IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 1357 (Comm)

Claim No. LM-2021-000097

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

Tuesday 29 March 2022

Before:

HIS HONOUR JUDGE KEYSER QC
(sitting as a Judge of the High Court)

B E T W E E N :

DD CLASSICS LIMITED — Claimant

- and -

KENT CHEN — Defendant

MR. J. ROBINSON (instructed by PCB Byrne LLP) for the Claimant

MR. J. VIRGO (instructed by Healys LLP) for the Defendant

J U D G M E N T

JUDGE KEYSER QC:

Introduction

1 This is my judgment upon the application of the claimant ("DDC"), by notice dated 22 October 2021, for summary judgment under CPR Part 24 on its claim against the defendant, Mr Chen.

2 In summary, by a written contract made on 24 March 2021 Mr Chen agreed to sell to DDC a Ferrari race car ("the Car") for a price of €3.2 million according to the contract. (A subsequent adjustment took the price to €3.155 million.) A deposit of €50,000 was paid on 28 March 2021. DDC contends that it paid the balance on 9 April 2021 and has been the owner of the Car since that date. Mr Chen contends that he had not received the balance by 13 April and that on that date he lawfully terminated the contract (whatever precise meaning may be given to that expression) in accordance with its terms.

3 DDC accepts that the issue concerning time of payment of the balance cannot be determined summarily on this application, but it seeks judgment on the basis of summary determination of the two issues that it says arise on the pleadings. First, was time for payment of the essence of the contract? If the answer to that question is in the negative, that (says DDC) is conclusive. Second, however, if time for payment was of the essence and if, as Mr Chen contends, payment was not made by 13 April, did Mr Chen have an entitlement to terminate the contract on 13 April, or had he lost the right to terminate by waiver or affirmation?

4 The application is supported by two witness statements from the claimant's solicitor, Mr Benjamin Davies, and there is a statement in response from Mr Chen.

5 I am grateful to Mr Robinson and Mr Virgo, counsel respectively for the claimant and for the defendant, for very helpful written and oral submissions.

CPR Part 24

6 CPR rule 24.2 provides, so far as relevant to this application:

> "The court may give summary judgment against a … defendant on the whole of a claim … if –
>
> (a) it considers that – … that defendant has no real prospect of successfully defending the claim …; and
>
> (b) there is no other compelling reason why the case … should be disposed of at a trial."

7 Many cases have explained the correct approach to applications for summary judgment, including the following: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]–[10] (Potter LJ); *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J), approved by the Court of Appeal in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41]-[42] (Asplin LJ, dealing with the similar test for permitting amendment of a statement of case); *Skatteforvaltningen v Solo Capital Partners LLP* [2020] EWHC 1624 (Comm) at [3]-[4] (Andrew Baker J); *Foglia v The Family Officer Ltd* [2021] EWHC 650 (Comm) at [11]-[18] (Cockerill J).

8 For present purposes, the main points are these. Summary judgment will be given against the defendant on a claim only if the court is satisfied that the defence to the claim has no real, as opposed to fanciful, prospect of success. A defence that is merely arguable but carries no conviction will not have a real prospect of success. The court will not conduct a mini trial and, accordingly, where disputed questions of fact arise it will not generally attempt to determine where the probabilities lie. However, the court is not prohibited from carrying out a critical examination of the material, and where it is clear that factual case is self-contradictory, or inherently incredible, or inconsistent with reliable objective evidence, the court can reject that case. Of particular relevance to this case is the seventh proposition of Lewison J in the *EasyAir* case:

> "[I]t is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction..."

9 Finally, I remind myself that r. 24.2(b) always falls to be considered in principle, although it seems to me that it rarely has any impact in practice.

The Facts

Pre-Contract

10 The relevant pre-contractual facts are as follows. The Car is a race car that is part of Ferrari's *Corse Clienti* programme, an exclusive annual competition allowing select Ferrari customers to compete against each other by racing their Ferrari race cars at tracks all over the world. Only forty such cars were ever made. They are designed for racing; they are not road legal and cannot be bought at a dealership. The Car was and remains in the possession of Ferrari in circumstances that I will mention later.

