[2018 Gib LR 234]

BALBAN-DIABLE v. ALFREND SWANTEX SALES LIMITED, BAW HOLDINGS LIMITED and ANDRES HOLDINGS LIMITED

SUPREME COURT (Ramagge Prescott, J.): June 14th, 2018

Land Law—contract of sale—interpretation—where original sale of property included cellar, subsequent conveyance, based on original conveyance, also included cellar—unless specific exclusion, land with buildings and dwelling houses on it includes cellar beneath

The claimant sought, inter alia, a declaration that she was the owner of a cellar.

The property consisted of a residential dwelling situated on the ground and first floor of 1 Boschetti's Steps. Beneath the dwelling was a cellar, the footprint of which was smaller than the footprint of the property. The cellar was occupied by the first defendant, who claimed to be a tenant of the second and third defendants, and used as a store. The property backed onto another property comprising a ground floor commercial store ("the Benzimra store"). The cellar was accessed via the Benzimra store. The cellar and the Benzimra store were referred to as "the combined store."

On December 31st, 1989, the second and third defendants purchased 1 Boschetti's Steps. The indenture ("the original conveyance") conveyed the dwelling house on the ground and first floors as well as the cellar. The second schedule to the conveyance described the premises as "ALL THAT piece of ground with the dwelling house and buildings erected thereon known as 1 Boschetti's Steps Gibraltar . . ." Another indenture of December 31st, 1989 showed that the Benzimra store was also conveyed to the second and third defendants ("the Benzimra store conveyance"). The original conveyance had only three schedules and did not set out any covenants to be performed by the purchaser. The Benzimra store conveyance contained further schedules and a grant of easements together with a reference to the exception and reservation of rights related to a "store."

In 2004, a Mr. Benady purchased 1 Boschetti's Steps from the second and third defendants ("the Benady conveyance"). The Benady conveyance was drafted by Ms. Wink, a solicitor. The second schedule described the premises as "ALL THAT piece of ground with the dwelling house and buildings erected thereon known as No 1 Boschetti's Steps . . ." It referenced root of title to an indenture dated December 31st, 1989. Clause 1 of the indenture described the land conveyed as "ALL THAT the premises together with the easements rights and privileges set out in the Fifth Schedule to the Conveyance EXCEPTING AND RESERVING as set out in the Sixth Schedule . . ." There were, however, no fifth or sixth schedules to the conveyance.

In 2013, the claimant and her now husband purchased the property ("the Balban conveyance"). The Balban conveyance was drafted in materially the same terms as the Benady conveyance, save that it referenced its root of title to the Benady conveyance. As in the Benady conveyance, the Balban conveyance erroneously referred to the fifth and sixth schedules and to covenants undertaken by the purchaser.

The parties agreed that the original conveyance granted the second and third defendants both the cellar and the dwelling house above it, collectively described in the original conveyance as 1 Boschetti's Steps. The second and third defendants claimed that the Benady conveyance had the effect of conveying only the dwelling house and not the cellar to Mr. Benady. It was not in dispute that the Balban conveyance was intended to transfer to the claimant that which Mr. Benady had acquired by virtue of the Benady conveyance.

The claimant sought an order (i) that she was the rightful owner of the cellar; (ii) for delivery of vacant possession of the cellar; (iii) as against the second and third defendants, an account of rent received; and (iv) further or in the alternative an order for the payment of *mesne* profits for the use or occupation of the cellar. The first defendant denied that the claimant was the rightful owner. The second and third defendants sought a declaration that they were the rightful owners or, in the alternative, rectification of the relevant conveyance to exclude the cellar.

The claimant submitted, inter alia, that (a) references in the Benady conveyance to a conveyance of December 31st, 1989 were to the original conveyance and not the Benzimra store conveyance; and (b) the errors in the Benady conveyance were not ambiguities but had been included by mistake, and words in a deed or contract which were meaningless should be rejected and ignored. Rectification was not available to the defendants as she was a bona fide purchaser for value without notice.

