but helpfully illustrate the drafting scheme of the Agreement. The Lease was completed on January 23, 2009 when the Plaintiff formally became Tenant of the Premises capable of assigning its rights under the Lease.

8. The crucial provisions for the purposes of the present action may now be considered. Clause 6 ("*ASSIGNMENT*") provides for completion of the Deed of Assignment between the Plaintiff as Tenant and the Defendant as Assignee on the Condition Date. Like clause 3 in relation to the Lease, clause 6 explains what is to occur on the Condition Date. Like clause 1.2 in relation to the (Lease) Completion Date, clause 1.1 expands on the long-form explanation of what the Condition Date means by linking this term (albeit more fluidly) to a place in time. This fluidity in my judgment is wholly attributable to the fact that it was impossible to identify with any degree of precision on October 16, 2008 when the Power House Premises would be completed. Clause 1.1 provides:

> "*1.1 'Condition Date' means the date falling no more than fifteen (15) Working Days following the latter* [sic] *of:*
>
> *1.1.1 completion of the Lease; and*

1.1.2 *receipt by the Assignee of the Tenant's written notice confirming completion of their fit out works in relation to their occupation of the 5th and 6th Floors of 7 Par-la-Ville Road, Hamilton* [the Power House Premises] *and such written notice shall be given by the Tenant immediately following the completion of its said fit out works.*"

9. So while Completion Date for the Lease was fixed as a date certain with the parties given contractual remedies to ensure that completion actually occurred, the Agreement provided for completion of the Assignment to be triggered by a Condition Date occurring no later than the completion of the Power House premises which the Plaintiff needed to move into to be able to vacate the Premises which formed the subject of the Agreement for Lease. In similar vein, clause 6 provides contractual remedies to enable either party to ensure that completion of the assignment actually occurs. In addition, because of the absence of any fixed date when the Condition Date will occur, clause 6 creates a right for the Tenant or the Assignee to terminate the Agreement if the Condition Date does not occur by December 31, 2009. The relevant provisions merit consideration in further detail.

10. Clause 6.1 provides for the Deed of Assignment to be prepared by the Plaintiff's attorneys and sent to the Defendant's attorneys "*at least five Working Days after the Condition Date*". It was common ground that "after" should read "before". Thus read, clause 6.1 mirrors clause 3.1, which required the Landlord's attorneys to provide engrossed copies of the Lease to the Plaintiff's attorneys "*at least 10 Working Days before the Completion Date*".

11. Clause 6.2 states in terms which replicate the words of clause 3.2 in relation to the Lease: "*Completion of the Deed of Assignment shall take place on the Condition Date*". As in the case of clause 3.2, a target date for completion is fixed while the following provisions of the clause clearly contemplate the possibility that completion may not take place as planned. Clause 6.4 provides:

> "*At any time on or after the Condition Date either the Tenant or the Assignee are ready able and willing to complete the Deed of Assignment and perform their other obligations under this Agreement they may invoke the provisions of clause 6.5 by serving a Notice to Complete to* [sic] *the other or on the Landlord but without prejudice to any other available right or remedy.*"

12. Clause 6.5 replicates clause 3.5 in relation to the Lease in providing: "*The Deed of Assignment shall be completed within 20 Working Days after service of the Notice to Complete (excluding the day of service) and time shall be of the essence of* [sic] *this provision.*" So, as in the case of completion in relation to the Lease, a target date is fixed and provision is made for a back-up date if completion does not occur on a consensual basis. In both cases, the back-up completion date is fixed at 20 days after service of a Notice to Complete. However, in the case of the Deed of Assignment alone, with its open-ended target date for completion, there is what was referred to in evidence as a

"drop-dead" date after which either party to the proposed Assignment is entitled to terminate the Agreement. Clause 6.6 provides as follows:

> "*6.6 If for any reason the Condition Date has not occurred by the 31 December 2009 then the Tenant or the Assignee may serve written notice on the other to determine this Agreement and upon service of such this Agreement shall determine and cease to have effect and no party shall be under any further liability to any other party under this Agreement without prejudice to any pre-existing right of action of any party in respect of any breach by any party of its obligations under this Agreement.*"

13. The crucial point of construction which requires determination is not whether the term "Condition Date" in clause 6.6 is to be given the narrower meaning assigned by clause 1.1 (the initial target date) or the broader actual completion date meaning clearly contemplated by, for example, clause 6.2, 6.3 as read with 6.4, 6.5. This dichotomy was not directly alluded to in argument; it was, rightly, considered to be self-evident that clause 6.6 engaged the initial Condition Date defined by clause 1.1.

14. The Plaintiff's case is that clause 1.1 contemplates that the Condition Date occurs on the date when the parties are ready to complete (in this case December 18, 2009), unless such date is extended by agreement (as it was to December 31, 2009). The Defendant's case broadly is that clause 1.1 envisages that the Condition Date should be agreed within 15 working days of service of the Fit-Out Completion Notice contemplated by that clause. In effect, the date occurs automatically in the absence of completion on an earlier date on the expiration of that 15 day period. Accordingly, as the 15 day period unarguably expired after December 31, 2009 without a completion date being agreed, the Condition Date occurred on January 13, 2010 and a Termination Notice could plainly be served.

15. At first blush, having regard to the structure of the Agreement as a whole as described above, the Defendant's interpretation seems far more straightforward than the Plaintiff's. However, it leaves unresolved the somewhat broader dichotomy between construing Condition Date as the target completion date contemplated by clauses 1.1 and 6.4 and the actual completion date contemplated by clause 6.2 and 6.3. Because of the way in which the present case was argued and because this assumption seems justifiable in any event, I will assume for the purposes of the present Judgment that the right to terminate under clause 6.6 is engaged when the target completion date has not occurred by December 31, 2009.

The Plaintiff's submissions on the construction point

16. In Mr. Hargun's Closing Submissions on behalf of the Plaintiff, his case on the construction point was summarized as follows:

"*9.Lancashire's case in relation to the construction of the Agreement is simple and straightforward:-*

By Clause 2.2 of the Agreement, MSF agreed to accept from Lancashire an Assignment of the Lease on the Condition Date. This was a substantive obligation undertaken by both parties and not dependent upon the unilateral whim of either party.

By letter dated 18 December 2009, Lancashire gave written notice to MSF that Lancashire's fit out works at its new premises were completed on that date. The notice stated that 'Accordingly, the conditions set out in this Agreement have been satisfied and our client now requests the Assignment to be completed without delay'.

Upon the true construction of the Agreement, the Condition Date occurred on 18 December 2009 and MSF was then obliged to take and complete the assignment without delay (subject to any further agreement between the parties extending the completion date).

The Completion Date was extended by the agreement of the parties. It is the evidence of Francesca Fox and Simon Robinson that Harry Kessaram agreed that the Completion Date will be 31 December 2009. An agreement as to the Completion Date necessarily concedes that the Condition Date has already occurred. It was the evidence of Francesca Fox that in this case the Completion Date is effectively the same as Condition Date whilst pointing out that in theory the Condition Date is antecedent to the Completion Date.

MSF wrongfully and in breach of the Agreement, refused to proceed with the Assignment and served the Notice of Termination purporting to terminate the Agreement."