11 The claimant is an independent classic car dealership in London. Its managing director and, as I understand it, its owner is Mr Daniel Donovan. With regard to the Car, it was acting for an Australian buyer ("AVD").

12 The defendant, Mr Chen, is a Taiwanese national, resident in Tai Chung City. He does business through his company TAK Investment Holdings Limited (TAK").

13 The background to the Contract appears from a lengthy series of WhatsApp communications, both text and audio, between Mr Donavan and Mr Chen in the period January to April 2021. Caution is required in the use made of these communications, but they provide some relevant

information regarding the factual matrix in which the Contract was made. I shall not set out lengthy extracts from the pre-contract communications; it will suffice to identify some relevant points. (Where I do quote from the communications, for convenience I shall sometimes combine in one message the contents of several messages sent in quick succession.)

14 The WhatsApp communications begin at the end of January 2021, though there had clearly been a good deal of prior communication between the parties. Mr Chen was expressing some polite impatience that the transaction anticipated with AVD had not been confirmed. Mr Donovan apologised and explained that AVD was finding it hard to make a decision regarding the Car.

15 After 30 January 2021, there were no further communications until 10 March 2021, when we begin when Mr Donovan asked concerning the Car: "Is your White FXXK still for sale?" The following day, Mr Chen replied: "Yes. For sale if u got a quick buyer ready to sign and pay for, we can still go ahead." Mr Chen said he wanted to "close it ASAP".

16 After some further communications, on 16 March 2021 Mr Donovan confirmed, "It is the same man but he [is] quite old and really nervous at the moment". On 17 March Mr Donovan said, "I am glad we can now complete a deal to purchase your FXXK. Thanks for your patience". On 18 March Mr Donovan asked for a draft contract. Mr Chen provided a draft contract on 19 March. Mr Donovan remarked that he had a number of issues with the draft—I shall not set them out—and agreed to provide his own re-write. On 22 March Mr Donovan wrote that it was the intention to pay for the Car by way of a single payment of €3,200,000; he said, "The funds are available to be transferred to purchase the car this week …" Mr Chen said, "Can u finalize the contract today and let me take a look and let's try to finish signing whether today or tmw and complete the whole deal within this week. They [Ferrari] have 2 potential buyers in hands which also about to close[.] I don [scil. don't] want to jeopardize anything I just want to make the thing to be in the simplest way." Mr Donovan provided a rewritten draft contract on 23 March. Despite what had been discussed, it provided for a deposit followed by a payment of the balance of the price. The contract price remained €3,200,000; however, communications on 24 March show that there was to be a deduction from the contract price of €45,000 - that was because of who was to pay for various required works - so that the actual money changing hands between the parties would be €3,155 million. That draft was signed by the parties on Wednesday 24 March.

The Contract

17 The contract referred to Mr Chen as the "seller" and to DDC as the "buyer". In construing the contract, it is necessary to have regard to its entire text; however, for present purposes the following provisions are of most relevance.

> "2. Sales price
>
> (1) The sales price is €3,200,00[0] (net) …
>
> 3. Payment of the sales price
>
> (1) Payment of the sales price according to cl. 2 shall become due immediately upon the entry into force of this agreement.

(2) The parties agree that the buyer has to pay the sales price to the seller within 5 business days of the due date [viz. 24 March 2021] and confirmation that the car will be released to the buyer upon payment in full.

(3) A payment with debt-discharging effect can only be made as follows:

(a) An amount of €50,000 to the following account: [details stated]

(b) The remaining sales price in the amount of €3,150,000 to the following account: [details stated].

…

(5) If the buyer does not meet his payment obligations according to cl. 3 (1) and (2) of this agreement within 5 business days after the due date, the seller is entitled to withdraw from this contract without reminder or setting a deadline.

4. Transfer of ownership

The seller undertakes to transfer ownership of the Car to the buyer IMMEDIATELY upon receipt of the sales price. The seller will immediately upon receipt of the sales proceeds instruct Ferrari Cliente department to release the car to DD Classics Ltd as the new owner.

If for any reason Ferrari will not release the Car to DD Classics, then the seller must refund all of the purchase monies to the buyer within five working days with time of the essence.

