Neutral Citation Number: [2021] EWHC 753 (Ch)

Case No: PT-2020-000502

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

31 March 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

- -

Between :

REACTION ENGINES LTD	**Claimant**
- and –	
(1) BNP PARIBAS DEPOSITARY SERVICES (JERSEY) LIMITED **(2) BNP PARIBAS DEPOSITARY SERVICES LIMITED**	**Defendants**

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Patrick Lawrence QC (instructed by **Fieldfisher LLP)** for the **Claimant**
Dermot Woolgar (instructed by **Penningtons Manches Cooper LLP**) for the **Defendants**

Hearing date: 24 March 2021
Draft judgment circulated: 26 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 31 March 2021.

Judge Jonathan Richards:

1. This is the Claimant's application for summary judgment of its Part 8 claim made against the Defendants in their capacities as trustees of what is now called the Patrizia Hanover Property Unit Trust (the "Trust"). The hearing was a fully remote video hearing, neither party having asked for a different kind of hearing.

2. The dispute concerns an Agreement for Lease (the "Agreement") entered into between the Claimant as lessee and the Defendants as lessors of Plot 6040, Westcott Venture Park in Buckinghamshire (the "Property"). On 18 March 2020 the Claimant served a notice (the "Notice") on the Defendants. The Claimant argues that the Notice validly terminated the Agreement and seeks summary judgment on this issue. The Defendants argue that they have a sufficiently good defence for that issue to proceed to a full trial.

Procedural matters

3. The Claimant issued its proceedings under Part 8 of the CPR, considering that it was seeking the court's decision on a question which was unlikely to involve a substantial dispute of fact. The Defendants argue that the Part 8 procedure was not appropriate to this dispute as they had, in pre-action correspondence with the Claimant, raised a defence based on estoppel that was fact-dependent. I will not at this stage express a conclusion on whether Part 8 proceedings were appropriate as I may hear fuller argument on this issue when I come to make further case management directions consequent on this judgment. It is sufficient to note that, while objecting to the use of the Part 8 procedure, the Defendants accept that summary judgment can be given on a Part 8 claim and that they have had sufficient time to marshal their evidence and arguments so as to resist the Claimant's application.

4. The parties agree that I should apply the following principles when deciding whether to give summary judgment:

    i) the court must consider whether the Defendants have a "realistic" as opposed to a "fanciful" prospect of success;

    ii) a "realistic" claim is one that carries some degree of conviction: this means a claim that is more than merely arguable;

    iii) in reaching its conclusion the court must not conduct a mini-trial;

    iv) in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

    v) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial that is possible or permissible on summary judgment; thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the

application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

vi) if the application gives 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, the court should grasp the nettle and decide it;

vii) the overall burden of proof rests on the Claimant to establish that there are grounds to believe that the Defendants have no real prospect of success and that there is no other reason for a trial;

viii) if the Claimant has adduced credible evidence in support of its application, the Defendants become subject to an evidential burden. That does not set a high bar. It is sufficient for the Defendants to show some real prospect of success or some other reason for a trial.

Facts that are not in dispute

5. The Claimant is an aerospace manufacturer. It entered into the Agreement as it wanted to use the Property to conduct research into space propulsion systems. The Property is owned by the Defendants as an asset of the Trust and the Trust wished to generate revenue from the Property by letting it.

6. The Agreement provided for the Defendants to construct a building and car park (referred to as the "Base Build" in the Agreement) and an engine testing facility (referred to as the "Test Site"). On completion, both the Base Build and the Test Site would be let to the Claimant on a 10-year lease for an initial rent of £324,100 per year.

7. The Base Build and the Test Site were constructed pursuant to building contracts between the Defendants and a third-party contractor ("A&H"). The Agreement set out a basis for the Claimant and Defendants to share construction costs with the Claimant liable to fund the majority of Test Site costs. However, the Claimant was not party to the construction agreements with A&H. Accordingly, the Claimant had neither the benefit nor the burden of the contracts between the Defendants and A&H.

