

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY
MR RECORDER BLOHM QC
(Sitting as a Judge of the High Court)
9BS01211**

Royal Courts of Justice
Strand, London, WC2A 2LL

21/10/2010

Before :

**LORD JUSTICE MUMMERY
LORD JUSTICE ETHERTON
and
LORD JUSTICE SULLIVAN**

Between:

**EMINENCE PROPERTY DEVELOPMENTS
LTD
- and -**

Appellant

KEVIN CHRISTOPHER HEANEY

Respondent

**Mr Bernard Livesey Q.C., and Paul Mitchell (instructed by Solicitors Direct) for the Appellant
Mr Andrew Clarke Q.C., and Charles Auld (instructed by Foot Anstey Solicitors) for the
Respondent**

Hearing dates : 5th October 2010

Lord Justice Etherton :

Introduction

1. This issue on this appeal is whether a vendor of land, who served a notice to complete making the time for completion of the essence of the sale contract, and then, mistakenly, treated the contract as at an end prior to the expiry of the notice, was thereby itself in repudiatory breach of the contract entitling the purchaser to terminate the contract.
2. Mr Recorder Blohm QC, sitting as a judge of the High Court, held that vendor in the present case, Eminence Property Developments Ltd (“Eminence”), was in those circumstances in repudiatory breach of the contract of sale, and the purchaser, Kevin Heaney, lawfully terminated the contract by accepting that repudiation. This is an appeal by Eminence from the Recorder’s order dated 15 January 2010.

The factual background

3. The material facts, largely taken from the Recorder's judgment, may be simply stated. Eminence is the freehold owner of a block of one and two bedroom flats called Carpenters Place in Bristol, which it constructed. Mr Heaney is a property developer. Prior to completion of the flats, Mr Heaney negotiated and agreed with Eminence the purchase by him off-plan of 13 flats for the aggregate price of £1,470,000 and a deposit of 2.5 per cent of the purchase price of each flat, amounting to £36,750 in total. On 10 December 2007 13 separate contracts were exchanged in identical terms, each contract being for the sale of a flat on a long lease.
4. The contracts provided for the contractual completion date to be fixed by reference to the date on which the relevant flat under construction was ready for occupation. It was common ground before the Recorder that, in the circumstances which occurred, the contractual completion date was 4 December 2008.
5. The contracts incorporated the Standard Conditions of Sale (4th ed) ("the Conditions"), subject to minor amendments. Condition 1.1 contains the following material definitions:

"1.1.1(m) 'Working day' means any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory Bank Holiday

1.1.3 A party is ready, able and willing to complete:

(a) if he could be, but for the default of the other party, and ..."
6. Condition 6.1.1 provides:

"6.1.1 ... time is not of the essence of the contract unless a notice to complete has been served."
7. Condition 6.8 concerns the service of a notice to complete and provides:

"6.8. Notice to complete

6.8.1 At any time on or after the completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

6.8.2 The parties are to complete, the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.

6.8.3 On receipt of a notice to complete:

(a) ...

(b) if the buyer paid a deposit of less than 10 per cent (no less than £500), he is forthwith to pay a further deposit equal to the balance of that 10 per cent deposit"
8. Condition 7.5 concerns the consequences of the buyer's failure to comply with a notice to complete, and provides:

"7.5 Buyer's failure to comply with notice to complete.

7.5.1 If the buyer fails to complete in accordance with a notice to complete, the following terms apply:

7.5.2 The seller may rescind the contract, and if he does so:

- (a) he may
 - (i) forfeit and keep any deposit and accrued interest
 - (ii) resell the property and any chattels included in the contract
 - (iii) claim damages,
- (b) The buyer is to return any documents he received from the seller and is to cancel any registration of the contract.

7.5.3 The seller retains his other rights and remedies.”

9. Following the making of the contracts, there was a significant downturn in the property market. By late 2008 Mr Heaney was having difficulty raising the funds necessary to complete at the contract price. There were negotiations between Eminence and Mr Heaney for a lower purchase price and higher specification for the flats, but no concluded agreement was ever reached.
10. Eminence wished to complete the contracts on 4 December 2008, the contractual completion date, but Mr Heaney did not do so. On 5 December 2008 Eminence, by its solicitors, Solicitor Direct, served a notice to complete in respect of each contract pursuant to Condition 6.8. Each notice referred to the relevant contract for the flat in question, stated that the sale had not been completed on the date fixed and that the seller was ready, willing and able to complete, gave “notice under condition 6.8 of the Standard Conditions of Sale 4th edition (to which the contract was made subject) to complete the contract in accordance with that condition”, and drew “attention to the consequences set out in condition 7.5 of the Standard Conditions” should Mr Heaney “fail to complete the transaction within 10 working days of giving [the] notice, exclusive of the date on which it was given.” It is not disputed that the terms of the notices were in accordance with the contracts and the Conditions.
11. The notices were sent under cover of a letter dated 5 December 2008 from Matthew Jones, a solicitor with Solicitor Direct, to Foot Anstey, Mr Heaney’s solicitors. In the letter Mr Jones referred to the flats which Mr Heaney had contracted to purchase, and said:

“We are disappointed to note that we have not completed the above and we have had no explanation as to why.”
12. Mr Jones referred to the enclosed notices to complete. He then set out “the contractual daily compensation rate for each flat”, said that Mr Heaney was liable for certain legal costs, and concluded in the last paragraph:

“We calculate the final date for completion under the notice is 15th December 2008”.
13. That statement as to the final date for completion was incorrect. It is common ground on this appeal that the combined effect of Condition 6.8.2 and the definition of “working day” in Condition 1.1.1(m) was that the notices to complete expired on 19 December 2008. Mr Jones’ evidence before the Recorder, in paragraph 28 of his witness statement, as to why he said in the letter that the final date for completion under the completion notices was 15 December 2008 was as follows:

“I am not sure why I did this. I presume I calculated the ‘days’ rather than the ‘working days’. I can only put this down to human error on my part”.
14. Mr Heaney took no steps to complete the contracts. Eminence decided to rescind them pursuant to Condition 7.5 and to exercise the other remedies specified in that Condition, including forfeiting the deposits. However, it did so prematurely. On 17th December 2008, under cover of a

letter from Mr Jones to Foot Anstey, Solicitor Direct sent notices of rescission in respect of each contract. Each notice said as follows:

“Further to the expiry of the notice to complete served under condition 6.8 of the Standard Conditions of Sale 4th edition (The Standard Conditions) you have failed to complete the purchase of the above property. Pursuant to 7.5 of the Standard conditions please treat this letter as formal notice of rescission of the Agreement for sale dated 10th December 2007. Your clients deposit has been forfeited along with accrued interest and our client is entitled to damages for breach of contract, including but not limited to the remainder of the deposit payable under the contract.”