…

6. Reservation of ownership

The object of sale remains the property of the seller until the payment for the car is made by bank transfer in full.

…

8. Place of jurisdiction

This contract will be subject to UK laws and in the very unlikely event of a legal dispute any actions would be subject to the UK High Courts of London.

9. Final provisions

This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements for the above purpose."

Post-Contract

18 The deposit of €50,000 was transferred on Thursday 25 March. Mr Chen confirmed receipt on Sunday 28 March. By that time, for various reasons, including delay in confirming receipt of the deposit and Mr Chen having made direct communications with AVD, the WhatsApp messages reveal that the relationship between the parties was becoming strained.

19 On Monday 29 March 2021 Mr Chen asked Mr Donovan to try to complete the wiring of the balance that day or at the latest on the following day, because the payment would take a few days to clear and he wanted the funds before the banks closed for public holidays. A little later, shortly after midnight on Tuesday 30 March, Mr Chen asked for the money to be wired that day, "so I can get it on time otherwise this will be closed till next week. We will have a vacation of 7 days. Not pushing but juts to let u know the real situation, and Tks." Mr Donovan replied that he would not pay the balance until Ferrari agreed in writing to release the Car once Mr Chen received payment. Mr Chen agreed, and later that morning he confirmed that he had sent an email to Ferrari asking for the required confirmation. Mr Chen said, "Let's close the deal today and wish I can tell them [Ferrari] to transfer the ownership on Thursday once confirmed received (sic) of the money".

20 On Wednesday 31 March Mr Donovan told Mr Chen that he was ready to transfer the funds for the balance of the price when he received the confirmation from Ferrari. That confirmation was provided later that day. During the afternoon of the same day, Mr Donovan asked Mr Chen to provide the paperwork evidencing his purchase of the Car. Mr Donovan was dissatisfied with the paperwork provided. Mr Chen said:

> "Daniel, I am treating this deal in good faith and tried all my best to close the deal with u, u want something I did my best to provide u, u got the contract signed, Ferrari replied u officially, we set a time line, u wire the balance and once received I inform Ferrari for the transfer. U got paid already, wire my part, u keep ur cut, everyone is happy. We got a contract signed with amount and time frame to be settled, why making everyone difficult, let's close it and everyone is happy isn't it."

Mr Donovan replied:

> "I am being responsible. It is a lot of money and we have to be100 per cent satisfied. Would be exactly the same if you were buying something you cannot touch. You would want to be completely confident."

Mr Chen in turn replied at about 3.30 p.m. on 31 March:

> "Yes I know. But I did everything to provide u as much as I could already. Ferrari officially replied u and we have contract signed! The only thing I can do is once u paid the remaining I do the transfer. Nothing else I can do.
>
> Anyway mate, if u have concerns and don want to buy just let me know, u r busy and so I am, we can waive this deal anytime. Or just close the deal within time frame and we can close this deal today or tmw.
>
> Thanks Daniel
>
> So in conclusion u need to let me know if u will pay or not today or tmw, very serious otherwise we treat this deal is waived. The contract we signed is 5 biz working days.
>
> Just let me know up front coz it is just a FXXK EVO[.] I can always to keep it as my collection."

21 Mr Donovan then requested additional documentation relating to the maintenance and registration of the Car. Mr Chen sent certain documents and said at about 4.20 p.m. on 31 March:

> "I won't say again if u r not happy let's waive this deal[.] we have contact signed and Ferrari replied officially, if u still don trust, we will waive this deal immediately. U paid the remaining as per time line agreed which the due date is today which maybe some time difference we can put it till tmw
>
> Dear Daniel that's all I will like to say, if u not happy then don go ahead. I don mind if I don sell my car. Good night my friend, if u want to keep this deal, then just deliver what u need to deliver TODAY or TMW otherwise I will take this deal as an OFF."