17. The Submissions proceed to highlight the fact that the way the Defendant has put its construction argument from the beginning of the present dispute has been a shifting one:

"*As noted above, the Notice of Termination from MSF and the letter from CHW dated 19 January 2010 contended that the Condition Date referred to in Clause*

*1.1 was a specific date which took place fifteen (15) days **after** the relevant notice had been given under Clause 1.1. Lancashire submits that such an interpretation is entirely contrary to the language used in the Agreement and is, in any event, wholly uncommercial. Indeed, whilst the Notice of Termination specified the sole breach was the failure to serve the Notice 15 working days prior to 31 December 2009 this point now appears to have been abandoned by MSF. In its opening submissions MSF now contends that it is not MSF's case that the Agreement requires notice of completion of fit out to be given 15 Working Days before 30 December 2009 (see paragraph 33 of MSF's opening submissions)…"*

18. The fact that a party changes the way it advances a legal-as opposed to factual- argument does not in my view necessarily undermine the cogency of the final position advanced at trial. It merely illustrates the fact that, in the present context, the construction issue is a difficult one arising in relation to what appears to have been a custom-made rather than a standard form agreement. After a cogent critique of the contention that clause 1.1 required 15 working days to expire after service of the Notice of Completion (Fit-Out) before the Condition Date occurred and an exposition on the principles requiring commercial documents to be given a commercially sensible construction, it is further submitted by the Plaintiff as follows:

"18.*In this case, the obligation placed upon Lancashire under Clause 6.1 was satisfied on 30 November 2009 when CD&P sent to CHW 'engrossment copies of the Deed of Assignment and Bill of Sale for execution by your client' **[2/110]**. In the circumstances, when the requisite notice was served on behalf of Lancashire on 18 December 2009, there were no outstanding condition precedents which either party had to satisfy. All that was required was the execution of the Deed of Assignment which had been sent to MSF's attorneys on 30 November 2009. In these circumstances, to provide for a fifteen (15) Working Days interval between the service of the notice and the Condition Date would have served absolutely no useful commercial purpose. Furthermore, it was entirely appropriate for Lancashire to state in its notice of 18 December 2009 **[2/114]** that:-*

> *'We confirm that the Lease was completed on 23 January 2009 and we hereby give notice of completion of our client's fit out works to the 5th & 6th Floors, 7 Par la Ville Road, Hamilton. Accordingly, the conditions set out in the Agreement have been satisfied and our client now requests the assignment to be completed without delay. The Deed of Assignment was sent to your attorneys on 30 November 2009 duly executed by our client*

and we look forward to its return to enable completion of the same.'

19. in the circumstances of this case, the Condition Date was indeed 18 December 2009. There were no further conditions to be satisfied by either party. MSF was contractually obliged to execute the Deed of Assignment in accordance with the terms of Clause 2.2 of the Agreement. Given that the obligation to provide the Deed of Assignment is on Lancashire, it is for Lancashire to determine the Condition Date."

19. The Plaintiff's Closing Submissions then proceed to deconstruct the Defendant's pleaded case that the parties were required to agree a completion date within the 15 day period described in clause 1.1:

"21.The contention that the selection of the Condition Date is subject to the agreement between Lancashire and MSF finds no support either as a matter of linguistic analysis of the words used or as a matter of commercial reality. Clause 1.1 simply states that ""Condition Date" means the date falling no more than fifteen (15) Working Days following" the notice. There is no suggestion anywhere in the Agreement that the selection of the Condition Date within the fifteen (15) Working Days is a matter of agreement between Lancashire and MSF. As a matter of construction, the language used does not in any way suggest the pre-condition of an agreement between the parties. Furthermore, the requirement of an agreement between the parties would serve no commercial purpose. The substantive obligation assumed by MSF to take the assignment is set out in Clause 2.2. That substantive obligation is subject to the two pre-conditions set out in Clause 1.1.1 (completion of the lease) and Clause 1.1.2 (the notice of fit out). After these two pre-conditions have been satisfied, there is, from a commercial perspective, nothing further to agree. All that is required is the execution of the Deed of Assignment by MSF. The fifteen (15) Working Days leeway is provided in the event that the Deed of Assignment has not been provided to MSF by the time the notice is served. Once the Deed of Assignment has been provided to MSF and the notice has been served, there is nothing further either to negotiate

or to agree. In those circumstances, to impose a pre-condition, to MSF's obligation to execute the Deed of Assignment, an agreement between Lancashire and MSF as to the Condition Date makes no commercial sense.

22.Even if Clause 1.1 could be construed as requiring an agreement between the parties as to the selection of the Condition Date within the fifteen (15) Working Days, it does not follow that "In default of agreement as to the Condition Date [MSF] was not obliged to complete the assignment" (¶6 of the Defence).

23. Such a submission by MSF wholly ignores the legal position that once the notice was served by Lancashire on 18 December 2009, MSF was obliged not to frustrate the machinery designed to give effect to the substantive rights of the parties. As a matter of law, MSF could not unilaterally withhold its agreement so as to frustrate the entire agreement. Furthermore, such a submission ignores the legal position that once the notice had been given, the selection of the Condition Date was, on any basis, subsidiary to the main purpose of the Agreement which was the assignment of the lease. Once Lancashire served the notice on 18 December 2009, there was constituted a complete agreement under which MSF was obliged to take the assignment. If the machinery provided in the agreement to give effect to the main purpose of the contract breaks down, the Court will substitute its own machinery.

24.In Sudbrook Trading Estate Ltd. v Eggleton [1983] A.C. 444 ***[Tab 12]****, the House of Lords had to consider whether the owner could frustrate an agreement to purchase the reversion in fee simple at a price agreed by the parties' valuers by simply refusing to appoint a valuer. Overruling a long line of authorities, the House of Lords held that the owner could not frustrate the agreement between the parties simply by refusing to appoint the valuer. Furthermore, the appointment of the valuer was simply machinery designed to give effect to the substantive rights of the parties under the agreement and if the machinery became unworkable, for whatever reason, the court could substitute its own machinery and give effect to the agreement."*

20. The argument that the Condition Date defined in clause 1.1 could not be viewed as crystallizing until the parties agreed a completion date within the 15-day window I found to be compelling. However, this preliminary conclusion ignores the Defendant's crucial supplementary contention that in the absence of agreement the Condition Date

crystallizes at the end of the 15 day period. Moreover, I did not find the Plaintiff's further submission that as soon as all that remained to be done after service of a clause 1.1 Notice was to complete, the Condition Date occurred to be as persuasive. Such a "crystallizing event" would itself be subject to a multitude of uncertainties, including: (a) whether the Premises had to be inspected after the Plaintiff vacated; (b) whether remedial works had to be performed and, if so, when would they be completed to the Tenant's satisfaction; (c) whether the draft Deed of Assignment required revision despite the fact that the Tenant's lawyers felt it was adequate and the Assignee's lawyers had not immediately raised any dissent to its terms? Indeed, on the facts of the present case, although the Agreement was silent on inspection rights, it was common ground that various matters ancillary to completion (including vacant possession and inventory issues) were outstanding on December 18, 2009.

The Defendant's submissions on the construction point

21. I found the following submissions in the Defendant's Skeleton to be highly persuasive, in the round:

> "16.*The definition in Clause 1.1 of the Agreement contemplates that "the Condition Date" will be a single date; but, rather than identifying a specific date, it provides a range of possible dates beginning with the day following the day of the delivery of the notice of completion of fit out and ending on the 15th Working Day thereafter. The Condition Date must be a specific day as the parties' obligations to complete the Assignment take effect on that day; it is on that date that both the Landlord and the Assignee are required to execute the Deed of Assignment under Clause 6.3; it is from that date that the Assignee assumes liability for rent and other obligations and the Tenant is released from its liability under the covenants in the Lease by Clause 3 of the Deed of Assignment. All of these considerations indicate that "the date" which is the Condition Date must be a specific date.*
>
> *17. Further according to "Hill & Redman's Law of Landlord and Tenant", Chapter 2, A4 Requisites for Agreement for Lease, at [462]* ***[DA:2:8]****:*
>
> > *'It has been said that there must be a certain beginning and a certain ending to a lease, otherwise it is not a perfect lease, and a contract for a lease must contain these elements. Thus, in order to have a valid agreement for a lease, it is essential that the day on which the term is to commence should appear, either in express terms or by reference to some writing which would make it clear, or by reasonable inference from the language used. Where no date for the commencement of the term is stipulated there is no valid agreement. The court will not cure the invalidity by implying a term that the lease is to commence within a reasonable time or at the date of the agreement."*

18. How is "the date" which is to be the Condition Date to be identified? There are two possibilities: either the date is to be identified by the unilateral nomination of one or other of the parties (as alleged by the Plaintiff); or, alternatively the date is to be identified by agreement. In either case the date may not be later than the last date which satisfies the definition of Condition Date in Clause 1.1.

19.Where parties have not stipulated for completion on a specific date, but have identified a period within which completion is to take place, there is no reason to understand "the date" as meaning a date within the permitted range to be selected by one party rather than the other. The Agreement does not expressly give either party the right to nominate a date. Each party might have its own reasons for wishing completion to take place on a particular date within the permitted range, or for wishing to avoid a particular date. The Tenant may have made arrangements to vacate the premises at a particular time and it may not be convenient or practical for it to have to complete earlier than the end of the 15-day period. Equally the Assignee may not yet be ready to move in when it receives notice from the Tenant that its fit out works have been completed and may wish to have further time to make the necessary arrangements. There may also be practical difficulties over the execution of the necessary documents, for example if the Assignee is out of the country when the notice under Clause 1.1.2 is received.