15. In the covering letter Mr Jones asked Foot Anstey to “confirm whether you will be dealing with the claim against your client as well.”
16. Foot Anstey replied by letter dated 18 December 2008. The Recorder described it as “almost by return”. It referred to “each of your letters of 17 December 2008” and to the notices to complete, and the provisions of Condition 6.8, and continued as follows
 - “1.3. The Notices to Complete that were served by you required completion of the contracts on or before 18 December 2008, which is the date 10 working days after service of the Notices to Complete (assuming it was deemed served on 5 December rather than 8 December for the purpose of standard condition 1.3.
 - 1.4. The act of rescinding contracts under cover of your letters of 17th December 2008 constitutes a repudiatory breach of contract. Our client accepts your clients’ repudiatory breach of contract and elects to rescind the contracts and is discharged from them.
 - 1.5 Please remit, by return, our client’s deposits together with any interest accrued on those deposits.”
17. That letter from Foot Anstey was written by Richard Bagwell, who was a litigator and not involved in the conveyancing. The promptness of the response to the letter from Solicitor Direct enclosing the rescission notices and the fact that the letter was written by Mr Bagwell led the Recorder to speculate that Foot Anstey were already aware, on receipt of Mr Jones’ letter of 5 December 2008 enclosing the notices to complete, that Mr Jones was mistaken in his stated calculation of the final date for completion as being 15 December 2008, and that (as the Recorder said in paragraph [15] of his judgment) “they were prepared and awaiting Eminence to fall into the elephant trap that it had dug for itself.”
18. Solicitor Direct replied to Foot Anstey’s letter of 18 December 2008 on the same day. They said:

“Further to your letter of the 18th December 2008 we note your comments. As you will note the rescission notice stipulates “Further to the expiry of the notice to complete...” Your client is still entitled to the full 10 working days to complete under the notice. The contents letter of the 17th was not intended to come into effect until after the expiry of the notice. If your client is willing and able to complete we look forward to receiving the purchase prices.”
19. Mr Bagwell’s response by e mail on the same day was that

“you cannot seek to retrospectively alter the fact of rescission ... Your notice of rescission was unambiguous and immediate, as were the consequences. Your client has committed a repudiatory breach of contract, which our client has accepted. Please send the deposits by return.”
20. It is frankly accepted on behalf of Mr Heaney that he was pleased to have the opportunity to extricate himself from the contracts.

These proceedings

21. On 9 February 2009 Eminence commenced these proceedings against Mr Heaney for a declaration that the deposits were forfeited as at 19 December 2008 and for damages for breach of contract. The Particulars of Claim proceed on the basis that Mr Heaney's default was in failing to complete on or before 19 December 2008 or at all.
22. By his Defence and Counterclaim Mr Heaney alleged that it was not possible for him to complete the purchase on 18 or 19 December 2008 because Eminence "had by then wrongfully purported to rescind the contract and to have forfeited the Defendant's deposits." He counterclaimed for a declaration that the parties were discharged from future performance of their obligations under the contracts and for re-payment of the deposits.
23. On 10 July 2009 District Judge Watson ordered the trial of the following preliminary issue:

"whether the defendant has rescinded the contract in relation to the claimant's repudiatory breach and that, as a result, the parties are discharged from future performance of their obligations under the 13 contracts, all dated 10th December 2007, for the sale and purchase of 999 year leasehold interests in each of plots 1, 2, 3, 4, 5, 6, 7, 8, 9, 16, 19 and 24 Carpenters Place, Melvin Square, Bristol"

The judgment

24. That issue was tried before the Recorder on 14 and 15 January 2010.
25. He reached the following conclusions of fact, against which there is no appeal or cross appeal:

"30. ...

 - (1) The claimant's solicitors intended to serve the notice of rescission after the expiry of the notice to complete;
 - (2) They miscalculated the period of the notice to complete, probably by counting ten days rather than ten working days, but I do not think that the mechanism for the mistake matters too much;
 - (3) On receipt of the notice Foot Anstey were aware that the claimants could only serve a valid notice of rescission after 19th December 2008;
 - (4) Foot Anstey believed that the claimants had made a mistake in calculation. I reach that conclusion because, as I say, it is screamingly obvious;
 - (5) A reasonable recipient of the notice to complete would have been aware of the claimant's intention and would also have been aware that the letter had been sent when it was sent by reason of a mistake and would have believed that had the claimants been aware of the true position the letter would not have been sent, but would have been sent after 19th December 2008 had the contract remained uncompleted."
26. The Recorder noted that Eminence, by its then counsel, Mr Steven Ball, advanced two arguments. The first was that, on the basis of the approach to interpretation in *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749, the notices to complete should be interpreted as determining the contracts on 19 December 2008. The second argument was that, in the light of the decision of the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 and of Gloster J in *CDV Software Entertainment AG v Gamecock Media Europe Ltd* [2009] EWHC 2965, the letter of 17 December 2008 was on any view not an unequivocal repudiation of the contracts.

27. The Recorder rejected both arguments. He gave his brief conclusion on the first argument as follows:

“[32] I agree with Mr Auld [counsel for Mr Heaney] that the only meaning that can be given to the letter of 17th December 2008 is that Eminence intended to bring the contract to an end immediately and that they did so, and said they did so, on the assumption that the time for completion of the notice to complete had expired. In my view the other possible meanings of the letter put forward by Mr Ball were not realistic meanings.”