22 After a further day of messages and little progress, at shortly after midnight on the morning of Thursday 1 April Mr Chen wrote:

> "Hello Daniel, this is not buying a classic car or road car, it's a FXXK or special car from Ferrari. They will answer in their way which they did already. I am the owner of the #58, we have the contract signed, u paid the deposit. We finalize the balance and I do the transfer of the ownership! The transfer of the ownership can be done in just in an email. I am really tired of this looping and looping issue. Like I said, if u don feel okie, then don buy, it's okie, if u do want to close the deal, then please stick to the agreement and pay the balance tmw (Thursday) and send me the wiring proof, the minute I saw that in my bank, I will immediately inform Ferrari to do the transfer. U sent the contract to me and modified by your legal department or whatever, then we agreed then we signed. U got everything needed from me, official email from Ferrari (and all the head of XX division) and cc u in the email, if I am not the owner, they will not even bother to reply anything. That's all we can do. I am being pushy is because I want to put a conclusion on this, I have other biz to take care of, and so do u! It's your choice sir."

More emails followed later that morning, and at about 2 p.m. Mr Chen wrote:

> "Alright Daniel, make up your mind, today is the final deadline sir, I been very helpful and everything, if u do not do the remaining balance within today I will official call this deal off! Thank you!"

23 Nevertheless, in the days that followed DDC remained dissatisfied with the responses to its concerns and did not pay the balance and Mr Chen did not purport to terminate the Contract.

24 On Tuesday 6 April Mr Donovan wrote to Mr Chen, recording that Mr Chen's vehicle broker had confirmed that Mr Chen would write to Ferrari to say that the Car had been sold to DDC and to request that Ferrari release the Car once final payment had been made to Mr Chen, "which can be done today." Mr Chen replied, "Yes. And let's close this deal my friend and I will notify Ferrari and you once received the fund." By the time Ferrari had responded that afternoon, it was (said Mr Donovan) "[t]oo late today to do transfer"; however, he said, "Will do it tomorrow morning now", and Mr Chen replied, "Sure and tks mate".

25 On Wednesday 7 April, Mr Chen confirmed that the remaining balance was €3.105 million reflecting a €45,000 deduction for certain expenses that were to be borne by DDC. That may perhaps a variation of the contract, as DDC says. However, it is unnecessary to grapple with

that question for present purposes. It at least confirmed, as was obvious, that the contract was afoot.

26 Mr Donovan then instructed his bank to transfer the balance to Mr Chen's account with HSBC in Hong Kong; that was the receiving account identified in clause 3(3) of the contract. The funds left DDC's account that day.

27 Over the next few days, Mr Donovan repeatedly asked Mr Chen to check whether the funds had been received and Mr Chen repeatedly said that they were not showing in his account.

28 On Monday 12 April Mr Donovan wrote: "Our bank have confirmed that HSBC confirmed receipt and that they have credited the client recipients account on the 9th! So the money was credited to your account on the 9th". Mr Donovan sent a photo of the confirmation that Mr Chen's account had been credited.

29 On 13 April Mr Chen wrote, "Still nothing I will chase my bank." Mr Donovan replied, "What is happening?" Having received no response from Mr Chen, he wrote about four hours later (around 11.15 a.m.):

> "You are the only person who can claim the €3,105,000 which is sent to your account on your instructions to me. May bank can't reclaim it and your bank say it was credited to your account on the 9th. By ignoring me and telling Ferrari not to contact it seems you are intending to defraud me of the money. Please confirm that you have made proper attempts to clarify with your bank why the money has not shown up in your account if that is the case."

At about midday Mr Donovan wrote:

> "There must be a written email or letter confirmation when dealing with such amounts of money. It is totally unacceptable to treat our €3,155,000 as if it is loose change!
>
> Any bank will confirm in writing the situation with a bank transfer especially with the huge amount of money in this transaction. If you sent me the €3,155,000 and I told you I would only call the bank you would bombard me with emails, texts and voicemails day and night. This is not 3 grand we are talking about"

Mr Chen replied immediately:

> "Dude, just pass me ur account info and I will wire the money back to next day I receive it.
>
> No more deals.
>
> Thank you".

30 That concludes the relevant communications between the parties. DDC's case on the facts is that by 13 April 2021 Mr Chen's bank account had indeed received the balance that had been transferred to it on 7 April; it says that the moneys were credited to the account on 9 April but that Mr Chen failed to answer certain compliance questions put to him by his bank, with the result that the bank would not release the moneys to him. However, for the purposes of this

application DDC asks me to proceed on the assumption that the balance, though transferred by it on 7 April, had not been received into Mr Chen's account by 13 April.