20. These considerations make it extremely unlikely that the parties intended that one of them should have the unilateral right to stipulate for completion on a particular date within the 15-day range without the concurrence of the other. Once the Condition Date is ascertained completion has to take place on that date if one or other of the parties is to avoid committing a breach of its obligations under Clause 6. If the Assignee was entitled to specify the Condition Date on receipt of a notice under Clause 1.1.2 it could, in theory, specify a date which was less than 5 Working Days away thereby making it impossible for the Tenant to comply with its obligation under Clause 6.1. If the Tenant was entitled to specify a date, it could specify the earliest possible date after giving notice which might not be a date on which the Assignee was in a position to complete, thereby putting it in breach of its obligations under Clause 6.3.2. It would be very surprising if the parties had intended to give each other the unilateral right to place the other in breach of contract.

21. There is no reason why a right of one party to specify the Condition Date should be assumed or implied into Clause 1.1. Such an implication is not necessary to make the contract work or give it business efficacy.

22. In Barnsley's Conveyancing Law and Practice (4th Edition) (1996) at p. 420 ***[DA3:9-11]****, it is noted in relation to dates of completion that:*

'Where a date has been agreed by the parties it is expressly inserted in a contract, often with varying degrees of precision. Usually a specific date appears; sometimes expressions such as "on or before", or, less frequently, "on or about", a certain date are to be found. The reason for using such formulae is patent. The parties have fixed their latest date but are hoping to effect completion earlier. It is equally obvious that their adoption achieves nothing. One party cannot complete before the specified date without the other's concurrence…'

By defining the Condition Date as the date falling "no more than" 15 Working Days after the receipt of notice, the parties in this action were equally fixing their latest date but hoping to effect completion earlier.

23.It is respectfully submitted that the proper construction of the Agreement is that the Condition Date must be a date not later than 15 Working Days after the receipt of notice that the Tenant has completed its fit out and it is to be such date as the parties agree; in default of agreement the Condition Date is to be the 15th Working Day after the day of delivery of the notice of fit out, since that will be the only day which, by that time, will be capable of satisfying the definition in Clause 1.1. The parties are free to agree a Condition Date at any time within that period but neither party is entitled unilaterally to specify the date."

22. Although the need for precision with respect to completion of the Assignment in the present case was somewhat less than with respect to the term of the Lease (which was clearly defined in the Agreement), I found the above submissions on the construction of clause 1.1 to be fundamentally sound.

Conclusion: meaning of "Condition Date" in clause 1.1 and 6.6 of the Agreement

23. Clause 1.1 of the Agreement provides as follows:

"*1.1 'Condition Date' means the date falling no more than fifteen (15) Working Days following the latter* [sic] *of:*

1.1.1 completion of the Lease; and

1.1.2 *receipt by the Assignee of the Tenant's written notice confirming completion of their fit out works in relation to their occupation of the 5th and 6th Floors of 7 Par-la-Ville Road, Hamilton* [the Power House Premises] *and such written notice shall be given by the Tenant immediately following the completion of its said fit out works.*"

24. Having regard to the related terms of the Agreement in which this definition is found, I accept Mr. Kessaram's submissions on behalf the Defendant as to the meaning to be assigned to the term "Condition Date" in this clause. It is not without difficulty ultimately clear, that the term means such date after receipt of a clause 1.1.2 Notice being either:

24.1 a date before the expiration of 15 days which is expressly agreed to be the Condition Date or completion date, whether or not completion actually occurs on that date;

24.2 a date before the expiration of 15 working days when completion of the Assignment actually occurs, whether or not it is expressly agreed to be the Condition Date; or

24.3 upon the expiration of 15 working days after the Assignee receives the Tenant's clause 1.1.2 Notice.

25. The scheme of the Agreement is inconsistent with the analysis that as soon as the Plaintiff served its Fit Out Completion Notice, the Defendant was obliged to complete immediately. It is only under clauses 6.4- 6.5, after the (target) Condition Date fixed by clause 1.1 has arrived, that a Notice to Complete can be served requiring completion within 20 working days. It is this context that clause 6.5 provides that "*time shall be of the essence*". Such a construction is entirely consistent with the commercial context and factual matrix out of which the Agreement arose.

26. The Condition Date under clause 1.1 was triggered by the Power House Premises being ready for the Plaintiff to occupy. This required time for the Plaintiff to not only vacate the Premises which were to be assigned but also to deal with the sort of logistical details which were discussed in the initial late December "walk through". The Agreement contemplated the draft Deed of Assignment being supplied by the Plaintiff's attorneys as little as 5 working days before the Condition Date. It is entirely logical and commercially sensible to construe the Agreement as contemplating that actual completion might not take place on the Condition Date fixed by clause 1.1 and that remedies to compel actual completion (if this target date was not met) should only become available after this date had passed. The converse applies to the Plaintiff's contention that the Tenant was, in effect, able to compel completion under clause 1.1. This would render redundant the remedies provided in clause 6.4-6.5 of the Agreement. Thus read, no breach of the duty to cooperate with the performance of the Agreement would arise through an Assignee declining to complete for whatever reason during the initial (target) Condition Date period.

27. Accordingly, I find that the Condition Date prescribed by clause 1.1 could not validly arrive until the Plaintiff served its clause 1.1.2 Notice and either of the two events occurred: (a) actual completion or an agreement of a Condition Date (or completion date) within 15 working days after service of the relevant Notice, or (b) the expiration of 15 working days after the clause 1.1.2 Notice was received by the Defendant. Whether the Condition Date occurred on or before December 31, 2009 on the facts of the present case now falls to be considered.

Findings: did the Condition Date occur after December 31, 2009 on the facts of the present case?

28. In light of the above conclusions as to the legal construction to be placed upon the crucial clauses in the Agreement, I find that the Condition Date did not occur until after January 31, 2009 in all the circumstances of the present case. The clause 1.1.2 Notice was admittedly served on December 18, 2009. This meant that absent agreement of a Condition Date (or completion date) on or before December 31, 2009, the Condition Date would occur under the terms of clause 1.1.2 on the expiration of 15 days thereafter-uncontrovertibly after December 31, 2009.

29. The Plaintiff relied in the alternative upon an alleged oral agreement as to a completion date of December 31, 2009 reached in a telephone conference between Francesca Fox of Conyers Dill and Pearman ("CDP") and Harry Kessaram of Cox Hallett Wilkinson ("CHW"). This plea was supported by the Witness Statement and oral evidence of Francesca Fox for the Plaintiff but not contradicted by any other witness.

30. Mr. Hargun invited the Court to draw adverse inferences against the Defendant arising from its failure to call either Mr. Harry Kessaram or Mr. David Cooper, who was also said to be a material witness. The Plaintiff's counsel relied in this regard on *Philip Harry Wisniewski v Central Manchester Health Authority* [1990] PIQR 324. It was common ground that adverse inferences could only be drawn in relation to the failure to call a material witness if the witness' evidence was required to rebut *prima facie* evidence of a relevant fact or facts. The most pertinent portion in the Judgment of Brooke LJ in that case was to my mind the following:

> "*There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue…*"[1]

31. The evidence, both oral and documentary, in support of this agreement was very thin indeed. And the alleged agreement was only first pleaded by way of re-amendment on the first day of the trial. The first hint of the point in the Plaintiff's formal case before this Court is seemingly found in paragraph 11 of Ms. Fox's June 4, 2010 Witness Statement where she states as follows:

> "*Later that same day* [December 21, 2009] *Mr. Kessaram and I had a telephone call about another matter. However, during our conversation Mr. Kessaram addressed this matter and suggested we agree a condition date for closing. He suggested 31st December 2008* [sic] *as this would avoid any apportionment of rent and I agreed. I emailed Simon Robinson to advise him of this and a copy of my email is found at page 5 of FSF-1.*"

32. This statement, standing by itself, does not in my judgment quite reach the threshold of *prima facie* evidence in support of a binding agreement in respect of completing a substantial assignment of lease transaction. At its highest it constitutes *prima facie* evidence of an agreement in principle, subject to subsequent confirmation in writing. If Ms. Fox had emailed the opposing lawyer to confirm the agreement rather than her

[1] Transcript, page 21.

colleague, this would have supported a finding (in the absence of any evidence in rebuttal) that an agreement had been reached. The email to her colleague merely confirms her own view that a completion date had been agreed. The final paragraph of her Witness Statement adds little to the case that a firm agreement on completion had been reached in objective terms. Francesca Fox essentially elaborates upon her own state of mind when she handed the file back to Simon Robinson, assuming "*that a completion date had been agreed with Harry Kessaram already*".