28. There is no appeal against that finding.

29. As to the second argument, the Recorder referred to *Woodar, CDV Software Entertainment, Chilean Nitrate Sales Corporation v Marine Transportation Co Ltd* [1982] 1 Lloyd’s Rep 570, *Dalkia Utilities Services plc v. Celtech International Ltd* [2006] 1 Lloyd’s Rep 599, and *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipping Co Ltd* (1919) 121 LT 628. His analysis and conclusions on the second argument were as follows:

“41. In the present case I conclude that the letter of 17th December 2008 comprised a clear case of refusal by Eminence to perform their future obligations under the contract, those obligations going to the very root of the contract. That, after all, is the very purpose of a letter terminating a contract after a failure to comply with a notice to complete. This letter made that doubly clear by referring to the remedies that the vendor had and was exercising, the forfeiture of the deposit and the claim for damages. These are remedies which were only available on the termination of the contract by the vendor (see the general conditions of sale, which are the standard conditions, I think, paragraph 7.5).

42. Next, in my view, it is abundantly plain that this letter was not intended to be conditional. It set out the basis for termination, which was the failure on the part of Mr Heaney to complete, and it set out its entitlement to repudiate, which was based on the notice to complete having made time of the essence. These were the basic assumptions underlying the letter and the termination. Had Eminence, or more realistically their solicitors, been aware of the true position, they would undoubtedly not have served that letter, or indeed any letter, at that time. That seems to me to be wise with the benefit of hindsight.

43. The letter does not seek to reserve their position should these assumptions be incorrect. One can understand why it does not do so. There may be difficulties for a party who wishes to accept a repudiatory breach if his letter of acceptance is couched in equivocal terms and therefore conditions or reservations may not be easy to express without risk to the basic effectiveness of the letter. Be that as it may, the letter was, in my view, clear in its terms. Having all due regard to the circumstances surrounding it, it is simply not possible to construe it as being conditional upon the assumptions that it makes being correct. In my view the letter has the effect set out in the words of Lord Justice Atkin at *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd* [1918-1919] All ER Rep 963 in page 968 that: “The party to the contract made quite plain his own intention not to perform the contract.”

44. I am fortified in this view by the reference to the vendor’s remedies contained in the letter and in particular the reference to forfeiture of the deposit. I do not agree with Mr Auld’s submission that this changed the status of the deposit. The deposit was paid to Eminence’s solicitors as agents for Eminence and therefore became their property. Eminence was subject to the contractual obligation to repay that sum in certain circumstances. The announcement of forfeiture simply purported to affect Eminence’s remedy on the contract coming to an end. However, it did underline the assertion that the contract was at an end and that Eminence would not perform any of its obligations but would, henceforth, act on the basis that the contract had been determined.

45. ...

46. Although I do not base my decision on the more general consequences of finding in Eminence's favour, it does seem to me that a finding that Eminence's letter of termination was only conditional would be contrary not only to the true construction of the letter but also to the understood practice of conveyancers, certainly as I understand it, and more generally would be damaging of the reasonable expectations and requirements of certainty as regards contractual matters.

47. In those circumstances my conclusion is that Eminence committed a repudiatory breach of the contract by their letter of 17th December 2008 and that that breach was accepted by the letter dated 18th December 2008 sent by Foot Anstey and that the contract has therefore been determined, and I answer the preliminary issue accordingly."

The appeal

30. Eminence's case on this appeal, as presented by its leading counsel, Mr Bernard Livesey QC, may be summarised briefly as follows. Eminence will have repudiated the contracts if, but only if, by its conduct it clearly intimated an intention to abandon and altogether to refuse to perform them. That is a matter of fact, to be considered objectively, that is to say from the perspective of a reasonable person in the position of Mr Heaney, looking at all the circumstances and Eminence's entire conduct. In support of those propositions Mr Livesey relied on the speeches of the majority of the Appellate Committee of the House of Lords in *Woodar* and on the judgment of Donaldson LJ in *Chilean Nitrate Sales*.
31. Mr Livesey submitted that, having regard to those principles, the Recorder could not properly have found that the notices of rescission sent on 17 December 2008 constituted a repudiatory breach of the contracts. He said that, firstly and critically, the notices themselves, far from being clear, were internally inconsistent. Each of them referred to the notice to complete, which had been properly served and was properly worded in accordance with the Conditions, and stated that the notice to complete was served under Condition 6.8 and that notice of rescission was being given pursuant to Condition 7.5. In effect, the rescission notice incorporated those Conditions by reference, and so disclosed an obvious inconsistency between the requirement of the Conditions that 10 working days must expire before the remedies under Condition 7.5 arose and the statement in the notice that the contract was thereby rescinded and the deposit forfeit. Secondly, a reasonable person would have appreciated, and as the Recorder found as a fact Mr Heaney, by his solicitors, on receipt of the notices of rescission was perfectly aware, that a mistake had been made by Mr Jones in prematurely giving notice of rescission. Mr Heaney knew, or at any event a reasonable person in Mr Heaney's position would have known, that had Mr Jones been aware of the correct position Eminence would have waited until after the expiry of the 10 working days specified in Condition 6.8 before rescinding the contracts. Thirdly, there was never any doubt, objectively or in the mind of Mr Heaney, that Eminence wished to enforce the contracts rather than abandon them. That was apparent from the fact that the property market had fallen since the contracts were made, as well as the fact that Eminence was manifestly intending to follow the contractual procedure in serving the notices to complete under Condition 6.8 and then purportedly exercising the remedies conferred by Condition 7.5.
32. Mr Andrew Clarke QC, for Mr Heaney, advanced the following six key propositions in support of the decision of the Recorder. First, a clear and absolute declaration that a contract is at an end, the making of which is later found to be a breach of contract, is repudiatory of that contract. Secondly, the mere fact that the party making the declaration asserts and believes that they are acting in accordance with the terms of the contract does not make what would otherwise be a repudiatory breach non-repudiatory. Thirdly, one party can declare to the other that a contract should be interpreted, or performed, in a particular way without being thereby in repudiatory breach of contract if they are wrong. Parties often make such an assertion whilst performing the contract (as they see it) and, in such cases, the court must determine whether their conduct was, in all the circumstances, repudiatory. To declare the contract to be at an end in reliance upon that erroneous view is altogether different and repudiatory of the contract: it is conduct inconsistent