The defendants identified various errors in the Benady conveyance which they claimed resulted in ambiguity, and submitted that the construction of the conveyance should be approached with caution and extrinsic evidence should be admitted. The defendants urged caution against precise reliance on plans, which were for identification purposes only. As the footprint of the cellar was significantly smaller than the footprint of 1

Boschetti's Steps, the property could never have been regarded as including anything below the ground and a conclusion that the Benady conveyance excluded the cellar would not be inconsistent with the plan. The use of the words "known as" in the second schedule to the original conveyance required extrinsic evidence to be admitted to identify the property so known. Relying on records from the Office of the Valuation Officer, the defendants submitted that 1 Boschetti's Steps had long been regarded as comprising only the dwelling house on the ground and first floors and not the cellar. The defendants submitted that in any event the Benady conveyance was contrary to the mutual intention of the parties in 2004 and should therefore be rectified to exclude the cellar.

Held, ruling as follows:

(1) On a balance of probabilities, when Ms. Wink drafted the Benady conveyance the property she had in mind as being sold pursuant to deed was 1 Boschetti's Steps and the conveyance she used as a template to prepare the draft was, erroneously, the Benzimra store conveyance. The erroneous description of the premises was changed from "Store" to "1 Boschetti's Steps," thus confirming that the premises under deed was 1 Boschetti's Steps, but neither side noticed the redundant references to the schedules and covenants which were not removed. The reference in the Benady conveyance to the conveyance of December 31st, 1989 was a reference to the original conveyance. In light of this finding and the consensus that the original conveyance transferred both the house and the cellar beneath it, the starting point was that, unless there was a compelling reason to show otherwise, what passed in the original conveyance passed in the Benady conveyance (paras. 27–28).

(2) The general rule was that extrinsic evidence was not admissible on the construction of a written contract; the parties' intention had to be ascertained from the words used. Where there was ambiguity, extrinsic evidence should be admitted so long as its value was probative. There was no ambiguity in the Benady conveyance. The errors were words erroneously left in the deed. The reason for their insertion was traceable to the use of the wrong indenture as a template. They had very obviously been transposed by mistake. They did not operate to exclude the cellar from the Benady conveyance; indeed, they did not operate at all. They referred to schedules and covenants which did not exist, they were in reality meaningless and should be ignored. Without them the Benady conveyance made perfect sense. The information contained in the conveyance was not unclear, the parcels were neither indefinite nor contradictory, and in fact the parcels clause was unequivocal. The errors did not amount to ambiguities and must be rejected as repugnant to the intention of the parties (paras. 31–37).

(3) The original conveyance and the Benady conveyance described the premises as "ALL THAT piece of ground with the dwelling house and buildings erected thereon . . ." The definition of those words was made

clear by the Conveyancing and Law of Property Act 1881, s.6(2) (applicable in Gibraltar by virtue of the English Law (Application) Act 1962), *i.e.* "a conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey . . . all . . . cellars . . ." It was apparent from the provisions of the statute and from a decision of the English Court of Appeal that, unless the contrary were specified, a piece of land with buildings and dwelling houses on it included any cellar beneath it. There was no such specific exclusion in the Benady conveyance. The starting point therefore had to be that the land conveyed as 1 Boschetti's Steps included the cellar (paras. 38–43).

(4) A plan could not of itself be determinative of the land conveyed. The court agreed with the claimant that the plan had necessarily to be read in conjunction with the parcels clause. In the present case given that there was only one plan, that plan should be read in conjunction with the parcels clause of the original conveyance and each subsequent conveyance. Given that the description of the premises matched in the original and subsequent conveyances, and the plan supported that description and correctly set out the footprint of the ground, the court agreed with the claimant that the use of the plan should not be limited in the manner suggested by the second and third defendants. Importantly, the description of the premises in all three conveyances was materially identical and it was the description of the premises taken together with the plan which enabled identification of the premises (paras. 48–49).

