JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 24th February 2006.

INTRODUCTION

1. By a claim form dated 21st July 2004 the Claimants seek damages and various declarations against the Defendant. The damages claim is yet to be fully quantified.

2. The claim arises out of the design and construction of 18 apartments in a building known as The Icon, located at 135-137 Battersea High Street, in London. The Claimants agreed to purchase from the Defendant these 18 apartments on long leases, and they accordingly paid deposits of £25,000 per flat. Mr. Donnelly, the first Claimant, was buying four of the apartments; Mr. O'Brien, another of the Claimants, was buying three; and the other 11 Claimants were each buying one apartment.

3. The Claimants were unhappy about the standard of design and workmanship in the apartments, complaining that they were not constructed in accordance with the relevant planning permissions and building regulation consents; had not been constructed in a good and workmanlike manner with good quality materials; and had not been constructed in accordance with the relevant specifications. Accordingly, despite the notices to complete from the Defendant's solicitors, the Claimants refused to complete on their purchases. As a result, their deposits were forfeit.

4. In consequence of these events, which took place in the first half of 2004, the Claimants now seek declarations that the Defendant was in repudiatory breach of contract and, because of those breaches of contract, further declarations that the Claimants themselves were lawfully entitled to rescind the contracts of sale. They also seek the return of their deposits and damages.

5. All the claims are denied, the Defendant contending that there was compliance with the contracts for sale and that any changes made were within the permissible scope allowed by those contracts. They also contend that any outstanding items that may have existed were no more than "snagging" items and did not therefore excuse the Claimants' failure to complete the purchases in any event. The Defendant counterclaims for the losses allegedly caused by the Claimants' failure to complete.

6. The trial in this action should have taken place early in 2006, but in December 2005 it was apparent that the parties were nowhere near ready for such a trial. As a result, I made various directions and the trial was adjourned for a new date on 5th June 2006. Although it is a matter to which I shall return, it appears that there have been further delays even after my order of 2nd December 2005.

BACKGROUND TO APPLICATION

7. The Defendant has been seeking to sell the apartments at The Icon to other parties since June 2004. They have now found a group of investment purchasers who wish to purchase all 18 apartments. It appears that all, or almost all, of these potential purchasers are now ready to exchange contracts and, for understandable reasons, the Defendant wants to sell the apartments together. The total sale value of The Icon is said to be £5,435,000.

8. On the 1st February 2006, the Claimants' solicitors wrote to the Defendant's solicitors requesting an undertaking that the net proceeds from the sale of The Icon would be paid into court or into an escrow account pending the outcome of the trial. The letter claims that this was necessary because the Defendant would "not have any assets of substance following the sale of The Icon."

9. This undertaking was refused in a letter written the following day by the Defendant's solicitors. That letter said: *"Our client is trading. Your clients have to take the risk on recovery, as do all Claimants and indeed as does our client, on its counterclaims. Your clients have no grounds for supposing that any judgment, which they may obtain, will not be satisfied. They certainly have absolutely no grounds for believing that there is a risk that, unless restrained, our client will deal with its assets in order to avoid enforcement of any judgment which your clients might obtain. The very fact that your clients have waited until now to raise the question of security, is in itself confirmation that your clients' real intention is to hamper our client in its business activities."*

10. Although it was not a point made in the letter, it has subsequently become apparent that, on the Defendant's case, the undertaking could not be provided in any event because, after payment of all sums due to the Defendant's bank (the National Westminster Bank Plc) *"there would be no equity over which such an undertaking could take effect"*: see paragraph 9 of the statement of Anne Charity. It appears

on the figures that there is in fact negative equity in The Icon. On the basis of the Bank's letter of 6th February 2006, the redemption figure in respect of the Bank's first charge would appear to be £5.9 million, whilst the sale price is, of course, £5.4 million. These figures were provided to the Claimants' solicitors on 7th February 2006. Miss Harrison, for the Claimant, does take a point in relation to the wording of that letter, which I understand and which I will deal with below.

11. On 2nd February 2006, the Claimants' solicitors lodged outline applications for unilateral notices to be placed on the Land Registry against The Icon. On 9th February 2006, the Claimants' solicitors advised that the unilateral notices had been registered the previous day. The Defendant's solicitors invited the Claimants' solicitors to discharge the notices. The invitation was declined. On 15th February, the Land Registry informed the Claimants' solicitors that registration of the 18 unilateral notices had been completed.

12. It is important to identify the underlying basis for the unilateral notices. They have been registered against the freehold title of The Icon to protect the claim of each Claimant to a purchaser's lien in respect of the payment of the deposit (or, in the case of Mr. Donnelly and Mr. O'Brien, the deposits).