33. Under cross-examination by Mr. (David) Kessaram, Ms. Fox insisted that in her own mind an agreement had been reached. She was unable to satisfactorily explain both the contents of and her failure to respond to the following email correspondence between her and Harry Kessaram, with Ms. Fox's email being sent the day after the purported oral agreement:

> "*On 12/22/09 4.46 PM...*
>
> *Hi Harry,*
>
> *I understand that our respective clients had a walk through of the premises today which went well. There are a few issues to be resolved but my client has informed me that the final cleaning is scheduled for 27th December following which the parties have agreed to a further walk through. On this basis I believe that a 31st December completion is feasible. I am aware however that you are away from close of business tomorrow. Please would you let me know who will be handling this in your absence or otherwise what arrangements can be made for completion in your absence...*" [emphasis added]

34. As the Defendant's counsel was keen to point out to Francesca Fox in cross-examination, this communication did not even suggest-let alone explicitly state- that the parties had reached a firm or concluded agreement for completion to take place on December 31, 2009. At the highest it confirms that the parties had tentatively or provisionally agreed that December 31, 2009 was a potential completion date which they should work towards. Harry Kessaram responded the following day on December 23, 2009 at 12:02 pm:

> "*Hi Francesca,*
>
> *David Cooper will have conduct of the file in my absence.*
>
> *You can deal with him on agreeing the condition/completion date as well as any other matters...*" [emphasis added]

35. This email from CHW, responding to a CDP email suggesting that a December 31, 2009 completion date was "feasible" (a) unambiguously avoided any commitment to completing on the proposed date and (b) was written in terms which were wholly inconsistent with the proposition that the lawyers concerned had previously agreed any

such completion date. The contemporaneous correspondence between the lawyers who supposedly agreed a December 31, 2009 completion date is clearly inconsistent with any such agreement having been consummated (as opposed to, perhaps, agreed in principle as a feasible and sensible date to work towards). In light of this, the internal CDP correspondence between Francesca Fox and Simon Robinson on the afternoon of December 21, 2009 has minimal if any evidential effect in terms of supporting the existence of the alleged agreement:

> "*...HK has just called me about another matter and in passing said that we need to agree a condition date for closing. He pointed out that there is a wide window and I was v non-committal then he suggested agreeing a completion date of 31st December to avoid any rent apportionments. I agreed that was sensible and he said that he thinks his client will be signing the assignment this week. Good news so fingers crossed...*" [emphasis added]

36. Even this inter-office communication between the Plaintiff's own lawyers, carefully read, suggests nothing more than that the parties' respective lawyers discussed December 31, 2009 as a suitable completion date, with the Plaintiff's lawyers crossing their fingers and hoping that the "drop dead" date of December 31, 2009 would not pass with the Deed of Assignment unsigned by the Defendant. Against the background, Simon Robinson's December 30, 2009 email to David Cooper, which provoked no response, is little more than a case of "to wish is to hope, to hope to expect"; it has no evidential value in demonstrating the existence of an agreed December 31, 2009 completion date:

> "*Dear David,*
>
> *I understand you are dealing with completion of the above lease assignment on behalf of Harry and that Francesca Fox and Harry agreed that completion of the Deed of Assignment and the Bill of Sale would take place tomorrow, so avoiding the parties having to the rental and other outgoings under the lease.*
>
> *Please would you confirm that you are in a position to proceed...*"

37. I find that there is no credible evidence in support of the plea added by way of re-amendment at the commencement of the trial that the parties agreed December 31, 2009 as the Condition Date, either expressly or impliedly. In light of the paucity of the evidence and the absence until trial of any formal allegation in relation to the purported agreement, it is entirely understandable that Harry Kessaram was not produced as a witness. No serious question of drawing an adverse inference from the failure to call evidence to rebut the Plaintiff's tenuous evidence of the existence of an agreed completion date on December 31, 2009 properly arises.

38. The evidence of the alleged agreement is fundamentally weakened by the fact that, irrespective of the fact that Ms. Fox at least harboured anxieties about the consequences flowing from a failure to complete on December 31, 2009, the formal tactical position adopted by the CDP lawyer with primary carriage of the file was that the Condition Date

had already occurred on December 18. This position was maintained as the Plaintiff's primary position on construction of the Agreement at trial. The December 18, 2009 Fit Out Completion Notice stated in material part as follows:

> "*...The assignment of the Lease is to take place upon the 'Condition Date', being the later of the date of completion of the Lease and your client's receipt of our client's confirmation of completion of their fit out works to the 5th and 6th floors, 7 Par-la-Ville Road, Hamilton....Accordingly the conditions in set out in the Agreement have been satisfied and our client now requests the assignment to be completed without delay...*"

39. If this analysis was correct, it would have been illogical for CDP to reveal to CHW any anxiety about a failure to complete on or before December 31 or, indeed, an excessive enthusiasm for formally agreeing such a completion timetable. If the Defendant was still considering whether or not the passing of year end without completion might give them a "get out of jail free card", it would have been quite logical for CHW and the Defendant to engage in subtle delaying tactics which would allow the date to pass and give themselves maximum leverage, irrespective of what final view they took of their rights under the Agreement. In this game of poker, neither side would have been willing to reveal their hand, as the documentary record strongly suggests. This issue will be revisited when considering the Plaintiff's waiver and estoppel claims below. It seems inherently improbable Mr. (Harry) Kessaram, in particular, would have entered into a binding agreement on a completion date without even seeking instructions from his client, especially in the context of a telephone call initiated to deal with another matter. It is entirely possible that when Fox and Kessaram spoke on December 21, 2009, the latter was quite positive about an early completion, and stepped back from this position after obtaining instructions prior to sending his December 23, 2009 email. But this would still not support a finding that a completion date was actually agreed.

40. Accordingly, I further find that the Condition Date under the Agreement did not occur until after December 31, 2009 so that, subject to the Plaintiff's waiver and estoppel claims, the Defendant was entitled to terminate the Agreement pursuant to clause 6.6.

Findings: was the Defendant debarred from exercising its termination rights because it waived compliance with the December 31, 2009 Condition Date?

41. The Plaintiff's case on waiver as set out in the Plaintiff's Closing Submissions was summarised in this way:

> "39. *Even if it could be said that the notice given on behalf of Lancashire on 18 December 2009 was in some way irregular (either in terms of timing or otherwise), it is clear, we submit, that any such irregularity has been waived by MSF. It is noteworthy that until the delivery of the Notice of Termination on 13 January:-*

39.1 MSF did not suggest that the notice given by Lancashire could not be relied upon.

39.2 MSF did not suggest that the notice was in any way irregular.MSF did not suggest that the notice needed to specify a particular date.

39.3 MSF did not suggest that the Condition Date had to be agreed between Lancashire and MSF.

39.4 MSF gave every indication that it was proceeding to execute the Deed of Assignment."

42. After setting out the legal principles relied upon, the Plaintiff's Submissions summarised the evidence relied upon in support of its case on waiver:

"43.*In relation to the issue of waiver, Lancashire relies upon the following facts and circumstances.*

43.1 It is the evidence of Mr. Devery on behalf of MSF that "It was our understanding that pursuant to Clause 1.1 of the Agreement, the Condition Date on which the assignment had to take place was the date agreed between the parties up to fifteen (15) Working Days following notice of completion of the fit out at Power House, and that this date had to take place before 31 December 2009, or either party would have the right to terminate the Agreement as provided for by Clause 6.6 of the Agreement". Mr. Devery further adds that "With the above in mind, if they wanted to proceed with the assignment, we were expecting to hear from Lancashire at least by 8 December 2009 (ie. 15 Working Days prior to 31 December 2009)".