(5) The court distinguished case law which held that when a property was described as "the property known as" it was permissible and inevitable that recourse would be had to extrinsic evidence to identify the property. That case law involved boundary disputes and in such cases the importance of correctly defining words such as "known as" when delineating a plot could be immediately seen. This was not a boundary dispute case. The use of the words "known as" in the original conveyance was consistent in the Benady and Balban conveyances. In the original conveyance those words lent no confusion to the subject matter of the conveyance: the plot of ground was not only quite extensively described in the first and second schedules but was also clearly and accurately marked on the plan annexed to the original conveyance. The property did not call for identification. Though there might be a dispute as to whether the plot carried with it what was below, there was no dispute as to the boundary or identification of the piece of ground itself. Nothing therefore rested on the impact of the words "known as" and their inclusion did not justify the admission of and reliance on extrinsic evidence to identify the property (paras. 50–51).

(6) The records of the Valuation Officer did not support the defendants' case. For the purposes of establishing title it mattered not what the general perception might be. The conveyance superseded the Valuation Office records for the property. The three records of the Valuation Officer relied on by the defendants pre-dated 1989, when the cellar was in fact included

in the original conveyance, and were therefore largely irrelevant. The records had been created for the purposes of calculating the rates payable on the property, and the levelling of rates against an occupier was not a reflection of ownership. In addition, the premises were described as dwellings, which indicated that what was being valued for the payment of rates was the dwelling part of the building, which did not include cellars. The court concluded that the cellar passed with the original conveyance and that it also passed to Mr. Benady through the Benady conveyance and to the claimant through the Balban conveyance (paras. 52–53).

(7) The court had an equitable power to rectify a written instrument so as to make it accord with the true intention of the maker of the instrument. A party seeking rectification had to show that (i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (ii) there was an outward expression of accord; (iii) the intention continued at the time of the execution of the instrument sought to be rectified; and (iv) by mistake the instrument did not reflect the common intention. Rectification was not available in the case of a bona fide purchaser for value without notice. It was not in dispute that the claimant was a purchaser for value. There were three forms of notice to be considered: actual, constructive and implied. The claimant did not have actual notice in the present case. She was at all times prior to the purchase in ignorance as to the existence of the cellar. Constructive notice was the knowledge which the courts imputed to a person either from his knowing something which ought to have put him on further enquiry or from his wilfully abstaining from enquiry so as to avoid notice. Section 3 of the Conveyancing Act 1882 provided that a purchaser was deemed to have notice of any matter which would with reasonable diligence have been discovered by himself or his lawyer. Constructive notice entailed a duty of diligence to ensure that all usual and proper enquiries were made including the inspection of the property itself and enquiries regarding anything that appeared inconsistent in the title offered by the vendor. In the present case, the claimant had inspected the property but there was no visible clue from the exterior or interior of the property as to the presence of the cellar. Imputed notice of an equitable interest would arise if the claimant's agent (*i.e.* her solicitor) had either actual or constructive notice of it. It was clear from the evidence, however, that the references in the Balban conveyance to the fifth and sixth schedules which stemmed from the use of the Benzimra store conveyance did not operate in the mind of Ms. Wink to raise the possibility of the existence of a cellar. She was not aware of the presence of an error in drafting until the present proceedings arose and the errors were not obvious to her until now, and in the absence of that knowledge it was therefore difficult to see how Ms. Wink could have been expected to conduct enquiries. On the balance of probabilities, the claimant did not have actual, constructive or imputed notice of a prior existing right. In the circumstances, rectification was not available to the second and third defendants. The court found that the claimant was the true and rightful

owner of the premises at 1 Boschetti's Steps including, for the avoidance of doubt, the cellar (para. 54–55; paras. 57–63; paras. 65–66; paras. 70–72).

(8) The court found on a balance of probabilities that the first defendant was a tenant of the second and third defendants. The claimant was entitled to rent pro rata according to area from the date she became owner and to a full account of the rent paid by the first defendant as tenant from January 2013 to date (paras. 79–80).

Cases cited:

(1) *Alan Wibberley Building Ltd.* v. *Insley*, [1999] 1 W.L.R. 894; [1999] 2 All E.R. 897; (1999), 78 P. & C.R. 327; [1999] 2 E.G.L.R. 89, *dicta* of Lord Hoffmann referred to.