13. On application to the court made on 14th February, the Defendant seeks an order that the outline applications and/or the unilateral notices be vacated. The reason is said to be straightforward. Unless they are vacated, the sale of The Icon cannot take place. The application is opposed by the Claimants.

ENTITLEMENT TO REGISTER NOTICE

14. The first dispute that I need to resolve is whether the Claimants have any prima facie entitlement to register notices in respect of a lien, in circumstances where the lien is claimed but disputed, and therefore not yet found to be good in law. This was a point that was raised in the very helpful skeleton arguments provided by both Ms Harrison and Ms Galley.

15. It seems, having considered the various authorities, that Miss Galley now accepts that a lien can be protected by a unilateral notice, even in circumstances where the lien is simply claimed and has not yet been adjudicated upon. I should say that I regard that concession as entirely proper and correct. It seems to me that claimed liens of this sort can properly be the subject matter of unilateral notices. In this regard, I refer to section 34(1) of the **Land Registration Act 2002** which provides that: *"A person who claims to be entitled to the benefit of an interest affecting a registered estate or charge may, if the interest is not excluded by section 33, apply to the registrar for the entry on the register of a notice in respect of the interest."* Further, section 87(1) of the same Act states that an interest affecting an estate or charge includes a pending land action within the meaning of the **Land Charges Act 1972**, and that is defined as *"any action or proceeding pending in court relating to land or any interest in or charge on the land."*

16. Accordingly, it seems to me that the Claimants have a prima facie entitlement to register the notices. They have a claim in a pending land action. The real question therefore is whether the court has the power to vacate those notices and, if so, how that power should be exercised.

THE POWER OF THE COURT

17. Again, Miss Harrison and Miss Galley very helpfully agreed that the court had a discretionary power to vacate a unilateral notice in the appropriate circumstances. Again, it seems to me that this must be right. Under the old law, the High Court always had both an inherent and a statutory jurisdiction to do just that. As Miss Harrison fairly pointed out in her skeleton, the case of **Calgary & Edmonton v. Dobinson** [1974] 1 Ch 102 was authority for that proposition. More recently, under the new law, set out in the 2002 Act, in a case called **Loubatieres v. Mornington Estates** [2004] EWHC 825, Richards J. made an order requiring an application to enter a unilateral notice to be withdrawn. The dispute concerned a property in Islington and the learned judge found that there was no arguable basis for the alleged contract for sale because the relevant documents were all clearly marked "*Subject to Contract*".

18. Accordingly, it seems plain that the court has the power to vacate the notices. It also seems to me right that, as both counsel agreed, that power should be exercised in a way that is at least akin to the exercise of the court's powers when considering applications for an interlocutory injunction. What matters most, therefore, is the balance of convenience.

19. For completeness, although it was not an authority that was referred to me, I should say that I have always found the most helpful summary of the principles relating to the exercise of the balance of convenience to be that of Chadwick J. (as he then was) in **Nottingham Building Society v. Eurodynamic Systems** [1993] FSR 468 where he said that ultimately what mattered - the overriding consideration - was *"which course is likely to involve the least risk of injustice if it turns out to be '**wrong**'."*

THE EXERCISE OF THE COURT'S DISCRETION

20. In my judgment, applying those principles to the present case, I have reached the conclusion that the balance of convenience overwhelming favours the discharge of the unilateral notices. There are five separate reasons for my conclusion that the discharge of the notices involves *"the least risk of injustice"* if it turns out that that was the 'wrong' course to take.

21. First, I consider that, on the evidence, the registration of the notices can be ultimately of no practical or positive value to the Claimants. That is because, of course, the figures demonstrate that, once the Bank has exercised its first charge, the proceeds from the sale of The Icon will go to the Bank and there will be nothing to which the liens can then attach.

22. As I indicated above, Miss Harrison, perfectly properly, takes the point that the Bank's letter of 6 February is, as she put it, oddly worded. There is no doubt that the Bank's letter is not as clear as it might be, but I think, reading it fairly, it does make the point that there is an amount of £5.9 million which is *"required to repay the [Defendant's] borrowings"* and which, says the Bank, they are "presently relying on the Battersea properties to secure." I cannot find that the letter is incorrect, inaccurate or untrue. Therefore I think it is clear, certainly for the purposes of this application, that there is a charge in favour of the Bank which would effectively account for the entirety of the sale price of The Icon.