8. Clause 6.3 of the Agreement imposed requirements relating to the duration of these building works as follows:

> *"**6.3 Duration of the Works***
>
> *6.3.1 Subject to obtaining the Landlord's Consents (which it shall use reasonable endeavours to promptly procure), the Landlord shall use its reasonable endeavours to complete the Works as soon as reasonably practicable and by not later than the Target Date;*
>
> *6.3.2 In the event that Practical Completion has not occurred on or before the Long Stop Date, then the Tenant shall be entitled to*

> *rescind this Agreement by notice in writing to the Landlord at any time thereafter (but not if Practical Completion has occurred prior to issue of such notice) whereupon this Agreement shall determine without prejudice to any claim that either party may have against the other for antecedent breach of its terms.*
>
> *6.3.3 The Long Stop Date may be extended by mutual agreement in writing between the parties.*

9. This clause needs to be understood in the context of the following other provisions of the Agreement:

   i) The "Works" were, by Clause 1.1.77, the works of constructing the Base Build and the Test Site.

   ii) The Long Stop Date was, by Clause 1.1.33, 13 September 2019.

   iii) The Target Date was, by Clause 1.1.59, initially defined as 13 September 2018. After the execution of the Agreement, the parties agreed to extend that date to 1 November 2018.

   iv) By Clause 1.1.43, "Practical Completion" could only happen when both the Base Build and the Test Site had achieved practical completion. Clause 6.5 of the Agreement provided for Practical Completion to be evidenced by a certificate issued by the "Employer's Agent" which was a company called Feasibility Limited ("Feasibility"). By Clause 6.5 of the Agreement, the Claimant had some rights to input into the decision of the Employer's Agent by, for example, making representations. However, ultimately the decision whether Practical Completion had occurred was to be taken by the Employer's Agent alone.

   v) By Clause 15 of the Agreement, the Agreement was to be completed by the grant of a lease ten working days after Practical Completion.

10. It is common ground that, under Clause 6.3.1, even if Practical Completion did not take place by the Target Date or Long Stop Date, the Defendants remained subject to a continuing obligation to use reasonable endeavours to complete the Works as soon as reasonably practicable thereafter.

11. Practical completion of the Base Build Works was certified on 25 September 2018. However, the Test Site Works ran into construction difficulties and overall Practical Completion was not achieved by the Long Stop Date of 13 September 2019. The Claimant did not, however, exercise its right to rescind the Agreement immediately after the Long Stop Date was passed. Instead, considerable dialogue continued between the various parties after the Long Stop Date. The Defendants say that they have a reasonable prospect of establishing that this dialogue resulted in the Claimant being estopped, or otherwise precluded, from exercising its rights under Clause 6.3.2 and I will consider that issue later in this judgment.

12. On 18 March 2020, the Claimant served the Notice claiming to exercise its right to rescind the Agreement. It was common ground that Practical Completion had not occurred by the date on which the Notice was served.

The application for summary judgment and the defence advanced

Overview of the parties' positions

13. The Claimant only seeks summary judgment in respect of its claim for a declaration that the Notice was validly served pursuant to Clause 6.3.2 of the Agreement. It argues that the position is entirely straightforward. It is common ground that Practical Completion had not taken place by the Long Stop Date and still had not taken place by the date the Notice was served. The Claimant's rights under Clause 6.3.2 of the Agreement were accordingly engaged and it was contractually entitled to serve notice rescinding the Agreement.

14. The Defendants take no issue with the Claimant's construction of the Agreement. They do not assert that there was any amendment to the Agreement, or any collateral contract, under which the right to rescind set out in Clause 6.3.2 was varied or waived. Rather, they argue that the words and conduct of the Claimant between 13 September 2019 and 18 March 2020 operated to preclude the Claimant from exercising its rights under Clause 6.3.2 by issuing the Notice at the time it did. They put that case in two ways by relying first on an "estoppel by convention" or, in the alternative, on the application of the doctrine of "forbearance in equity", as articulated in the case of *Hughes v Metropolitan Railway* (1877) 2 App Cas 439.