31 On 27 April, DDC obtained an attachment or judicial seizure order from the Court of Modena, Italy, which prevents Ferrari from releasing the Car.

32 Mr Chen's evidence is to the following effect. On Friday 15 April he learned from HSBC "that a payment had been received into the 'central bank'". He did not really understand what this meant, but he believed that there were certain issues concerning the size of the payment and that HSBC was therefore likely to "bounce the money back"—which was precisely what he intended should happen to it anyway. Subsequently he learned of the order of the Court of Modena. Concerned that he now had neither the Car nor the payment, he contacted HSBC and learned that the moneys received into the "central bank" had not in fact been "bounced back". He therefore asked HSBC to transfer the moneys into TAK's account, which it did on 25 May 2021. He states: "As far as I am concerned, the deal was cancelled and the freezing order over the car should be lifted and I will return the money transferred to TAK's account on 25 May" (statement, paragraph 19); and, "The release of funds on 25 May was not acceptance of payment but simply a pragmatic step to obtain some protection now that the car had been impounded" (statement, paragraph 24).

The Issues

33 DDC's primary case is that Mr Chen received the balance of the purchase price on 9 April 2021 and that thereupon it became the owner of the Car and entitled to delivery of it in accordance with clause 4 of the Contract. For the purposes of this application, however, DDC accepts that the issue of the date when the balance was received by Mr Chen would properly be determined at trial. Accordingly DCC relies on the simple facts that full payment of the price has been made, that the price has not been returned and that the Car has not been delivered.

34 By his defence dated 8 July 2021 Mr Chen advances the following material contentions:

1) On a true construction of the Contract, time of payment of the price was of the essence: paragraph 7.1.

2) Mr Chen was entitled to withdraw from the Contract if the price were not wholly paid by the end of Tuesday 30 March 2021, being the 5th business day after the date of execution of the Contract (24 March 2021): paragraphs 7.2 and 7.3.

3) After payment of the deposit, the balance of the price was not paid before 31 March 2021 (or, indeed, at any time until 25 May 2021), and Mr Chen was entitled to withdraw from the Contract and did so on 13 April 2021: paragraphs 10 and 11.

4) Mr Chen is ready, willing and able to return the price, if only DDC will nominate an account into which to receive payment: paragraph 13.

35 In oral submissions, Mr Virgo urged upon me the submission that paragraph 11 of the defence was sufficient to plead an alternative case that clause 3(5) of the Contract created a contractual right of withdrawal. I do not agree. Paragraph 11 is not pleaded as an alternative analysis; it is naturally construed in its context as furthering the analysis in paragraph 7. The purpose of statements of case is to set out one's case clearly. The defence fails to set out the alternative case now advanced. This will be clearer later in this judgment.

36 There are certain other things that the defence does not do. First, it does not plead any matters, forming part of the factual matrix of the Contract, that are relied on as relevant to the construction of the Contract. This is required by section C1.4 of the *Commercial Court Guide* and by principles of proper pleading practice. Second, it does not plead that clause 3(5) is an innominate term and that DDC was in repudiatory breach of such a term. Third, it does not plead any breach other than failure to pay the full price by midnight on 30 March 2021. In particular, it does not plead that the time for payment was extended or that there was any later or ongoing breach of contract. I shall return to these points later. All are significant, though none of them is determinative of this application.

Time of the Essence

37 In his helpful skeleton argument, Mr Virgo identified the first issue as being one of construction of clause 3(5) of the contract. As he put it: Does Mr Chen have a real prospect of establishing that clause 3(5) made time of payment the essence of the contract? I largely agree with this identification of the issue. However, I would qualify it in line with Lewison J's remarks in the *Easyair* case. If I am satisfied (as I am) that the necessary materials for determining the point are before me, I ought to grasp the nettle and perform the exercise of construction now.