with the continuance of the contract. Fourthly, that last proposition is subject to qualification where the declaration is merely a vehicle to achieve a court resolution of a dispute and the parties anticipate that the one making the declaration will perform if wrong (and such performance is possible). In such a case, what would otherwise be a declaration that the contract is at an end does not have the quality because of the parties' agreement. Fifthly, the fact that a party is mistaken in its grounds for declaring a contract to be at an end (even where that the mistake is known to the other party) does not deprive an otherwise repudiatory breach of that quality. Sixthly, the present case is one where there was a clear, absolute and immediate repudiation of the contract by the notices of rescission – a declaration of termination coupled with forfeiture and a claim for damages: that repudiation could be and was accepted. The fact that Eminence was mistaken and that was known to Mr Heaney is of no assistance to the Eminence since it declared the contract to be at an end and acted accordingly. In support of those propositions, Mr Clarke relied particularly on *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri, Benfri and Lorfri)* [1978] QB 949 (CA), [1979] AC 757 (HL) ("*the Nanfri*"), *Woodar, Chilean Nitrate Sales*, and *Bridgen v Lancashire County Council* [1987] IRLR 58. Mr Clarke submitted that, in the circumstances, the Recorder's decision was a proper allocation of risk as between Eminence and Mr Heaney.

Discussion

33. Notwithstanding the carefully crafted and attractive submissions of Mr Clarke and the Recorder's detailed analysis, I consider that it is clear that the notices of rescission did not constitute a repudiatory breach of the contracts. I reach that conclusion essentially for the reasons advanced by Mr Livesey.
34. It is convenient to refer, first, to *The Nanfri* because reference is made to that case in *Woodar*. *The Nanfri* concerned time charters by which ships were let for periods of about 6 years. Most of the cargoes were carried on c.i.f terms, the shippers paying the freight in advance and receiving "freight pre-paid" bills of lading. The charters provided for the payment of hire twice monthly in advance; the owners to have the right to withdraw the vessel in default of payment. The charters also contained provision for permissible deductions from hire; and stipulated that the masters were to be under the orders of the charterers as regards employment, agency or other arrangements. Accordingly, the bills of lading were issued and signed by the charterers on behalf of the master and freight was paid to the charterers or their agents. The charterers made deductions from hire which the owners did not accept were permissible. The owners informed the charterers that the authority of the charterers or their agents to sign any bill of lading was being withdrawn. The owners also instructed the masters not to sign any bill of lading endorsed "freight pre-paid" or not bearing an indorsement incorporating a lien in favour of the owners on all cargoes and sub-freights belonging to the charterers and any bill of lading freight. If the order to the masters had been implemented, it would have had disastrous consequences for the charterers. The charterers treated the totality of the owners' conduct as a repudiation of the charters, which they accepted. On a case stated in respect of each ship from arbitrators, it was held by the Court of Appeal and the House of Lords that the charterers were entitled to make the deductions, and that the owners had by their conduct repudiated the charters, which repudiation had been accepted by the charterers.
35. The owners argued that their conduct was not repudiatory because they had acted on the advice of their lawyers in New York and London, and they were under an honest misapprehension as to their rights. They relied on *James Shaffer Ltd v Findlay Durham & Brodie* [1935] 1 WLR 106, *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 and *Ross T Smyth & Co Ltd v T.D. Bailey, Son & Co. (1940) 56 TLR 825*. In the Court of Appeal, Lord Denning, rejecting that argument and distinguishing those three cases, said (at p. 979E-p. 980A):

"I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension. Nor can he excuse himself on those grounds from the consequences of a repudiation. In those three cases the

conduct of the party concerned was entirely innocent. It did not evince any intention to break his contractual obligations. I would go by the principle as I have always understood it that if the party's [conduct] – objectively considered in its impact on the other party – is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards. A most important point here is that the conduct of the owner was such as to lead the charterers reasonably to believe that the owners would issue such orders again in the future whenever they, the owners, wished to force the charterers to comply with the owners' demands in similar circumstances. In short, the owners were determined to give orders to the masters – in flat contradiction of the charterparty – time and time again so long as the contract continued so as to enforce their demand that hire should be paid in full without any deductions unless the owners agreed. To my mind such conduct amounted to a repudiation of the contract within the principles laid down by Lord Blackburn in *Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co. (1884) 9 App.Cas. 434*, 442-444 and followed ever since. It was open to the charterers to accept the repudiation, as they did, and to treat themselves as discharged from any further performance. It was then at an end for the future. It cannot be revived by any subsequent "without prejudice" agreement."

36. Goff LJ emphasised the need for an objective assessment. He said (at p. 991D):

"The question is not what the owners wanted or wished in the recesses of their minds, but did they by their conduct evince an intention no longer to be bound by the contract or to perform it only in a way inconsistent with their obligations under the charter?"

37. Goff LJ quoted the following findings of fact by the arbitrators, which he described (at p. 991E) as "entirely destructive of the owners' case":

"The issuing of the order of October 4, 1977, was not to secure their claim for disputed deductions (the offer for an escrow deposit having been rejected by owners as 'meritless') but rather to compel the charterers to pay over all sums deducted from hire by the charterers which the owners disputed, irrespective of whether such deductions should ultimately be determined to be valid or invalid, in whole or in part, and to ensure that in the future the charterers made no deductions whatever from hire unless they had previously been expressly approved by the owners or they were supported by vouchers signed by the master or a proper tribunal had pronounced on their validity. At the same time, the owners knew that part of the amounts, payment of which they were demanding as a condition of the withdrawal of their orders, were due to the charterers."

38. He concluded (at p. 992E) that:

"the irresistible inference is that they were saying, "We will only perform the contract upon our terms and not on yours" and, as Lord Denning M.R. has said, they were holding a pistol to the heads of the charterers and we have the finding as to their true purpose which I have read from the award..."

39. On appeal to the House of Lords Lord Wilberforce described the law in this area as "perspicuous". He said the following (at p. 778F - p. 779C):

"Was this breach, or threatened breach, repudiatory or not? I shall not set out at any length the numerous authorities on anticipatory breach: this is one of the more perspicuous branches of the law of contract and the modern position is clear. The form of the critical question may differ slightly as it is put in relation to varying situations:

'... an intimation of an intention to abandon and altogether to refuse performance of the contract ...' or 'evince an intention no longer to be bound by the contract ...' (*Freeth v. Burr (1874) L.R. 9 C.P. 208, 213*, per Lord Coleridge C.J.)