(2) *Ali* v. *Lane*, [2006] EWCA Civ 1532; [2007] 1 P. & C.R. 26; [2007] 1 E.G.L.R. 71, *dicta* of Carnwath, L.J. considered.

(3) *Barclays Bank plc* v. *O'Brien*, [1994] 1 A.C. 180; [1993] 3 W.L.R. 786; [1993] 4 All E.R. 417; [1994] 1 FLR 1; [1994] 1 F.C.R. 357; (1994), 26 H.L.R. 75, considered.

(4) *Brown* v. *Pretot*, [2011] EWCA Civ 1421; [2012] E.G.L.R. 15, *dicta* of Hooper, L.J. referred to.

(5) *Freeguard* v. *Rogers*, [1999] 1 W.L.R. 375, distinguished.

(6) *Grigsby* v. *Melville*, [1974] 1 W.L.R. 80; [1973] 3 All E.R. 455, followed.

(7) *Haycocks* v. *Neville*, [2007] EWCA Civ 78; [2007] 1 E.G.L.R. 78, *dictum* of Collins, L.J. referred to.

(8) *Hopgood* v. *Brown*, [1955] 1 W.L.R. 213; [1955] 1 All E.R. 550, considered.

(9) *L. Schuler A.G.* v. *Wickman Machine Tools Sales Ltd.*, [1974] A.C. 253; [1973] 2 W.L.R. 683; [1973] 2 All E.R. 39; [1973] Lloyd's Rep. 53, considered.

(10) *Neilson* v. *Poole* (1969), 20 P. & C.R. 909, *dicta* of Megarry, J. considered.

(11) *Nicolene Ltd.* v. *Simmonds*, [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 882; [1953] 1 Lloyd's Rep. 189, *dicta* of Denning, L.J. considered.

(12) *Parmar* v. *Upton*, [2015] EWCA Civ 795; [2015] 2 P. & C.R. 18, *dicta* of Briggs, L.J. referred to.

(13) *Racal Group Servs. Ltd.* v. *Ashmore*, [1995] STC 1151, referred to.

(14) *Smith* v. *Jones*, [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823, referred to.

(15) *Spall* v. *Owen* (1982), 44 P. & C.R. 36, distinguished.

(16) *Swainland Builders Ltd.* v. *Freehold Properties Ltd.*, [2002] EWCA Civ 560; [2002] 2 E.G.L.R. 71, followed.

(17) *Thomas Bates & Sons Ltd.* v. *Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505; [1981] 1 All E.R. 1077; (1981), 41 P. & C.R. 345, *dicta* of Brightman, L.J. considered.

Legislation construed:

Conveyancing and Law of Property Act 1881 (c.41), s.6(2): The relevant terms of this sub-section are set out at para. 37.

Conveyancing Act 1882 (c.39), s.3:

"(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

A. Serfaty, *Q.C.* and *D. Nagrani* for the claimant;
G.C. Stagnetto, *Q.C.* for the defendants.

1 **RAMAGGE PRESCOTT, J.:** This is an application by the claimant for a declaration that she is the true and rightful owner of a basement cellar or store ("the cellar") located under the building known as 1 Boschetti's Steps, Gibraltar, and that she has been the owner since January 29th, 2013. The claimant further seeks an order for delivery up of vacant possession of the cellar. As against the second and third defendants she seeks an account of the rent received. Further or in the alternative against the first defendant she seeks an order for the payment of *mesne* profits or compensation for the use and occupation of the cellar from January 29th, 2013 until such date as vacant possession is given to her. The cellar is currently in the occupation of the first defendant who claims to be a tenant of the second and third defendants. The first defendant denies that the claimant is the owner of the cellar and that she is entitled to possession. The second and third defendants claim a declaration that they are the true and rightful owners of the cellar and in the alternative they ask for rectification of the relevant conveyance to exclude the cellar from its ambit.

Background summary

2 1 Boschetti's Steps consists of a residential dwelling situate on the ground and first floor. Underneath 1 Boschetti's Steps is the cellar, the footprint of which is smaller than the footprint of the property. The property backs onto adjacent premises at No. 6 Benzimra's Alley. 6 Benzimra's Alley comprises of a ground floor commercial store and an underground water tank at 6/1 Benzimra's Alley ("the Benzimra store")

with residential accommodation situated above it ("6/2 Benzimra's Alley"). The cellar and the Benzimra store are referred to herein as "the combined store."