23. Secondly, whilst on that analysis the notices have no positive benefit to the Claimants, they do present a major and fundamental disadvantage to the Defendant. The evidence is -- and I do not think that this was seriously challenged -- that with the notices in place, the investment purchasers will not go ahead with the purchase of The Icon. The Defendant will therefore be deprived of its ability to sell the apartments, and thus will be prevented from mitigating any loss due to the alleged repudiation by the Claimants. It seems to me that it would be most unjust to prevent the sale by allowing these notices to remain in force. Again, therefore, the balance of convenience favours the discharge of the notices.

24. Thirdly, and on a related point, as Miss Galley pointed out in her written and oral submissions on behalf of the Defendant, there is no undertaking in damages from the Claimants. Thus, if the Claimants were allowed to prevent the sale of The Icon by registering these notices, but at trial I found that the Claimants repudiated the contracts for sale and had no lien, they will face a potentially large counterclaim in respect of which they have offered no undertaking at all. Whilst I accept Miss Harrison's point that it may well be that any such counterclaim would have to take into account the value of the deposits that have been forfeited, it seems to me, on the evidence, that it would be unfair to allow that situation even to arise in the absence of any undertakings from the Claimants.

25. Fourthly, it seems to me that it would be disproportionate to allow the notices to remain. The deposits which the notices allegedly protect were each worth £25,000. The sale value of The Icon, which the notices would prevent, is in excess of £5 million. It would therefore be disproportionate to allow notices in respect of relatively modest sums to prevent the sale at a figure which is 200 times that of each of the deposits.

26. On this point I should say that Miss Galley raised points about who paid the deposits originally, and whether or not it was in fact the Part 20 Defendants who, she says, are continuing to maintain this litigation. Whilst the factual background to the various transactions can best be described as murky, it does not seem to me that that is something I should take into account in the exercise of my discretion. I therefore make it plain that I consider the deposits, for the purposes of this application, to have been paid by the Claimants.

27. Fifthly, I have reached the conclusion that the notices have been registered in order to put at least some commercial pressure on the Defendant in the run up to the trial. The action has been on foot for 18 months or so, during which the Defendant has been actively seeking alternative purchasers, but no

notices have ever been registered before now. Miss Harrison told me (although only in answer to a direct question from me on the point) that her instructing solicitors fairly accepted that the failure to register was a mistake on their part. It does seem to me that I have to consider the timing of this application as well as the substance and, in all the circumstances, I am confirmed in my view that this application is an attempt to put commercial pressure on the Defendant.

28. On a related point as to timing, I initiated a discussion with Miss Harrison about the potential delays in this litigation, a point to which I referred above. It does seem to me that there is at least a potential problem with the trial date in June. It may very well be that a new timetable can be put in place that would allow that trial date to be achieved, but I am bound to note my disappointment that, having explained carefully to the parties in early December there was no room for any slippage at all in the timetable if they wanted the trial to take place in June, I am now told that the vital schedules to be provided by the Claimants, which should have been provided a month ago, will not be ready until 1st March. This will inevitably mean delays in the run-up to the trial and there may be a delay to the trial itself. That is also a matter which, so it seems to me, I have to take into account when exercising my discretion.

ALTERNATIVE SECURITY

29. An underlying point behind the Claimants' submissions was the suggestion that if the notices were discharged, they should only be discharged on terms that some other form of security should be given by the Defendant. I do not consider that is a correct approach in principle. It seems to me that the real question is whether or not, on the balance of convenience, the notices should be discharged, and I have found that they should be discharged. The Claimants do not, in my judgment, have some sort of general right to security in respect of their claims. Even if that were wrong, on the evidence I read and for the reasons I have explained above, I would not require such alternative security to be provided in this case in any event.

30. Whether or not the Defendant should provide security for the Claimants' costs in accordance with the CPR seems to me to be an entirely separate point and would give rise to an entirely separate application. It may be it would be appropriate for the Defendant to provide security of costs, but that would entail a proper application for security and proper evidence as to whether or not, if the Defendant was unsuccessful in, for instance, its Part 20 Claim, it would be unable to meet its costs liabilities. There is no application and no evidence before me in relation to any such application. For all these reasons, it seems to me that it would not be appropriate to impose any terms on the discharge of the notices.

SUMMARY

31. I have concluded that, in the exercise of my discretion, the balance of convenience favours the discharge of these notices. I have also concluded that in all the circumstances, it would not be appropriate for me to impose conditions on the discharge of those notices, and therefore I decline to do so.

Ms Philomena Harrison (instructed by Howard Kennedy) for the Claimants
Ms Helen Galley (instructed by Paul Davidson Taylor) for the Defendant