‘I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way’ (*Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.* [1940] 3 All E.R. 60, 72, *per* Lord Wright) such as to deprive ‘the charterers of substantially the whole benefit which it was the intention of the parties. . . . that the charterers should obtain from the further performance of their own contractual undertakings’ (*Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 72, *per* Diplock L.J.).

‘To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. . . . Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages . . .?’ (*Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361, 380, *per* Buckley L.J.).

The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract

40. Lord Wilberforce, like the Court of Appeal, dismissed as irrelevant any subjective intention or desire of the party in breach not to abandon the contract. He said at (p. 780E-F):

“It is thirdly irrelevant that it was in the owners’ real interest to continue the charters rather than to put an end to them. If a party’s conduct is such as to amount to a threatened repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions. The two cases relied on by the appellants (*James Shaffer Ltd. v. Findlay Durham & Brodie* [1953] 1 W.L.R. 106 and *Sweet & Maxwell Ltd. v. Universal News Services Ltd.* [1964] 2 Q.B. 699) do not support a contrary proposition, and would only be relevant here if the owners’ action had been confined to asserting their own view – possibly erroneous – as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences.”

41. That case is the principal authority on which Mr Clarke relies for his submissions that it is irrelevant that the rescission letter of 17 December 2008 was served under a mistake on the part of Eminence’s lawyers; that, had Eminence appreciated the mistake, it would not have sent the letter; and that Eminence’s preference was to maintain the contracts. Mr Clarke further submitted that the present case is an even stronger and clearer one of repudiatory conduct since the owners’ conduct in *The Nanfri* concerned the manner in which they intended to perform the contract, whereas the present case concerns Eminence’s act of bringing the contracts finally to an end.

42. *Woodar* concerned a contract for the sale of development land. A special condition provided for the purchasers to have the following right to rescind:

“if prior to the date of completion . . . (iii) any authority having a statutory power of compulsory purchase shall have commenced to negotiate for the acquisition by agreement or shall have commenced the procedure required by law for the compulsory acquisition of the property or any part thereof.”

43. The purchasers sent to the vendors a notice purporting to rescind the contract under that provision on the ground that the Secretary of State for the Environment had commenced the procedure for compulsory acquisition of the land. The vendors brought proceedings against the purchasers for a declaration that the condition gave the purchasers no right to rescind and for damages for breach of contract in serving the notice. The House of Lords, allowing the purchasers’ appeal, held that the service of the notice of rescission was not a repudiatory breach of the contract.

44. Lord Wilberforce emphasised that, in considering whether the purchasers had repudiated the contract, it was necessary to consider all the circumstances, and, in particular, the purchasers' conduct as a whole. He said (at p. 280F-p. 281A):

"This gives rise to the first issue in this appeal: whether, by invoking special condition E (a) (iii), and in the circumstances, the appellants are to be taken as having repudiated the contract. The respondents so claim, and assert that they have accepted the repudiation and are entitled to sue the appellants for damages.

My Lords, I have used the words "in the circumstances" to indicate, as I think both sides accept, that in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract? In the present case, without taking the appellants' conduct generally into account, the respondents' contention, that the appellants had repudiated, would be a difficult one. So far from repudiating the contract, the appellants were relying on it and invoking one of its provisions, to which both parties had given their consent. And unless the invocation of that provision were totally abusive, or lacking in good faith, (neither of which is contended for), the fact that it has proved to be wrong in law cannot turn it into a repudiation. At the lowest, the notice of rescission was a neutral document consistent either with an intention to preserve or with an intention to abandon the contract, and I will deal with it on this basis — more favourable to the respondents. In order to decide which is correct the appellants' conduct has to be examined."

45. Lord Wilberforce stated that the purchasers' subjective intention was inconclusive. He said (at p. 281D):

"It is clear in the first place that, subjectively, the appellants, in 1974, wanted to get out of the contract. Land prices had fallen, and they thought that if the contract were dissolved, they could probably acquire it at a much lower price. But subjective intention is not decisive: it supplied the motive for serving the notice of rescission: there remains the question whether, objectively regarded, their conduct showed an intention to abandon the contract."

46. Lord Wilberforce then set out the relevant facts. He referred to a meeting between the purchasers' advisers and a Mr Cornwall, acting for the vendors, before service of the notice of rescission, in which Mr Cornwall was told of the intention to serve the notice, and Mr Cornwall said that, if that was done, the vendors would take the purchasers to court and would let the judge decide whether the contract could be rescinded. Mr Cornwall also said that, if a notice to rescind was served, he would accept it as intending to protect the purchasers fully and prudently and would not regard it as a hostile act. Following service of the notice, the vendors' solicitors wrote that the vendors did not accept its validity and they instituted proceedings. Mr Cornwall then wrote to the purchasers' president, in which reference was made to the proceedings, stating that both parties would have to await the decision of the court as to the validity of the purchasers' claim to be entitled to rescind upon the grounds stated. He wrote a further letter to the effect that the vendors and doubtless the purchasers would abide by the result of the court proceedings. Lord Wilberforce summarised as follows the relevance of that evidence (at p. 282D, and p. 282H-p. 283B):

"My Lords, I cannot find anything which carries the matter one inch beyond, on Wimpey's part, an expressed reliance on the contract (condition E (a) (iii)), on Woodar's side an intention to take the issue of the validity of the notice (nothing else) to the courts, and an assumption, not disputed by Wimpey, that both sides would abide by the decision of the court. This is quite insufficient to support the case for repudiation...My Lords, in my opinion, it follows, as a clear conclusion of fact, that the appellants manifested no intention to abandon, or to refuse future performance of or to repudiate the contract. And the issue being one of fact, citation of other decided cases on the other facts is hardly necessary. I shall simply state that the proposition that a party who takes action relying simply on the terms of the contract, and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it is supported by *James Shaffer Ltd. v.*

Findlay Durham & Brodie [1953] 1 W.L.R. 106 and Sweet & Maxwell Ltd. v. Universal News Services Ltd. [1964] 2 Q.B. 699 . “

47. Lord Wilberforce contrasted *The Nanfri*. He said at page 283B-C:

“In contrast to these is the case in this House of *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc* [1979] A.C. 757 which fell on the other side of the line. Of that I said at p. 780:

“The two cases relied on by the appellants (*James Shaffer Ltd. v. Findlay Durham & Brodie [1953] 1 W.L.R. 106 and Sweet & Maxwell Ltd. v. Universal News Services Ltd. [1964] 2 Q.B. 699*) ... would only be relevant here if the owners’ action had been confined to asserting their own view — possibly erroneous — as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences.”