15. In *Tinkler v HMRC* [2019] EWCA Civ 1392, Hamblen LJ (with whom both other members of the court agreed) endorsed the following summary of the law on "estoppel by convention" that appeared in the then current edition of *Chitty on Contracts*:

> *"Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it".*

16. Hamblen LJ then set out the following guidance as to how the various constituents of this test should be applied as follows:

> *"(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.*
>
> *(2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of*

> *conveying to the other party an understanding that he expected the other party to rely on it.*
>
> *(3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
>
> *(4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
>
> *(5) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

17. As to the doctrine of equitable forbearance, the parties were agreed that equity can intervene to preclude a person from insisting on strict legal rights if the following requirements are met:

    i) There must be a legal relationship between parties giving rise to rights and duties.

    ii) One party to that relationship (the "promisor") must give a promise or representation to the other (the "promisee") that strict legal rights arising out of that relationship will not be enforced. That promise must be clear and unequivocal. However, it need not be express; it can be inferred from conduct.

    iii) The promisor must intend the promisee to rely on the representation.

    iv) The promisee must in fact rely on the representation.

18. Even if those conditions are met, equity will only intervene if it would otherwise be inequitable for the promisor to go back on his promise.

<u>The averred facts on which the defences are based</u>

19. It was not disputed that after the Long Stop Date passed, but before the Notice was served, there was ongoing dialogue between the Claimant and Defendants. That dialogue was covered in detail in witness statements given by the following witnesses:

    i) Mark Wood, the Claimant's chief operating officer;

    ii) John McSweeney, a director of Michael Alexander Limited, which provided structural and civil engineering consultancy services to the Claimant;

    iii) Mischa Davis, a managing director at Patrizia Property Investment Managers LLP who provided property investment advice to the Trust.

iv) Nigel MacKenzie, who provides asset management services to the Trust and described himself as the Trust's "eyes and ears" at the business park at which the Property is located.

v) Neale Flavell, director and co-founder of Feasibility Limited, which acted as the "Employer's Agent" for the Defendants and thus administered the construction contracts governing the work to be done at the Property.

20. There was also a witness statement of Owen Talfan Davies, a partner at Fieldfisher LLP ("Fieldfisher"), who are the Claimant's solicitors. That witness statement did not seek to give first hand evidence of dealings between the Claimant and the Defendants, but focused on various matters of procedure both up to and after the Claimant's decision to issue the Part 8 claim.

21. There is some dispute as to what was said during this dialogue. For example, Mr Wood's evidence is that he stated expressly, on behalf of the Claimant, at a site meeting on 27 November 2019, that the Claimant reserved the right to rescind the Agreement. Mr MacKenzie and Mr Flavell say otherwise in their evidence. Since I am not performing a mini-trial, I will not make findings on matters of disputed fact such as this. In the paragraphs that follow, I set out the key aspects of that dialogue on which the Defendants rely as establishing an estoppel without making any finding as to whether the dialogue was precisely as the Defendants allege or not.

22. On 1 October 2019, a "summit meeting" was called which was attended by representatives of the Claimant and the Defendants and was chaired by Mr Flavell of Feasibility. The background to the summit meeting was tension between A&H and the Claimant, with A&H feeling that the Claimant was making unjustified complaints about defects in the construction work either to delay Practical Completion, or to ensure that Practical Completion never took place. The summit meeting took place after the Long Stop Date had passed but, until the solicitors' letters referred to below were sent, there was no suggestion that the Claimant was considering exercising its rights to rescind the Agreement. At that meeting, Mr Gill of the Claimant started by saying that the Claimant was committed to the site and wanted to see the construction through and have it delivered. Mr Gill was a senior figure at the Claimant, he had not been involved in the project previously and Mr Davis, and others on the Defendants' side, thought that he had come to the meeting as the "new face" of the Claimant to give assurances as to the Claimant's commitment to the site.

23. The meeting then went through each of the items on a snagging list that the Claimant had prepared and how each item on that list would be addressed in order to achieve Practical Completion. The meeting was positive and ended with a conclusion that there were issues to be addressed but completion was in sight. It was agreed that all parties would aim for completion in the third week of November 2019 although no specific date was agreed.