3 The Benzimra store is to the north of the combined store and is accessed via a door next to the residential entrance to 6/2 Benzimra's Alley. The cellar is to the south of the combined store and is accessed exclusively via the Benzimra store. The north and south sections of the combined store are connected by a passageway and toilet. Governor's Street rises towards the south from its junction with Benzimra's Alley to its junction with Boschetti's Steps, and Boschetti's Steps from its junction with Governor's Street ascends towards the Rock towards the east, so that the cellar lies beneath part of the dwelling at 1 Boschetti's Steps and yet is at the ground level of 6 Benzimra's Alley.

4 For the claimant said that because of the difference in levels between Boschetti's Steps and Benzimra's Alley there is no externally visible trace of the existence of the cellar underneath the residential part of No. 1 Boschetti's Steps from Boschetti's Steps, nor can such existence be discerned from Benzimra's Alley. For the defendants suggested that the existence of the cellar can be discerned from looking down from the terrace above 1 Boschetti's Steps. The second and third defendants have, by virtue of one or more companies beneficially owned by them or their shareholders, been in occupation of the combined store since at least January 1970.

5 Not in dispute that between 1932 and 1989 both 1 Boschetti's Steps and 6 Benzimra's Alley (including the combined store) were beneficially owned by trustees of the estate of Lewis Stagnetto ("the Stagnetto trustees").

6 In 1989 the second and third defendants purchased 1 Boschetti's Steps from the Stagnetto trustees. It is not in dispute that the indenture ("the original conveyance") conveyed to the second and third defendants the dwelling house on the ground and first floors of 1 Boschetti's Steps as well as the cellar which lay underneath part of the dwelling.

7 In 2004 Isaac Benady purchased 1 Boschetti's Steps from the second and third defendants ("the Benady conveyance"). It is disputed whether this purchase included the cellar.

8 In 2012 the claimant and her husband (fiancé at the time) were looking to purchase a freehold property which would serve as their family home. In October 2012 they viewed 1 Boschetti's Steps. In January 2013 the couple purchased the property from Isaac Benady placing it in the sole name of the claimant ("the Balban conveyance"). It is in dispute whether this purchase included the cellar.

9 In or around November 2014, the claimant and her husband engaged builders to commence a project of refurbishment on their residence and upon work commencing the builders discovered that there existed a cellar beneath the property. There are four conveyances which have an impact to a greater or lesser extent on the claim before me, for ease of reference it is useful to summarize them.

The original conveyance—December 31st, 1989

10 The original conveyance is dated December 31st, 1989, the parcels clause describes the land conveyed by the Stagnetto trustees to the second and third defendants as:

> "ALL THOSE the premises described in the second schedule hereto the situation whereof is shown on the plan annexed hereto and thereon delineated in red."

The second schedule describes the premises under sale as:

> "ALL THAT piece of ground with the dwelling house and buildings erected thereon known as 1 Boschetti's Steps Gibraltar for which the purpose of identification is coloured red on the plan annexed hereto being part of ALL THAT piece of ground with the dwelling house and buildings erected thereon situate lying and being on the South side of Benzimra's Alley and forming the North East corner of Governor's Street and measuring on the North side of the Alley one hundred and eighteen feet and three inches or thereabouts bounded on the East partly by premises formerly belonging to Isaac de Samuel Cohen and the representatives of the late Meshod de Shalom Benhaim and partly by premises formerly in the possession of Shalom Serruya on the South by Boschetti's lane and on the West by Governor's Street and containing in the whole Eight thousand and Seventy superficial feet or thereabouts according to the draft or plan of the said premises on the said Letters Patent drawn for the further explanation thereof and being R No 318 and R No 319 in the General Plan of the Garrison of Gibraltar."

11 This deed was registered in the Land Titles Register as Deed 21519 and in the Supreme Court Registry as Deed 1025 of 1990. The property was conveyed for a purchase price of £20,000.