43.2 On 18 December 2009, CD&P, on behalf of Lancashire, gave notice to MSF pursuant to Clause 1.1. The notice concluded with the statement "Accordingly, the conditions set out in the Agreement have been satisfied and our client now requests the assignment to be completed without delay" ***[2/114]****.*

43.3 At no time following the service of the notice of 18 December 2009, MSF indicated that the notice was in any way irregular. MSF did not contend that the notice had to be served by 8 December 2009. MSF did not contend that the selection of the Condition Date required agreement between Lancashire and MSF. MSF did not contend that the notice was defective because it did not specify the particular date.

43.4 On 21 December 2009, Francesca Fox of CD&P sent an e-mail on 21 December 2009 at 11:06am to Harry Kessaram ("Mr. Kessaram") of CHW advising that:-

> *'I understand that notice of the satisfaction of the pre-conditions was served on your client last week thereby triggering completion. I understand that the Deed of Assignment was sent to you in advance for execution by your client. Counterpart assignments have been executed by the Landlord (although Neal Molyneux has asked me to attach the relevant execution pages to the parts that will be executed by your client and mine rather than to have counterparts). And so I should be grateful if you would let me know when I can expect to receive the executed assignments from your client' **[2/146]**.*

43.5 Mr. Kessaram replied on the same date at 11:38am and advised:-

> *'I met with the client this morning and gave him the documents.*
>
> *I think my client will want to view the state of the premises before completion.*
>
> *I presume the premises are vacant but perhaps you can confirm.*
>
> *Look forward to hearing from you" **[2/146]**.*

There is no suggestion in the reply from Mr. Kessaram that he was in any way challenging the validity of the notice served on 18 December. The e-mail is premised on the assumption that the notice of 18 December is indeed valid because Mr. Kessaram says that his client wishes to view the state of the premises "before completion". All the indications are that MSF intends to complete.

43.6 Consistent with the e-mail from Mr. Kessaram, Mr. Devery, the Controller of MSF, sent an e-mail to Rosetta Landy of Lancashire on 21 December 2009 at 11:22am advising:-

> *'As we have now seen the completion of the fit out at Power House and from your call on Thursday, I think you have moved over there, we would like to come over to Mintflower to inspect the fixture and fittings as sometime has passed since we last inspected them" **[2/201]**.*

There is no indication that Mr. Devery is challenging the notice served in any way. There is no suggestion by Mr. Devery that the notice should have been served by 8 December. The desire to "inspect the fixture and fittings for sale" only makes sense if MSF was intending to execute the Deed of Assignment. The purchase of fixture and fittings, under the relevant agreement, was contingent upon MSF taking the assignment of the Lease.

*43.7 Later in the day on 21 December 2009, Mr. Kessaram telephoned Francesca Fox and suggested that they agree a condition date for closing. Mr. Kessaram suggested 31 December 2009 as this would avoid any apportionment of rent. Ms. Francesca Fox agreed **[2/147]**. The proposal to agree a completion date on 21 December 2009 is wholly inconsistent with the position that having regard to the terms of the notice, MSF is entitled to simply walk away.*

*43.8 As requested by Mr. Devery, Lancashire arranged for an inspection to take place the following day on 22 December 2009. Throughout the inspection, attended by Ms. Gayle Yoshimoto and Mr. Devery on behalf of MSF, no indication was given that MSF was not going to proceed with the assignment. On the contrary, the representatives of MSF gave every indication that the assignment would proceed and they would be moving into the premises in short order **[2/148]**.*

43.9 On 22 December 2009 Mr. Daniel Soares, Chief Operating Officer of Lancashire enquired from Mr. Devery whether MSF was interested in acquiring the UPS unit and the addition a/c unit in the server room on the 5th Floor. Mr. Soares advised that 'If not, I would like to know as soon as possible so I can

*arrange for the trades to do the removal and replacement work,' **[2/134]**. Mr. Devery advised that MSF did not require these items and as a result, Lancashire arranged to have these items removed from the premises. The removal of the UPS system, which was quite large, required Lancashire to remove a portion of the wall for the server room, which was subsequently rebuilt once the UPS had been removed on 28 December 2009. The removal of the UPS unit and the subsequent rebuilt would have been clearly unnecessary if MSF had taken the position that they were not bound to comply with the terms of the notice and that they intended to walk away.*

43.10 On 22 December 2009, Ms. Fox sent an e-mail to Mr. Kessaram at 4:46pm advising:-

> *'I understand that our respective clients had a walkthrough of the premises today which went well. There are a few issues to be resolved by my client has informed me that the final cleaning is scheduled for 27 December following which the parties have agreed to a further walkthrough. On this basis, I believe that a 31 December completion is feasible. I am aware however that you are away from close of business tomorrow. Please would you let me know who will be handling this in your absence or otherwise what arrangements can be made for completion in your absence' **[2/148]**.*

43.11 Mr. Kessaram replied to Ms. Fox the next day on 23 December 2009 at 12:02pm advising:-

> *'David Cooper will have conduct of the file in my absence.*
>
> *You can deal with him on agreeing the condition/completion date as well as any other matters' **[2/148]**.*

There is no suggestion by Mr. Kessaram that MSF does not intend to complete for any reason whatsoever. All the indications are that the assignment will be executed on 31 December 2009.

43.12 On 30 December 2009, Mr. Simon Robinson of CD&P sent an e-mail to Mr. David Cooper of CHW at 10:40am advising:-

'I understand you are dealing with the completion of the above lease assignment on behalf of Harry and that Francesca Fox and Harry agreed that completion of Deed of Assignment and the Bill of Sale would take place tomorrow, so avoiding the parties having to apportion the rental and other outgoings under the Lease.

Please would you confirm that you are in a position to complete' ***[2/115]****.*

43.13 The inquiry from Mr. Robinson was met with silence from Mr. Cooper. Mr. Cooper did not challenge the suggestion that 'Francesca Fox and Harry agreed that the completion of the Deed of Assignment and Bill of Sale would take place tomorrow'.

43.14 On 5 January 2010, Mr. Robinson sent an e-mail to Harry Kessaram at 10:51am advising:-

'Further to my correspondence addressed to your colleague David Cooper, I still await confirmation as to when your client will be in a position to complete the above assignment.

I look forward to hearing from you' ***[2/116]****.*

43.15 Mr. Kessaram replied on the same date at 12:31pm advising:-

'I am stuck here in Denver. Back Friday if lucky. Will try and revert then. Suggest you call DGC [David Cooper] in meantime" ***[2/117]****.*

There is no suggestion by Mr. Kessaram that MSF is intending not to complete or that it is challenging the notice given in any way despite the fact that this exchange takes place on 5 January 2010.

43.16 On 6 January 2010, Rosetta Landy, on behalf of Lancashire, sent an e-mail to Mr. Devery at 12:51pm advising:-

'Just checking to see if you had a chance to go through the furniture list? I am happy to assist you if my description of each item is not clear enough' ***[2/207]****.*

43.17 Mr. Devery responded on the same day at 3:53pm advising:-

> *'Sorry for not getting back to you earlier, but we are a bit swamped as having badly effected by personnel delays with people stuck in the UK and US.*
>
> *Can we do this next week?'* ***[2/207]***.
>
> *There is no suggestion by Mr. Devery as at 6 January 2010 that MSF is not obliged to take the assignment. He is proposing to go over the furniture list "next week". As stated above, the obligation to purchase furniture and fittings was contingent upon the assignment taking place.*
>
> *44. In the circumstances, it is clear that up until the date the Notice of Termination was served on 13 January 2010, MSF through its attorneys CHW (Mr. Kessaram) and its Controller, Mr. Devery, gave every indication that they intended to execute the Deed of Assignment consequent upon the service of the notice dated 18 December 2009. This involved inspecting the premises, inspecting the furniture and fittings and agreeing the date for completion on 31 December 2009. The Notice of Termination served on 13 January 2010 is entirely contrary to all the actions and representations of MSF's attorneys and Mr. Devery. At the very minimum, such conduct amounts in law to a waiver of any defect in the notice service on 18 December 2009, either in terms of timing or otherwise."*