38 The general principles of construction were summarised by Lord Bingham in *Dairy Containers Ltd v Tasman Orient Line CV (New Zealand)* [2004] UKPC 22, [2005] 1 WLR 215, at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of that approach have been discussed in detail in many recent cases. A helpful summation of the main points was provided by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17]-[19]:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out un-controversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial

common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the

> wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

39 To this summary I might add that evidence of pre-contractual negotiations is not generally admissible to interpret a concluded written agreement, but evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties: see Lewison, *The Interpretation of Contracts*, 7th edition, p. 117; *Chartbrook Homes Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, per Lord Hoffmann at [28]-[42]; *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4) Ltd* [2014] EWHC 2955 (TCC), per Ramsey J at [20].

40 As I have mentioned, Mr Chen's defence does not set out any parts of the factual matrix that might be relevant to the construction of the contract. This gives rise to one of a number of instances where it has become necessary to consider whether a case advanced in argument but not pleaded might be capable of being advanced with arguable merit.

41 In his skeleton argument and oral submissions Mr Virgo referred to a number of matters in the pre-contractual negotiations. First, he pointed to the communication on 30 January 2021, mentioning that AVD was vacillating about the deal. Mr Virgo said that this showed that it was within the knowledge of the parties that there had been discussions between these parties and that AVD had vacillated and caused delay. I cannot see that this has any relevance to the construction of the payment obligations with which we are concerned. Second, Mr Virgo referred to Mr Chen's remark that he wanted a quick buyer, ready to sign and pay. That seems to me to be a matter of negotiation and so inadmissible as regards construction of the contract. If however it is possible to distinguish it from a mere matter of negotiation or the subjective desires of one party, it seems to me to go no further than what it says. It does not say anything about whether time should be of the essence of the contract. Third, Mr Virgo pointed to the communications, in the run-up to the contract, in which Mr Chen was being told that funds were available that week, implying that funds would be paid that week. Again, it seems to me quite clear that this does not assist the court in deciding whether time is of the essence. It just indicates what was being said and what were the expectations and beliefs as to the availability of funds and the likely timescale for payment; it goes no further than that. Fourth, Mr Virgo referred to the mention of two potential buyers on 22 March. This really goes nowhere at all, other than (conceivably) to indicate that Mr Chen was pressing for a contract. What "potential buyers" actually means in this circumstance is somewhat unclear. (In fact, there are indications in the evidence that by the time of the contract Mr Chen at least knew that any "potential buyers" had been put off because he was anticipating this contract.) At any rate, the reference tells us nothing at all about whether the time for payment was of the essence. Fifth, Mr Virgo referred to the special nature of the Car. That could perhaps be relevant to any question that might have arisen concerning the appropriate remedies for breach of the seller's obligations under the contract, but it tells one nothing about the nature of the payment obligation. As Mr Robinson said, the case is entirely different from, for example, a contract for the sale of shares in publicly quoted companies, or of commodities, where there is liable to be fluctuation of the market price and where delays are capable of having a big impact upon the commercial operation of the contracts. This is not that sort of case. Finally, Mr Virgo said that the parties had used solicitors (at least, DDC had done so) and proceeded by way of a formal written contract. "So what?" seems to me to be a sufficient answer to that.

42 If Mr Chen intended to rely on these or any other matters in the factual matrix, they ought properly to have been pleaded. It has not been suggested that any points other than those that

have been mentioned in submissions are likely to crop up in the disclosure or exchange of evidence. As Lewison J pointed out in the *EasyAir* case, a party is not entitled to proceed on the basis that "something might turn up"—there has to be some ground for supposing that it is realistic to think that it might. I would certainly not give permission to amend to plead reliance on matters that had been raised as informing the construction of the contract.

43 I turn to the question of whether payment of the balance was of the essence of the contract. *Chitty on Contracts* (7th edition) explains a para. 27-026:

> "The agreement by the parties that 'time is of the essence' in relation to a particular term of the contract is another way of identifying the term as a condition of the contract so that any failure to comply with it will in principle entitle the other party to terminate further performance of the contract."