24. Mr Davis, on behalf of the Defendants, did not consider it necessary to ask the Claimant specifically to confirm that it would not be exercising its right to rescind the Agreement, considering that it was obvious that it would not be doing so in view of the agreement reached at the meeting to proceed with the

works and aim for practical completion in the third week of November 2019. That was a correct understanding of the Claimant's position at the summit meeting since Mr Wood's evidence was that the purpose of the summit meeting was to discuss a way forward so that, the Claimant hoped, Practical Completion could be achieved in a realistic timescale. At the date of the summit meeting, the Claimant would have been prepared to take a lease of the Property, even though the Long Stop Date had passed, if Practical Completion could be achieved in a realistic timescale.

25. Between November 2019 and March 2020, the Claimant asked Mr McSweeney to engage with the Defendants' agents with a view to ensuring that the steps required to achieve Practical Completion could be achieved. As well as sending emails relating to outstanding matters to the Defendants' own engineers and to Feasibility, Mr McSweeney attended meetings at the Property on 27 November 2019, 16 December 2019 and 7 February 2020.

26. The meeting at the Property on 27 November 2019 involved Feasibility conducting an inspection to consider whether it would issue a Certificate of Practical Completion. Feasibility decided not to issue such a certificate but, in advance of that meeting, the Claimant's solicitors wrote to the Defendants' solicitors on 22 and 26 November 2019 explaining the Claimant's position that no certificate could properly be issued. The letter of 22 November 2019 sought to dissuade Feasibility Limited from even carrying out an inspection on 27 November 2019 and threatened to apply for an injunction restraining Feasibility from issuing a Certificate of Practical Completion. The Defendants acknowledge that both of these solicitors' letters were expressed to be without prejudice to the Claimant's right to terminate the Agreement under Clause 6.3.2 and also expressly reserved the right to exercise that right. However, they assert that the right to terminate was not otherwise mentioned in any dealings between the Claimant and the Defendants, or their agents.

27. Feasibility decided on 27 November 2019 not to issue a Certificate of Practical Completion. Even after this, the Claimant and its representatives and agents continued to engage with, among others, Feasibility and engineers working on the construction project with a view to addressing various works that needed to be done to enable Practical Completion to be achieved. Mr MacKenzie's evidence is that even having been told on 27 November 2019 that Practical Completion would not be certified, Mr Wood confirmed to him in a conversation the same day that, despite the delay, the Claimant remained committed to taking possession of the Site and outlined the Claimant's plans as to where to locate staff and how elements of the site might be redesigned.

28. In a similar vein, meetings took place between the parties on 16 December 2019, 7 January 2020 and 7 February 2020 that were interpreted, on the Defendants' side, as demonstrating the Claimant's continuing commitment to taking a lease of the Property. The Claimant continued to ascertain the progress that was being made towards practical completion and continued to press for steps to be taken to achieve it. No reference was made at any of these meetings, or surrounding correspondence, to the fact that the Long Stop Date had passed or to the Claimant's contractual right to rescind.

29. No warning or ultimatum was given before the Notice was served on 18 March 2020. The Defendants regarded it as a bolt from the blue.

Discussion

Equitable forbearance

30. I will start with this defence as I consider that it is more likely to be applicable than a defence based on estoppel by convention which, for reasons set out in the next section, I consider to be clearly inapplicable.

31. I asked Mr Woolgar, during his oral submissions, to explain the precise representation or promise that the Defendants assert was made. The Defendants' position is that the Claimant promised or represented, by conduct, that for so long as the Defendants were seriously engaged, and working together with the Claimant, with a view to completing the works, the Claimant would not exercise its right to rescind under Clause 6.3.2 without first giving reasonable notice.

32. Consideration of whether a representation was given that was sufficiently clear and unambiguous has to start with the framework of the Agreement which dealt squarely with what was to happen if the Long Stop Date was missed. The undisputed effect of the Agreement was that, in this case, the Defendants had to continue with their obligation to use reasonable endeavours to complete the work within a reasonable timescale and the Claimant had a right to rescind (although it could not exercise that right after Practical Completion had been achieved). Therefore, the Agreement itself necessarily exposed the Defendants to the risk that, having missed the Long Stop Date, they would continue with the work only to find that they had nothing to show for those continued efforts because the Claimant opted to rescind before Practical Completion could be achieved. There was scope, under the Agreement, for a harsh outcome for the Defendants since, at least in theory, a notice of rescission could be delivered shortly before the works were due to be completed.