43. Before analyzing the above evidence and the applicable legal principles in any detail, it appeared to me at the outset that CHW chose to sail rather close to the waiver wind in electing not to formally reserve the Defendant's right to terminate upon receipt of the December 18, 2009 CDP letter. This initial impression was ultimately shown to be based on an unjustifiably generous view of the Plaintiff's evidential case on waiver and a superficial view of the commercial context. From Mr. Devery's evidence it seems obvious that this reticence to reveal the Defendant's hand was motivated by the reluctance to sour relations with the Plaintiff unnecessarily before a firm decision had been taken that the termination would be pursued. In light of the force of the commercial blow that the termination decision clearly inflicted on the Plaintiff when it was eventually delivered, the sensitivity about causing offence with hindsight at first blush seemed somewhat difficult to understand. It was difficult to see why the Defendant's lawyers could not, by way of initial response to service of the December 18, 2009 Notice, have said something along the following lines:

> "*While our client hopes to be in a position to proceed with the assignment, advice is currently being given as to whether or not the Condition Date has occurred on the basis you assert, or whether our client may be entitled to terminate the agreement under clause 6.6.*"

44. However if one considers the commercial context in which the assignment was taking place, with an ancillary agreement to purchase fixtures and fittings and no clear

agreement on inspection rights, it is perhaps easier to understand that Mr. Devery was reluctant to risk souring relations with the Plaintiff at a time when it was still possible that the transaction might proceed. Be that as it may the crucial analysis is what the law requires for a waiver of rights to come into play and whether or not the facts in the present case meet the requisite test. It is the application of the legal principles to the facts of the present case, rather than the content of the relevant legal rules, which was in dispute. Before the legal elements of waiver are considered, one important factual matter must be addressed.

45. The repeated references made in the Plaintiff's Submissions to the failure of the Defendant to challenge the validity of the December 18, 2009 Notice can only be fully understood with reference to the way the Defendant's own January 13, 2010 Termination Notice was framed. Having regard to this Court's approach to and resolution of the construction question, framing the waiver issue as a failure to challenge an invalid notice seems rather strange. The merits of the waiver issue can only fairly be appraised if the Plaintiff's framing of the issue and this Court's findings as to how the Agreement's Termination provisions ought to be construed is taken into account. The Termination Notice sent by the Defendant to the Plaintiff and copied to CDP provided as follows:

> "*We the duly authorised signatories of MS Frontier Reinsurance Ltd. ("the Assignee") hereby:*
>
> 1. *refer to the Agreement for Lease dated 16 October 2008 (the "Agreement") made between Raphael Limited (as Landlord) (1), the Tenant (2) and the Assignee (3) by which the Tenant agreed to assign the Premises to the Assignee upon satisfaction of certain conditions;*
>
> 2. *state that we have not received written notice, served in accordance with Clause 1.1.2 and Clause 7 of the Agreement, 15 Working Days in advance of the 31st day of December 2009 affirming that the Tenant has completed its fit out works by such date and are unwilling to waive such notice;*
>
> 3. *give notice pursuant to clause 6.6 of the Agreement that the Assignee hereby rescinds the Agreement on the grounds that the Condition Date has not occurred by January 31, 2009.*"

46. In my judgment paragraph 3 of the above-cited Notice was the operative part of the Notice; paragraphs 1 and 2 were in substance equivalent to recitals. Nevertheless, paragraph 2 of the Notice appears to characterise the reason why the Condition Date has not occurred as the failure to serve a clause 1.1.2 notice which met the Agreement's requirements. This was the initial way in which the Defendant's advisers chose to frame the way in which the right to terminate arose; this initial analysis would later be refined in their pleaded case and further refined in their submissions at trial so as to effectively resile altogether from the position that this was a case where defective notice was served. Perhaps because the doctrine of waiver is most commonly -and perhaps easily - engaged

in the context of defective notices, Mr. Hargun seized upon this construct which he clearly identified as the soft underbelly of the Defendant's case.

47. The first submission as to the applicable law advanced by Mr. Hargun was as follows:

"*The law in relation to the doctrine of waiver has been recently summarized by Potter L.J. in Flacker Shipping Limited v Glencore Grain Limited [2002] EWCA Civ. 1068 at ¶s 64 – 68* ***[Tab 4]****:-*

> *'[64] Broadly speaking, there are two types of waiver strictly so-called: unilateral waiver and waiver by election. Unilateral waiver arises where X alone has the benefit of a particular clause in a contract and decides unilaterally not to exercise the right or to forego the benefit conferred by that particular clause. It has been described as: '... the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.' (See Banning v Wright (Inspector of Taxes) [1972] 2 All ER 987 at 998, [1972] 1 WLR 972 at 979 per Lord Hailsham of St Marylebone LC.) In such a case, X may expressly or by his conduct suggest that Y need not perform an obligation under the contract, no question of an election by X between two remedies or courses of action being involved. Waiver by election on the other hand is concerned with the reaction of X when faced with conduct by Y, or a particular factual situation which has arisen, which entitles X to exercise or refrain from exercising a particular right to the prejudice of Y. Both types of waiver may be distinguished from estoppel. The former looks principally to the position and conduct of the person who is said to have waived his rights. The latter looks chiefly at the position of the person relying on the estoppel. In waiver by election, unlike estoppel, it is not necessary to demonstrate that Y has acted in reliance upon X's representation (see Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391 at 399 per Lord Goff of Chieveley).*
>
> *[65] So far as waiver by election is concerned, the basic proposition is that where two possible remedies or courses of action are to his knowledge open to X and he has communicated his intention to follow one course or remedy in such a manner as to lead Y to believe that his choice has been made, he will not later be permitted to resile from that position (see Scarf v Jardine (1882) 7 App Cas 345 at 360-361, [1881-5] All FR Rep 651 at 658 per Lord Blackburn and Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1971] AC 850). Waiver by election is essentially an illustration of the general principle that a party to a contract may not both approbate and reprobate: see the classic exposition of Isaacs J in Craine v Colonial Mutual Fire Insurance Ltd (1920) 28 CLR 305 at 327-328. In The Kanchenjunga [1990] 1*

Lloyd's Rep 391 at 397-398, Lord Goff dealt at some length with the principles underlying the doctrine of waiver by election in relation principally to the situation where -

> *'Characteristically, the effect of the new situation is that a party becomes entitled to determine or to rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it.'*

In Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109 the House of Lords was concerned with and applied the doctrine of waiver by election to a force majeure notice given by sellers to the buyers which was defective both in form and on the ground that it was given too late. Their Lordships treated the issue of waiver as an objective exercise based on the communications between the parties, Lord Salmon (at 126) observing:

> *"I think that any reasonable sellers would rightly have inferred the buyers were accepting the notice as a valid and effective notice under cl. 22 save that the reference to 500 tonnes should be altered to 280 tonnes. To put it another way, the buyers made an unequivocal representation that they were treating the notice as a valid and effective notice under cl. 22. To make an unequivocal representation or waiver it is not necessary for the buyers to say "We hereby waive it". It is quite enough if they behave in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect there might be in the notice and were accepting it as effectively extending the date for delivery in accordance with the provisions of cl. 22."*

See also Bremer Handelsgesellschaft mbH v Mackprang Jr [1979] 1 Lloyd's Rep 221 at 226, 230 per Lord Denning MR and Shaw LJ, respectively.

[66] Thus, it is clear that whether or not the party entitled to notice has waived a defect upon which he subsequently seeks to rely will depend upon the effect of the communications or conduct of the parties, the intention of the party alleged to have waived his rights being judged by objective standards. This being so, it seems to me clear that, in an appropriate commercial context, silence in response to the receipt of an invalid notice in the sense of a failure to intimate rejection of it may, at

least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, put another way, may amount to acceptance of the notice as complying with the contract pursuant to which it is given.