The basic propositions of law that are relevant can be taken from para. 27-029 of the same work (I omit the references in the footnotes):

> Time is of the essence:
>
> (1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be 'of the essence'.
>
> (2) Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, e.g. … 'mercantile contracts', such as a contract for the sale of goods where a time is fixed for delivery, or for the sale of shares liable to fluctuate in value (where the contract stipulated a time for payment). … Whether a time limit is of the essence of a contractual provision is a question of interpretation of the provision in the context of the contract as a whole. The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential, e.g. because they needed to know precisely what were their respective obligations. …"

The same paragraph continues:

> "However, under the Sale of Goods Act 1979 s. 10, unless a different intention appears from the terms of the contract, stipulations as to time of *payment* are not deemed to be of the essence of the contract of sale."

44 The argument for Mr Chen, once unhelpful references to an illusory factual matrix are stripped out, comes to this. Clause 3(1) of the contract contains the primary payment obligation. The payment is due immediately. That is in the context of the stipulation in clause 3(2) that the buyer has to pay the price within five business days. That stipulation is reinforced and the consequences are set out expressly in clause 3(5). If payment is not made within five business days, the seller is entitled to withdraw from this contract without reminder or setting a deadline. That made time of the essence because, otherwise, the words would lack meaning or effect, as Mr Virgo put it in his written submissions.

45 In my judgment, that argument is unpersuasive and clause 3(5) of the contract does not have the effect intended for in the defence. The clause does not purport to make time of the essence of the contract. Mr Virgo says that it does really do so and that it does so without the use of

archaic language. In fact, the "archaic" language of "time of the essence" is found under clause 4, dealing with transfer of ownership. The contract shows, on its face, a clear distinction between making time of the essence and giving a contractual right of withdrawal. Clause 3(5) purports to do the latter, giving an entitlement to withdraw from the contract in a certain circumstance.

46 It is not right to submit (as Mr Virgo did in writing, although he resiled somewhat from that in the course of his oral submissions) that a contractual right of withdrawal, such as is found in clause 3(5), has to be taken to be the equivalent of making time of the essence. This is made clear in the authorities. I refer in particular to the judgment of Leggatt J in *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), at [49]-[54]. I refer also to the decision of the Court of Appeal in *Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS (Rev 1)* [2016] EWCA Civ 982 and, in particular, to the observation of Hamblen LJ at [93], in the context of a charterparty, that:

> "...the inclusion of an express right of withdrawal is an indication that payment of hire timeously is not a condition, since its inclusion would otherwise be unnecessary. On any view it does not make it clear that it is a condition."

47 As the wording of the contract does not make clear that the time for payment here was a condition, one has to ask whether there are any circumstances of the contract or the nature of the subject matter which indicate that it must be construed as a condition. In that regard, nothing plausible has been identified in the circumstances of the contract. And, as I have already remarked, the subject matter of the contract is not such as to make its value highly time-sensitive, so that the time of the payment obligation will be construed to be of the essence. Rather, the case falls under the general commercial position that in a mercantile or commercial contract the time of payment will not be deemed to be of the essence. There is nothing to indicate the contrary.

48 In the light of that conclusion, it follows that the defence that is raised, namely termination on account of the acceptance of repudiatory breach of condition cannot succeed.

Waiver/Affirmation

49 If my conclusion on the first issue were wrong, however, it would be necessary to consider whether any arguable right of Mr Chen to terminate the contract by acceptance of a repudiatory breach had been lost by waiver or affirmation.

50 The position in this regard is that when a party ("the innocent party") learns of a breach of contract by the other party which gives it a right to terminate (that is, for present purposes, a breach of condition) the innocent party has a choice whether to terminate the contract by acceptance of the breach or to affirm the contract and hold it open for further performance.

51 Mr Virgo referred me to the well-known case decided by the Court of Appeal of *Peyman v Lanjani* [1985] 2 WLR 154, in which the Court of Appeal held in the context of equitable rescission of a contract that the right to rescind would only be lost if there were an affirmation by the innocent party in circumstances where the innocent party knew both the facts giving right to the right to rescind and his own legal right to resend. With reference to *Chitty on Contracts*, Mr Virgo submitted—and it was common ground between the parties—that essentially the same test applies in the case of a repudiatory breach of contract: that is, that the innocent party will only be held to have affirmed the contract if he acts in a manner that

is consistent only with its continuance when he has knowledge both (a) of the facts constituting repudiatory breach and (b) of his own right to terminate the contract in consequence of that repudiatory breach.