48. He concluded on this aspect as follows at (p. 283D-E):

“In my opinion therefore the appellants are entitled to succeed on the repudiation issue, and I would only add that it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations. To uphold the respondents’ contentions in this case would represent an undesirable extension of the doctrine.”

49. Lord Keith, agreeing with Lord Wilberforce in the result, also emphasised (at p. 294G-H) the need to consider the matter objectively and to look at all the circumstances. He referred (at p. 295) to “a tract of authority which vouches the proposition that the assertion by one party to the other of a genuinely held but erroneous view as to the validity or effect of a contract does not constitute repudiation.” He cited, in that regard, *Spettabile* , *James Shaffer* , and *Sweet & Maxwell* , and he quoted (at p. 295H) the following statement of Lord Wright in *Ross T Smyth and Co Ltd v TD Bailey and Son and Co* (1940) 164 LT p. 102, at p. 107:

“... a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation.”

50. Lord Keith continued as follows (at p. 296A):

“So in the present case the question comes to be whether, having regard to all the circumstances, the conduct of the appellants in relation to their invocation of special condition E (a) (iii) of the contract was such that a reasonable person in the position of the respondents would properly infer an intention “in any event,” to use the expression employed by Warrington and Atkin L.JJ. in the *Spettabile* case, 121 L.T. 628, to refuse to perform the contract when the time came for performance.”

51. He concluded that, on the facts, he was unable to regard the purchasers’ conduct as evincing an intention altogether to refuse performance of the contract. He distinguished the comments of Lord Denning MR in *The Nanfri* , quoted above, on the basis that the time for performance had not yet passed. He said (at p. 296H to p. 297C):

“I would accept without hesitation the statement of Lord Denning M.R. in *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. [1978] 1 Q.B. 927 , 979* that a party who breaks a contract cannot excuse himself by saying that he did it on the advice of his lawyers, or that he was under an honest misapprehension. If in the present case the time for performance had passed while the appellants were still maintaining their position based on the erroneous interpretation of

special condition E (a) (iii), they would have been in breach of contract and liable in damages accordingly. Lord Denning goes on to say: “Nor can he excuse himself on those grounds from the consequences of a repudiation.” That may be so, but it is first necessary to determine whether or not there has been a repudiation.

The doctrine of repudiatory breach is largely founded upon considerations of convenience and the opportunities which it affords for mitigating loss, as observed by Cockburn C.J. in *Frost v. Knight* (1872) L.R. 7 Ex. 111, 114. It enables one party to a contract, when faced with a clear indication by the other that he does not intend to perform his obligations under it when the time for performance arrives, to treat the contract, if he so chooses, as there and then at an end and to claim damages as for actual breach. Where one party, honestly but erroneously intimates to the other reliance upon a term of the contract which, if properly applicable, would entitle him lawfully to rescind the contract, in circumstances which do not and are not reasonably understood to infer that he will refuse to perform his obligations even if it should be established that he is not so entitled, legal proceedings to decide that issue being in contemplation, I do not consider it in accordance with ordinary concepts of justice that the other party should be allowed to treat such conduct as a repudiation. Nor, in my opinion, are there any considerations of convenience which favour that course.”

52. Lord Scarman agreed with the reasons given by Lord Wilberforce. He said that the error of the majority of the Court of Appeal was in concentrating on the notice of rescission and its accompanying letter, and in failing to take into account all the acts and conduct of the purchasers in their dealings with Mr Cornwall. He elaborated as follows (at p. 299C-H):

“My Lords, as I see it, the error of the majority of the Court of Appeal in the instant case was, notwithstanding some dicta to the contrary, to concentrate attention on one act, i.e. the notice of rescission with its accompanying letter. They failed to give the consideration which the law requires of all the acts and conduct of the defendants in their dealings with Mr. Cornwell — the “alter ego” of the plaintiff company. The law requires that there be assessed not only the party’s conduct but also, “objectively considered,” its impact on the other party. The error is neatly exposed in Goff L.J.’s terse conclusion: “In my judgment rescission is repudiation, and if it cannot be justified by the terms of the contract it is wrongful and a breach.” The learned Lord Justice was, with respect, concentrating too much attention on one act isolated from its surrounding circumstances and failing to pay proper regard to the impact of the party’s conduct upon the other party.

In this case the contract provided for the possibility of rescission by the defendants. But the notice of rescission, which the defendants gave, was not, in the circumstances which existed when it was given, one which the defendants had any contractual right to give. But they honestly believed the contract did give them the right. When one examines the totality of their conduct and its impact upon Mr. Cornwell it is plain, as shown by my noble and learned friend’s analysis of the facts, that the defendants, though claiming mistakenly to exercise a power given them by the contract to bring it to an end, were not evincing an intention not to be bound by the contract. On the contrary, they believed they were acting pursuant to the contract. And Mr. Cornwell well understood the situation... It never occurred to Mr. Cornwell that the defendants, if held not to have been entitled to give notice of rescission, would refuse to perform the contract. In fact, it would seem that he believed exactly the contrary. Such was the impact upon him of the defendants’ conduct.”

53. Lord Salmon and Lord Russell dissented. Mr Clarke relied upon the following passage in Lord Salmon’s speech (at p. 288E-G):

“I do not recall that any of these definitions of a repudiation of a contract have ever until now, been questioned. The fact that a party to a contract mistakenly believes that he has the right to refuse to perform it cannot avail him. Nor is there any authority for the proposition that if a party to a contract totally refuses to perform it, this refusal is any the less a repudiation of the contract

because he honestly but mistakenly believes that he is entitled by a condition of the contract to refuse to perform it.”