[67] Waiver is closely associated with the law of estoppel in that, in the case of estoppel (and at this point I leave aside estoppel by convention), it is necessary for there to have been an unequivocal representation of fact by words or conduct and, in waiver, there must similarly have been an unequivocal communication of X's intention, whether by words or conduct. As observed by Phillips J in Youell v Bland Welch & Co (The Superhulls Cover Case) (No 2) [1990] 2 Lloyd's Rep 431 at 450:

> *'A party can represent that he will not enforce a specific legal right by words or conduct. He can say so expressly-this of course he can only do if he is aware of the right. Alternatively he can adopt a course of conduct which is inconsistent with the exercise of that right. Such a course of conduct will only constitute a representation that he will not exercise the right if the circumstances are such to suggest either that he was aware of the right when he embarked on the course of conduct inconsistent with it or that he was content to abandon any rights he might enjoy which were inconsistent with that course of conduct.*

[68] In relation to waiver, it is important to note certain features of the doctrine around which the submissions of the parties have revolved. (1) In order to demonstrate awareness of the right waived, it must generally be shown that X had knowledge of the underlying facts relevant to his choice or indication of intention (see Matthews v Smallwood [1910] 1 Ch 777, [1908-10] All ER Rep 536 per Parker J approved in the House of Lords in Fuller's Theatre and Vaudeville Co Ltd v Rofe [1923] AC 435 at 443 (in the context of waiver of a right of re-entry)). (2) The court will examine any act or conduct alleged to be unequivocal in its context, in order to ascertain whether or not it is sufficiently clear and unequivocal to give rise to a waiver (see United States Shipping Board v JJ Masters & Co (1922) 10 Ll L Rep 573 at 578 per Atkin LJ). (3) The courts will also examine with care any agency relationship between X and any person alleged to have made the unequivocal communication on his behalf. If that person lacked the actual or ostensible authority to waive the right or rights concerned there will be no waiver (see Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia [1977] 1 All ER 545 at 551-552, [1977] AC 850 at 871-872)."

48. The Closing Submissions went on to rely on the following additional authority:

"41.Reliance is also placed on the House of Lords decision in relation to waiver in Bremer v Vanden [1978] 2 Lloyd's Law Reports 109 ***[Tab 5]****. In upholding that there had been waiver of any irregularity in the notice, Lord Wilberforce said at page 117:-*

> *'In none of the communications which passed was any reference made by the buyers to either of these possible defects: on the contrary, they continued negotiations and disputation with the sellers on the basis that the notice was, at least formally, a valid force majeure notice.'*

42. Viscount Dilhorne said at page 120:-

> *'A number of telexes passed between the buyers and the sellers after this date, but in none of them did the buyers challenge the validity of the notice under Cl. 22...*
>
> *In my opinion, the telexes to which I have referred show that the buyers accepted the notice given under Cl. 22 and waived the right to challenge its validity...'"*

49. The main principle demonstrated by these submissions is that where one party performs a contract in a defective way, the other party will be deemed to have waived the right to complain about the breach of contract if they unequivocally represent that they have elected not to complain of the defective performance. The Defendant's Skeleton astutely responded to this argument as follows:

> *"...33.5 It is incorrect to allege that under the Agreement "notice given under Clause 1.1.2 was required to be given 15 Working Days in advance of 31 December 2009" (Paragraph 12A of Amended Statement of Claim). Notice of completion of fit out could be given at any time. The important point is that the Plaintiff was not in breach of any term of the Agreement in giving notice of completion of fit out when it did.*

34. if there was no breach of contract by Lancashire, there was nothing for MSFRE to waive. The doctrine of waiver involves the voluntary or intentional

relinquishment of known rights. It operates where there is a breach of contract by one party which is alleged to have been waived by the other. The Plaintiff's case is that the Defendant waived a "requirement" under the Agreement which Lancashire failed to comply with. The alleged requirement does not exist. There was nothing to be waived. This is not a proper application of the doctrine of waiver."

50. I accept the latter submission. There was nothing defective about the Plaintiff's December 18 clause 1.1.2 Notice. The self-serving assertion made in the Notice as to how the Agreement defined Condition Date was no more an operative part of the Notice than the corresponding provisions of the Defendant's subsequent Termination Notice. The fact that its legal assertions as to the construction of the Agreement have been found by this Court to be flawed in no way impeaches the validity of the operative portion of the Notice, which validly states that the fit-out works at the Power House Premises have been completed. The Agreement merely required the Plaintiff to give notice of when the fit-out works were completed. It then provided that the Condition Date would be (assuming the Lease had already been completed, which it had) no later than 15 working days after receipt of the Notice. Because it was possible for completion to take place before (or after) December 31, 2009 by agreement, it is impossible to see how the Notice itself can be viewed as being defective. In my judgment there was no express or implied obligation on the Plaintiff under the Agreement to serve its clause 1.1.2 Notice at least 15 working days before December 31, 2009.

51. The scheme of the Agreement was as follows. Completion could not take place until the Plaintiff served its clause 1.1.2 Notice. Either party could exercise termination rights under clause 6.6 if the Condition Date did not for any reason occur before year end 2009. The Condition Date could validly occur after that date; however either party could elect to terminate should this eventuality occur. In the absence of completion taking place on December 31, 2009, the right to terminate crystallized at the beginning of the New Year at the earliest and on January 13, 2010 when the Condition Date actually occurred at the latest. What is the evidence said to amount to an unequivocal representation that the Defendant intended to waive its right to terminate?

52. Before the right to terminate even crystallized, cogent evidence would be required to support the Plaintiff's waiver claim. Such cogent evidence is simply lacking. It is true that Mr. Devery inspected the premises and generally gave the impression in late December 2009 that the Defendant intended to proceed with the assignment. CHW tentatively agreed a completion date of December 31, 2009 during a telephone call on December 21, 2009. However, in the Defendant's attorneys only written communication with their counterparts after the December 18, 2009 Notice was served (on December 23,

2009), they made it reasonably clear that: (a) they did not accept that the Condition Date had occurred already; and (b) that no agreement on this date had yet been reached. Bearing in mind that completion was a legal process to be handled by lawyers rather than lay clients, the primary evidence of the Defendant's representations as to its legal position must be found in its lawyers' communications. As noted above, on December 23, 2009, CHW emailed CDP as follows:

> "*David Cooper will have conduct of the file in my absence.*
>
> *You can deal with him <u>on agreeing the condition/completion date</u> as well as any other matters...*" [emphasis added]

53. The second paragraph of Harry Kessaram's email to Francesca Fox sent after Mr. Devery had inspected the Premises cannot fairly be construed as an unequivocal representation that the Defendant intended to complete the assignment at all let alone waive the termination rights which would accrue after December 31, 2009. In an admittedly somewhat oblique manner, the December 23, 2009 email made it clear that: (a) the Defendant did not accept that the Condition Date had occurred on December 18, 2009 as the Fit Out Completion Notice contended, and (b) the date for completion remained a matter to be agreed at some future uncertain date. Intelligently read, this communication signalled fairly clearly that after discussing the idea of a December 31, 2009 completion date over the telephone in an impromptu discussion on December 21, 2009, Harry Kessaram had not been instructed to formally agree that completion take place within this timeline or at all.

54. The fact that the Defendant was considering its legal position generally was made most explicit when Gary Devery responded on December 30, 2009 to Rosetta Landy's query about whether completion would take place on December 31, 2009 "*as agreed*" in an email which provided in salient part as follows:

> "*We are still awaiting advice from our lawyers and expect them to get back to CDP when ready.*"

55. If it is right that clause 6.6 was not engaged prior to January 1, 2010 at all, it is impossible to infer from the Defendant's leaving open the possibility of completing by December 31, 2009 as unequivocally waiving its right to terminate after that date had passed. The construction the Plaintiff places upon the written communications and the Defendant's conduct during this period reflects a view of the relevant facts looked at through the lens of wishful thinking rather than any objective analysis.

56. Evidential support for the Plaintiff's case on waiver is even weaker after December 31, 2009 when the Defendant was first obliged to formally consider whether or not to waive its termination rights. During this period, from January 1, 2010 until the *coup de grace* was eventually delivered on January 13, 2010 when the Condition Date actually occurred, the most that the Plaintiff can point to are holding communications. The Plaintiff's Ms. Landy emailed the Defendant's Mr. Devery on January 6, 2010 asking whether he had

been through the furniture list. He responded by asking to put this off until next week, explaining that he was "*swamped*" because "*people*" had been stranded overseas. Under cross-examination he explained that "people" referred to not just staff but lawyers as well. Indeed, the previous day Simon Robinson emailed Harry Kessaram stating: "*I still await confirmation as to when your client will be in a position to complete the above assignment*". Mr. Kessaram responded in the following terms: "*I am stuck here in Denver. Back Friday if lucky. Will try and revert then. Suggest you call DGC in the meantime.*" This communication took place on a Monday, the first full week of the New Year. Mr. Robinson diligently took up the matter on January 7, 2010 in an email to David Cooper to which there was no response. January 13, 2010 was Wednesday the following week.