52 In the present case, the only repudiatory breach relied on by the defendant is the failure to pay by the end of the fifth working day after the due date, namely the date of the contract, or by an agreed extension to 1 April 2021. What is being said, therefore, is that it was of the essence of the contract that payment be made by (at the latest) the end of 1 April and that, when it was not made by that date, the right to terminate for repudiation was exercisable.

53 The difficulty with that, which seems to me insuperable, is that Mr Chen did not terminate at the end of 1 April or, indeed, thereafter. One reason why I went through the post-contract facts in some detail was that, despite some tough talk, Mr Chen was treating the contract as afoot and, indeed, was encouraging and, to a degree, even facilitating performance up to and including the point when the transfer of funds was made on 7 April. Moreover, he then continued to treat it as afoot by seeking confirmation from his own bank that moneys had been received. It was only on 13 April—after the communications that I have read out, after the payment made at his behest and with his encouragement on 7 April—that he purported to terminate the contract.

54 Mr Virgo referred me to the decision of the Court of Appeal in *Buckland v Farmer & Moody* [1979] 1 WLR 221, where at 231 Buckley LJ recorded:

> "It is common ground between the parties that if a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date, the time remains essential."

55 One could, therefore, accept in principle that, if time was originally of the essence under the contract, it remained of the essence until the expiry of the extension, namely 1 April 2021. However, thereafter, there was no further extension to a definite time at all. It was simply that the contract was being kept alive and afoot indefinitely. As the communications that I have read out show, Mr Chen well knew both what the contractual obligations were and what his rights were. If he says he had a right to terminate for a breach consisting of late payment, then he had what he always said he knew he had. The argument that he advances in his witness statement—namely, that he knew of the breach and he knew of his right to terminate but he did not know that if, he chose to keep the contract on foot rather than terminating, he could not thereafter change his mind—is a completely different argument. Mr Virgo submitted that knowledge that, if one elects to affirm, one cannot thereafter change one's mind is required for a valid affirmation. He did not cite any authority for that proposition. I know of no authority to support it, and it is entirely ruinous of the whole operation of contracts in the event of repudiatory breach. The position is, in my view, straightforward. The innocent party has to know that he can choose to terminate the contract or choose not to terminate it. Once he makes his choice, that is that: if it were not, the concept of election would lose its practical significance and the party in breach could not know how the contract stood.

56 Accordingly, even if time were of the essence, Mr Chen would have not been entitled to terminate for repudiation.

Innominate terms

57 In oral submissions, Mr Virgo suggested another alternative, namely that Mr Chen had a right to terminate the contract on account of a serious breach of an innominate or intermediate term

as to the time of payment. I shall comment only very briefly on this. As I indicated in the course of argument, I regard the proposed analysis as completely hopeless. Whether one can terminate for breach of an intermediate or innominate term depends upon the seriousness of the breach having regard to the facts. In this case, by the time of the purported termination, the buyer had done everything it possibly could. It had authorised the transfer. The transfer had been made; if it had not reached the receiving account, that was a matter completely outside the control of the buyer and, indeed, had been outside its control for six days at the time of termination. In those circumstances, it is inconceivable that any court would hold that Mr Chen was entitled to terminate the contract on account of breach of an innominate term.

Contractual Right to Withdraw

58 That brings me to the final point, which is the question whether Mr Chen had a contractual right to withdraw. This is not a pleaded defence, and Mr Robinson was understandably not in a position to address the question fully. In the circumstances, I cannot say whether a defence based on such a contractual right would have a realistic prospect of success. It might do so. It might not, for a number of reasons, one of which is an analogous application of the rules concerning affirmation. However, as those points have not been properly argued in front of me and are not yet formulated in a pleading, I can take that no further.

59 I conclude, accordingly, that the pleaded defence shows no defence. I will not give judgment, because I will give an opportunity to Mr Chen to produce an application for an amendment to put forward his case on a contractual right to withdraw. Whether the amendment will be permitted will depend on whether it shows a defence with a realistic prospect of success.

CERTIFICATE

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Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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