33. However, the Agreement was not just concerned to protect the position of the Defendants; the Claimant had interests to protect as well. It wanted to use the Property for its business and was required to incur material expenditure in contributions towards building work. When the Agreement was signed, the parties were working towards a Target Date of 13 September 2018. Therefore, once the Long Stop Date was reached, the Claimant's ability to use the Property had already been delayed by a year. The Agreement could, conceptually, have protected the Claimant against the risk of having to wait around indefinitely by making the Defendants subject to an absolute obligation to complete the works by the Long Stop Date with the Claimant acquiring a right to terminate the Agreement, and sue for damages, once that deadline was missed. But the Agreement did not follow that course. Instead, it recognised that, even if the Long Stop Date was missed, the Claimant might be content to hold on and hope that Practical Completion could be achieved, albeit late. That could well be in both parties' interests if despite the lateness, the Claimant still wanted the Property and the Defendants still wanted a tenant. Importantly, that flexibility was accompanied by certainty afforded to the Claimant as it could, at any time before a late completion of the works, exercise its right to rescind. The

Agreement did not offer similar certainty to the Defendants who would not know from one day to the next whether the Agreement was to be rescinded.

34. Accordingly, the Agreement set out a careful balance between the interests of both parties. Against that background, communications from the Claimant indicating that it hoped, or wished, to be able to take a lease of the Property would not be sufficiently clear and unambiguous to engage the doctrine of equitable forbearance. A defence based on equitable forbearance could only succeed if the Claimant made a clear and unambiguous representation that it was prepared to circumscribe the benefit of the carefully crafted protections that it enjoyed under the Agreement. For the reasons that follow, I consider that the Defendants have no realistic prospect of showing that such a sufficiently clear and unambiguous promise or representation was given.

35. First, no representation or promise was needed as an inducement on the Defendants to continue to work towards Practical Completion. Irrespective of what the Claimant said or did before exercising its rights under Clause 6.3.2, the Defendants remained subject to a contractual obligation to use reasonable endeavours to complete the works within a reasonable timescale. Moreover, the Agreement necessarily exposed the Defendants to the risk that their work would be rendered futile if a rescission notice was served. The Claimant would, therefore, obtain little benefit from making a representation or promise of the kind for which the Defendants argue. That on its own is a powerful reason why the Claimant's conduct should not be regarded as setting out such a clear and unambiguous representation.

36. Second, the representation for which the Defendants argue was potentially uncertain and vague in its effect. It is not clear what "reasonable notice" would be in the context of building works that had already significantly overrun. It is not clear how, at the margins, the concept of the Defendants' "serious engagement" in attempts to complete the works could be measured. By contrast, the Claimant's position under the Agreement was entirely clear. Particularly given that the Claimant would be getting little, if anything, in return for any representation, I do not consider that the Defendants have a realistic prospect of showing that the Claimant made an unambiguous representation that it would refrain from exercising its clear and certain rights under the Agreement and would, instead, circumscribe the exercise of those rights with conditions that were difficult to measure.

37. I am only reinforced in my conclusion by the letters from Fieldfisher, the Claimant's solicitors, to the Defendants' solicitors of 22 and 26 November 2019. The letter of 22 November said, in an early paragraph:

> *"Please note that this letter is written without prejudice to our client's right, pursuant to clause 6.3.2 of the Agreement, under which our client is entitled to elect, at any time and by service of notice in writing on your client, to rescind the Agreement…. Please note that our client's right to make such an election, and its remedies in this regard, and indeed in all respects, are fully reserved."*

38. That is entirely inconsistent with the representation for which the Defendants argue as it reinforces the Claimant's right to rescind at any time. I agree with the Defendants that the wider context of the letter was the Claimant's attempt to require the Defendants to call off the inspection scheduled for 27 November 2019 since the works were still a long way from being completed. However, I cannot accept their invitation to read the paragraph I have quoted as merely confirming that the right in Clause 6.3.2 had not been waived altogether, while preserving the effect of the suspension of that right that formed the subject matter of the Claimant's representation. That is completely at odds with the clear meaning of the words used.