57. It is impossible to conclude, based on these neutral communications entirely consistent with a reservation of rights over the comparatively short time which elapsed between the earliest date when the Termination Notice could have been served and the date when it was served, that the Defendant must be deemed by its conduct to have waived its termination rights. The present facts fell far short of meeting the waiver requirements described in the following dictum upon which the Plaintiff's counsel relied:

> "C*haracteristically, the effect of the new situation is that a party becomes entitled to determine or to rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it."*[2]

Findings: is the Defendant estopped by its conduct from exercising its termination rights?

58. Mr. Hargun accepted that the estoppel plea also required an unambiguous representation by the Defendant to the effect that it intended not to rely upon its termination rights; in addition, the Plaintiff had to demonstrate that it had acted to its detriment although this requirement was not necessarily required if inequity could otherwise be made out.

59. The evidence as I have found it falls short of supporting a finding that the Defendant unambiguously represented by its conduct that it intended to complete the transaction and that it would be inequitable for it to be permitted to depart from its implied promise to complete. The Defendant did give the impression that it was interested in completing the assignment but its lawyers' email of December 23, 2009 and its' Chief Financial

[2] *The Kanchenjunga [1990] 1 Lloyd's Rep 391 at 397-398, per Lord Goff.*

Officer's email of December 30, 2009 ought to have made it clear to the Plaintiff that the Defendant was hedging its bets as to whether or not to go through with the Agreement.

60. The estoppel claim is rejected for the same reasons as are set out in respect of the waiver claim above. No need to consider the issue of detriment arises.

Findings: was the Termination Notice invalid?

61. Mr. Hargun's ultimate fall-back position was that if all other issues were determined against the Plaintiff, the Termination Notice was in any event invalid, primarily because it could only have been validly served on a date prior to the occurrence of the Condition Date on which date a mandatory obligation to complete became binding on the Defendant. In the Plaintiff's Closing Submissions, the following arguments were advanced:

> "52.*Fourthly, and in any event, MSF had no contractual right to serve the Notice of Termination on 13 January 2010.*
>
> *52.1In the Amended Defence, it appears to be conceded by MSF that in the absence of an agreement as to Condition Date, the Condition Date would be 13 January 2010 (see the positive case of MSF as advanced in ¶7 of the original Defence dated 16 March 2010 where it is asserted "In the events which happened, the Condition Date fell on 13 January 2010" and ¶7 of the Amended Defence dated 16 June 2010 where it is asserted "alternatively, the Condition Date fell on 13 January 2010".)*
>
> *52.2 Clause 2.2 provided:-.*
>
> *'In consideration of the agreement by the Tenant contained in Clause 2.1 above, the Landlord consents to an assignment of the Lease to the assignee on the Condition Date and the Tenant will assign to the assignee the Lease on the Condition Date and the assignee will accept from the Tenant an assignment of the Lease on the terms set out in this Agreement.'*
>
> *Under Clause 2.2, MSF came under a contractual obligation to accept the assignment on the Condition Date. On the basis that the Condition Date is 13 January 2010, MSF was under a contractual obligation on the date of 13 January 2010 to execute the Deed of Assignment.*

52.3The word "date" means a division of time shown on the calendar and does not refer to any particular time of the day. As explained by Lord Denning in Trow v Ind. Coope (West Midlands) Ltd. [1967] 2 QB 899 at page 914F ***[Tab 6]****:-*

'It was suggested for the Plaintiff that the word "date" should be construed as meaning "time", so that the twelve months ran from 3.05pm on September 10, 1965, to 3:05pm on September 10, 1966: and that the service was good as it was before that time. In support of this suggestion reference was made to the Shorter Oxford Dictionary, which gives one of the meanings as "the precise time at which anything takes place'.

I cannot accept this suggestion. When we speak of the date on which something is done, we mean the date by the calendar, such as: "the date today is May 2, 1967". We do not divide the date up into hours and minutes. We take no account of fractions of date. If authority were needed for so obvious a proposition, it can be found in the judgment of Lord Mansfield in Pugh v Duke of Leeds [1777] 2 Cowp. 714, 720. Speaking of the date of delivery of a deed, he said:

> *"What is "the date"? The date is a memorandum of the day when the deed was delivered: in Latin it is "datum": and "datum tali die" is "delivered on such a day". Then in point of law, there is no fraction of a day: it is an indivisible point.... "Date" does not mean the hour or the minute, but the day of delivery: an in law, there is no fraction of a day."*

52.4 It is perfectly true that Clause 6.6 provides that "If for any reason the condition date has not occurred by 31 December 2009, then the Tenants or the assignee may serve written notice on the other to determine this Agreement". However, on a proper construction of Clause 6.6, it necessarily means that when the Notice of Termination is served after 31 December 2009, the Condition Date has not occurred. Clause 6.6 assumes that by the time the Notice of Termination is served, after 31 December 2009, the Condition Date has still not occurred. Once the Condition Date has occurred after 31 December 2009, neither Lancashire nor MSF has the right to serve Notice of Termination under Clause 6.6. This is so because once the Condition Date has occurred, both parties come under a primary contractual obligation to assign the Lease and to accept the assignment under Clause 2.2. Once the parties come under the contractual obligation set out in Clause 2.2, it is no longer open to either party to determine the agreement by serving the Notice of Termination. Accordingly, when MSF

sought to serve the Notice of Termination on 13 January 2010, there was no power to do so under Clause 6.6.

55.Fifthly, the Notice of Termination is invalid because it is based upon the erroneous legal conclusion that Clause 1.1.2 requires that the written notice must be served "fifteen (15) Working Days in advance of 31 day of December 2009". Mr. Devery calculates that to be 8 December 2009. Lancashire contends that there is no such requirement in the Agreement."

62. In the Defendant's Supplementary Submissions, it is pointed out that the above submissions do not form part of the Plaintiff's pleaded case. It is submitted that the proposition that as soon as the Condition Date occurred there was a contractual duty to accept the assignment was a "*wholly uncommercial construction that makes no sense whatsoever*". I agree.

63. I have already found that the assertion in the Termination Notice that the Fit Out Completion Notice had to be served 15 working days before December 31, 2009 was legally erroneous; but this assertion by way of reciting the background in no way impeached the substantive validity of the Notice. The operative part of the termination Notice was wholly consistent with the terms of the Agreement properly construed in notifying the Plaintiff that the authorized signatories of the Defendant gave:

> "*notice pursuant to clause 6.6 of the Agreement that the Assignee hereby rescinds the Agreement on the grounds that the Condition Date has not occurred by 31 December 2009.*"

Summary

64. The Plaintiff's claim for specific performance of the Agreement is dismissed on the grounds that the Defendant validly terminated it under clause 6.6. The Agreement provided that if the Condition Date did not occur on or before December 31, 2009, either party could terminate it.

65. The term 'Condition Date' as defined in clause 1 of the Agreement meant the later of the completion date of the Lease (which was in fact January 23, 2009) and 15 working days after the Plaintiff served notice that the renovations to their proposed new premises were complete. Due to the delay in completing those works, which it was at one time hoped would be completed by April 1, 2009, the Plaintiff was not able to serve the clause 1.1.2 Fit Out Completion Notice, let alone vacate the Premises to which the Assignment Agreement related, until December 18, 2009. This effectively meant that unless the Assignment was completed by mutual agreement before year end, the Plaintiff would

have no effective means of preventing the Defendant from exercising its termination rights under clause 6.6.

66. The Plaintiff's interpretation of the Agreement which effectively merged the distinct concepts of Condition Date and Fit Out Completion Notice is rejected. The alternative contentions that the Defendant had waived its right to terminate (or was estopped from terminating) either by agreement or conduct are rejected on evidential grounds. The Defendant was seeking advice from more than one set of local lawyers and from Leading Counsel abroad and did not wish to disclose the fact that it wished to abandon the contract unless and until the decision had been taken. While its representatives flirted with the possibility of completing on December 31, 2009, they neither agreed to do so nor represented in any unequivocal manner that they intended to pursue completion. Within the first 14 days of 2010 the Termination Notice was served.

67. The final fall-back suggestion that the Termination Notice was itself invalid (because it contained legal reasoning subsequently abandoned by the Defendant and which was clearly flawed) was also rejected. These technical flaws related to matters which were not essential for the Notice's validity. The submission that the Agreement only permitted a Termination Notice to be validly served before the post-December 31, 2009 Condition Date arrived was inconsistent with the terms of the Agreement, properly construed.

68. I shall hear counsel as to costs.

Dated this 7th day of October, 2010 _____

KAWALEY J.