It would indeed be unfortunate if the law were otherwise. A mistake in the construction of a contractual condition, even such a glaringly obvious mistake as the present can apparently easily be made especially perhaps when the market price has fallen far below the contract price. It is acknowledged in this case that the mistake was an honest one. If, however, a case arose in which a mistake of this kind was alleged to be an honest mistake, but not acknowledged to be so, it would be extremely difficult, if not impossible to prove the contrary.”

54. Mr Clarke distinguished *Woodar* from the present case, as turning on its own special facts. It is the basis of his fourth key proposition. He submitted that it is authority that an act or declaration wrongly terminating a contract will not be a repudiatory breach only where the parties have agreed in advance that, if and when the act is done or the declaration made, the question of the validity and effectiveness of the act or declaration will be brought before the courts, and the parties will abide by the court’s decision. Mr Clarke relied upon *Woodar* as further authority that subjective intention is irrelevant; and he relied on the passage in Lord Salmon’s speech, which I have quoted, as illustrating the practical difficulty of distinguishing between honest mistakes precluding repudiation and other mistakes consistent with repudiation.
55. In *Chilean Nitrate Sales* Donaldson LJ, giving the judgment of the court, said at (p. 572) that the following propositions could be taken from *Woodar* and elsewhere:
 - “(a) Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of a refusal to perform contractual obligations in a respect or respects going to the root of the contract.
 - (b) The refusal must not only be clear, but must be absolute. Where a party declares his intention to act or refrain from acting in a particular way on the basis of a particular appreciation of his obligations, either as a matter of fact or of law, the declaration gives rise to a right of dissolution only if in all the circumstances it is clear that it is not conditional upon his present appreciation of his obligations proving correct when the time for performance arrives.
 - (c) What does or does not amount to a sufficient refusal is to be judged in the light of whether a reasonable person in the position of the party claiming to be freed from the contract would regard the refusal as being clear and absolute?
 - ...
 - (d) [T]he conduct relied upon is to be considered as at the time when it is treated as terminating the contract, in the light of the then existing circumstances. These circumstances will include the history of the transaction or relationship. Later events are irrelevant, save to the extent that they may point to matters which the parties should have considered as hypothetical possibilities at the relevant time.”
56. Mr Clarke submitted that Eminence’s conduct in serving the notices of rescission was, objectively, a clear and absolute refusal to perform its contractual obligations going to the root of the contracts, within the first two propositions of Donaldson LJ; further, in accordance with Donaldson LJ’s fourth proposition, what occurred after the service of the notices, in particular Eminence’s realisation of its mistake and its change of heart, is irrelevant.
57. Mr Clarke referred us to *Bridgen v Lancashire County Council* [1987] IRLR 58. That case concerned an unsuccessful claim for unfair dismissal by an employee who claimed that she had been constructively dismissed. It does not seem to me to have any useful bearing on the present appeal, and so I do not propose to consider it further.

58. Finally, in *Dalkia* Christopher Clarke J had to consider the different approaches and outcomes in *The Nanfri* and *Woodar*. One of the issues in *Dalkia* was whether the defendant, Celtech, was in repudiatory breach of a contract under which it was obliged to pay the claimant, Dalkia, charges under agreements by which Dalkia would construct a paper mill for Celtech and would provide electricity and steam to the mill. Celtech failed to pay three instalments of the charges, and informed Dalkia that it was not within its power and cash resources to make the payments and that it was facing insolvency. Dalkia served a notice of termination on Celtech pursuant to a contractual provision that Dalkia should have the right to terminate the principal agreement immediately if Celtech was in material breach of its obligations to pay the charges. Celtech contended it was not in material breach, having merely failed to pay three instalments, and that the notice of termination was a wrongful repudiation of the contract, which Celtech accepted as bringing the contract to an end.

59. Christopher Clarke J held that Celtech was in material breach of its obligations to pay the charges and Dalkia was entitled to serve the termination notice. He went on to consider whether, if he were wrong in his conclusion that Dalkia was entitled to terminate the contract, Dalkia's notice of termination was, as Celtech contended, a repudiation that Celtech was entitled to accept. Dalkia relied on *Woodar*. Christopher Clarke J contrasted that case with *The Nanfri*, gave an explanation for the different outcomes, and distinguished *Woodar* on the facts as follows:

“[148] The decision of the majority [in *Woodar*] must be contrasted with the proposition – most powerfully enunciated in *The Nanfri* [1979] A.C. 757 – that it is no defence to a party who has repudiated a contract to say that he acted in good faith under a mistaken understanding of the law. A reconciliation may lie in the fact that in *The Nanfri* the repudiation consisted of an act – the instruction of the master not to sign pre-paid bills of lading – which had the immediate effect of substantially depriving the charterers of virtually the whole benefit of the charter since the issue of such bills was essential to the maintenance of the charterers' trade. By contrast the notice of termination in *Woodar* did not have that or a similar consequence. In *Vaswani v Italian Motors* [1996] 1 WLR 270, the Privy Council said:

“Whilst ..the request for the payment of an excessive price would not in itself amount to a repudiation, if the conduct relied on went beyond the assertion of a genuinely held view of the effect of the contract the conduct could amount to a repudiation. This is the position if the conduct is inconsistent with the continuance of the contract.”

and referred to Lord Wilberforce's dictum in *The Nanfri* that two cases relied on by the then appellants:

“would only be relevant here if the owners' action had been confined to asserting their own view –possibly erroneous – as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences.”

[149] It seems to me that *Woodar* is distinguishable. On the facts of that case the majority felt able to conclude that, despite the unqualified terms of the notice, the circumstances in which it was given did not manifest an intention to refuse further performance. The time for performance had not arisen, *Woodar* needed to serve a notice in order to reserve its position, and the discussions between the parties had proceeded on the basis that the service of a notice was not to be regarded as a hostile act, and that the entitlement or otherwise of *Woodar* to serve the notice would be determined by the court, to which *Woodar* would apply, by whose decision both parties would abide.”

60. Mr Clarke submitted that the way in which Christopher Clarke J distinguished *Woodar* in paragraph [149] is precisely the same basis on which Mr Clarke seeks to distinguish it from the present case.