39. If anything, the position is made clearer still in the letter from Fieldfisher of 26 November 2019. When that letter was written, it had become clear that the inspection on 27 November would be going ahead. Accordingly, Fieldfisher wrote to say that the Claimant and its representative would attend that inspection saying:

> *"As a result [of the inspection going ahead], and without prejudice to our client's rights and remedies under the Agreement (including our client's right to rescind the Agreement at any time), which remain fully reserved in all respects, please note that our client, accompanied by an independent surveyor, will attend tomorrow's meeting…"*

40. This letter therefore makes clear that the act of attending a meeting with representatives to discuss and consider the state of work on the Property is not to be taken as constraining the Claimant from exercising its rights under Clause 6.3.2 to any extent. That firmly rebuts the Defendants' argument that, by attending meetings such as this, the Claimant was nevertheless giving a clear and unambiguous representation that it would limit its right to rescind.

41. Nor do I accept that it is arguable that the Claimant's actions either before or after Fieldfisher's letters were so inconsistent with those letters as nevertheless to give rise to the representation. Mr Woolgar said, in his oral submissions, that the Claimant should be denied the benefit of such inconsistency. I reject that argument as there was no inconsistency. The Claimant's behaviour, of engaging with the Defendants and their agents regarding the progress of construction work, was entirely consistent with the Claimant hoping that work might be completed sufficiently soon for it to start using the Property while at the same time retaining its full freedom to rescind the Agreement at any time. That was the very flexibility that the Agreement provided to the Claimant. Since the Claimant's conduct was consistent with it retaining a right to rescind at any time, there is no realistic prospect of establishing that this conduct amounted to a clear and unambiguous representation that it would only exercise that right with reasonable notice, or once a condition related to an absence of "serious engagement" was fulfilled.

42. Since the Defendants have no realistic prospect of establishing a sufficiently clear and unambiguous representation, it follows that their defence based on equitable forbearance has no realistic prospect of success.

Estoppel by convention

43. An estoppel by convention can arise only where parties to a transaction share a common assumption as to a state of facts or law. On the basis of paragraph 64 of Carnwath LJ's judgment in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, that common assumption can be as to a future state of events.

44. Mr Woolgar's explanation of the "common assumption" was similar to that outlined at [31] above: the Claimant would not take steps to exercise rights under Clause 6.3.2, without giving reasonable notice, while the Defendants were seriously seeking to complete the works. The difficulty with that analysis is that it does not articulate any "common assumption". Rather, it amounts to an assertion that the Claimant gave an assurance as to a future course of action which is the province of equitable forbearance, rather than estoppel by convention.

45. In any event for the reasons I have discussed in my analysis of the "estoppel by convention" defence, I see no realistic prospect, on the evidence that has been served or that could reasonably be expected to be given at trial, of the Defendants establishing that there was any "common assumption" of the kind that Mr Woolgar articulated. The Claimant did not share that assumption as is demonstrated by the letters its solicitors wrote on 22 and 26 November 2019.

46. Nor do I consider that there is any realistic prospect of the Defendants establishing that any such common assumption came into existence after 26 November 2019. There is no suggestion that the Claimant gave any express confirmation that it shared a common understanding that any limits had been placed on its right to rescind. I will assume in the Defendants' favour that, after 26 November 2019, the Claimant was an enthusiastic and active participant in attempts to achieve Practical Completion. However, even on that assumption, I do not consider that there is a realistic prospect of the Defendants establishing that the Claimant "crossed a line" (to use the words of the Court of Appeal in *Tinkler*) so as to indicate assent to any assumption by the Defendants that the Claimant's right to rescind had been limited or deferred. As I have explained in the section above, participation in attempts to complete the works was entirely consistent with the Claimant retaining the full right to rescind at any time but, at the same time, hoping that Practical Completion could be achieved soon so that the Claimant would not need to exercise that right.

47. For the reasons I have given, neither defence put forward has any realistic prospect of success. I will grant summary judgment in favour of the Claimant on the issue of whether the Notice amounted to a valid exercise of the Claimant's rights under Clause 6.3.2 of the Agreement.