61. I would make the following general observations on all those cases. First, in this area of the law, as in many others, there is a danger in attempts to clarify the application of a legal principle by a series of propositions derived from cases decided on their own particular facts. Instead of concentrating on the application of the principle to the facts of the case in hand, argument tends to revolve around the application of those propositions, which, if stated by the Court in an attempt to assist in future cases, often become regarded as prescriptive. So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, “perspicuous”. It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.
62. Secondly, whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in *The Nanfri*.
63. Thirdly, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in *Woodar* (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.
64. Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in *Woodar* itself.
65. On the facts of the present case which are agreed and were found by the Recorder, I consider it clear that Eminence’s rescission notices sent under cover of Mr Jones’ letter of 17 December 2008 did not constitute a repudiatory breach of the contracts, for the following reasons.
 - (1) It is common ground that Eminence was, as required by Condition 6.8.1, “ready, able and willing to complete” and so entitled to service the notices to complete. The covering letter dated 5 December 2008 confirms that was the case and that completion did not take place on the contractual completion date of 4 December 2008 in consequence of Mr Heaney’s default. That is further supported by the economic reality that, due to the downturn in the property market, the contractual sale prices of the flats were above market values, and Mr Heaney was attempting to negotiate lower prices and a higher specification.
 - (2) By paragraph 3 of the notices to complete, Eminence gave “notice under condition 6.8 ... to complete the contract in accordance with that condition”. Condition 6.8.2 required completion of each contract “within 10 working days”. By virtue of the definition of “working day” in Condition 1.1.1(m), completion was, therefore, required to take place by close of business on 19 December 2008. The covering letter of 5 December 2008 from Eminence’s solicitors stated that they “calculate the final date for completion under the notice is 15th December 2008”. That was, as its wording plainly indicates, a calculation based on the contractual provisions. It was not an attempt to vary the contractual provisions or an abandonment of them or a refusal to comply with them, but an obviously mistaken application of them. No reasonable person could have viewed it in any other way.
 - (3) Mr Heaney’s solicitors did not point out that obvious error. They either did not notice it, or, as the Recorder speculated, they lay in wait for Eminence to act on Mr Jones’ mistake, so that they could fortuitously extricate Mr Heaney from the contracts by claiming that premature termination of the contracts by Eminence was itself a repudiatory breach. What

is clear is that neither they nor Mr Heaney had any reason whatever to think that, if the error was pointed out to Mr Jones, he would not immediately have acknowledged his mistake.

- (4) The notices of rescission were served prematurely, before expiry of the 10 working days specified in Condition 6.8, and accordingly before Eminence was in a position lawfully to exercise the remedies specified in Condition 7.5, including rescission and forfeiture of the deposits. That was due to the same mistake on the part of Mr Jones in calculating the contractual date of expiry of the notices to complete. It was obvious that a mistake had been made because, as the Recorder said, it was “screamingly obvious”. Again, on the basis of the Recorder’s findings, a reasonable recipient of the notices of rescission would have appreciated that, had the error been pointed out, it would immediately have been acknowledged by Mr Jones. Indeed, that is precisely what happened on 18 December 2008 when DBF received Foot Anstey’s letter of the same date in response to the rescission notices. This was not a case like those cited by counsel and mentioned earlier in this judgment, in all of which the parties were maintaining in litigation different interpretations of contractual provisions. In the present case, as a reasonable person in Mr Heaney’s position would have realised, there was a simple error of calculation by Eminence’s solicitors, analogous to a clerical error, which, once pointed out, would have been (as it was) conceded immediately. The consequence of pointing it out, as the reasonable person would have appreciated, was that the rescission notices would have been treated, as they were in law, as ineffective, and Eminence would have waited until the expiry of the notices to complete before deciding whether or not to treat the contracts as at an end. No question of allocation of risk, as advanced by Mr Clarke, arises.
- (5) It is, in my judgment, impossible clearly to find on those facts an intention by Eminence to abandon and altogether to refuse to perform the contracts, which, in view of the state of the market, had become highly advantageous to Eminence and onerous to Mr Heaney. On the contrary, the obvious inference from those facts is that Mr Heaney and his solicitors were only too well aware that Eminence very much wanted to enforce the contracts, either by completing them or by rescinding them and exercising the other remedies conferred by them, in either case in accordance with the contractual terms.
- (6) The error of the Recorder was to concentrate on the rescission notices without taking into account all the circumstances. To do so results in a lack of reality. Mr Clarke’s submissions reflected that same approach as he sought to emphasise the distinction between, on the one hand, cases such as *The Nanfri* and *Bridgen*, in which the Court was considering wrongful performance of an ongoing contract, and, on the other hand, cases like the present case, which concern a wrongful termination of the contract. The essence of Mr Clarke’s approach was that, in the latter case, if the act of termination – here the notice of rescission – is clear in its intended effect, that is the end of the matter, save for a limited exception reflecting the precise facts of *Woodar*. For the reasons I have given, that is not a proper application of the legal test. It was precisely that approach that was criticised by Lord Scarman in *Woodar* (at p. 299C).
- (7) In any event, as Mr Livesey emphasised, and indeed placed at the forefront of his submissions, even if the rescission notices are looked at in isolation, they do not clearly show an intention by Eminence to abandon and altogether to refuse to perform the contract. They are, as he submitted, internally inconsistent and, on their face, throw up a query as to Eminence’s intention. By referring to the notices to complete and Condition 6.8 and Condition 7.5, the rescission notices, far from clearly indicating an intention to abandon the contracts, show an intention to implement the contractual procedure for bringing the contracts to an end and exercising the remedies specified in the contracts. Their service was, however, inconsistent with those contracts in that they were premature. From the perspective of a reasonable person in Mr Heaney’s position, that left unclear whether the intention of Eminence was to insist on the effectiveness of the notices of rescission,

notwithstanding the terms of the contracts, or, if the error as to the contractual terms was pointed out, to abide by those terms.

66. It follows that I do not accept Mr Clarke's fourth key proposition that the factual scenario in *Woodar* is the only one where a wrongful declaration that a contract is at an end will not be repudiatory. Moreover, I do not believe that Christopher Clarke J went so far as that proposition in *Dalkia*.

Conclusion

67. For those reasons, I would allow this appeal.

Lord Justice Sullivan :

68. I agree.

Lord Justice Mummery :

69. I also agree.