The Benzimra's store conveyance—December 31st, 1989

12 The parcels clause of another indenture of December 31st, 1989, shows that the Stagnetto trustees conveyed to the second and third defendants:

"ALL THAT Store (hereinafter called 'the Store') more specifically described in the second schedule hereto including the water tank and being on the ground floor of Benzimra's Alley."

13 The second schedule describes the premises under sale as:

"ALL THAT Store situate on the ground floor of No 6 Benzimra's Alley Gibraltar for which the purpose of identification is delineated in red on the plan annexed hereto being part of ALL THAT piece of ground with the dwelling house and buildings erected thereon situate lying and being on the South side of Benzimra's Alley . . ."

14 This deed was registered at the Land Titles Register as Deed 21518 and in the Supreme Court Registry as Deed 1026 of 1990. The property was conveyed for a purchase price of £15,000. Not in dispute that the property conveyed was the Benzimra store.

The Benady conveyance—March 26th, 2004

15 The Benady conveyance transferred ownership of 1 Boschetti's Steps from the second and third defendants to Mr. Benady. It references root of title to an "Indenture dated the 31st December one thousand nine hundred and eighty nine" and refers to the fact that the vendors were the owners of "the premises described in the second schedule hereto (hereinafter called 'the premises') for an estate in fee simple in possession free from encumbrances . . ."

16 The second schedule describes the premises as:

"ALL THAT piece of ground with the dwelling house and buildings erected thereon known as No 1 Boschetti's Steps, Gibraltar and more particularly described in the Second Schedule to the Conveyance which for the purpose of identification only is coloured red on the plan annexed to the Conveyance."

17 Clause 1 of the indenture describes the land conveyed as:

"ALL THAT the premises together with the easements rights and privileges set out in the Fifth Schedule to the Conveyance EXCEPTING AND RESERVING as set out in the Sixth Schedule to the Conveyance TO HOLD the same unto and to the use of the Purchaser and his assigns in fee simple . . ."

18 By cl. 2 of the indenture the purchaser covenants with the vendors: "to observe and perform the covenants conditions and stipulations more particularly set out in the Conveyance."

The Balban conveyance—January 27th, 2013

19 The Balban conveyance transferred ownership of 1 Boschetti's Steps from Mr. Benady to the claimant. The Balban conveyance is drafted in

materially the same terms as the Benady conveyance, save that it references its root of title to the conveyance of March 26th, 2004, the Benady conveyance. As in the Benady conveyance, the Balban conveyance makes reference to the fifth and sixth schedules and to the covenants undertaken by the purchaser.

20 It is agreed by the parties that the original conveyance granted the second and third defendants both the cellar and the dwelling house above it, collectively described in the original conveyance as 1 Boschetti's Steps, but it is denied by the second and third defendants that the Benady and Balban conveyance effected a corresponding grant in favour of Mr. Benady and the claimant respectively. The position of the second and third defendants is that the Benady conveyance had the effect of conveying only the dwelling house and not the cellar to Mr. Benady. Submitted on their behalf that the Benady conveyance is intrinsically so ambiguous in its form as to make it necessary to adopt a commercial and purposive approach in its interpretation and to consider extrinsic evidence in order to be able to construe it. Not in dispute that the intention of the Balban conveyance was to transfer to the claimant that which Mr. Benady had acquired by virtue of the Benady conveyance. The material point before me therefore is the determination of the extent of the land conveyed to Benady in 2004.

Construction of the Benady conveyance

21 The Benady conveyance bases its construction upon a conveyance dated December 31st, 1989. There were two conveyances in 1989: the original conveyance and the Benzimra conveyance. It is not in dispute that the original conveyance has only three schedules and does not set out any covenants to be performed by the purchaser. Nor is it in dispute that the Benzimra store conveyance contains the grant of easements in its fifth schedule and covenants in its fourth schedule together with a reference to the exception and reservation of rights related to a "store."

22 At para. 19 of the defence and counterclaim of the second and third defendants it is contended that—

> ". . . references in the Benady Conveyance to the 'Conveyance' are seemingly to the Benzimra Conveyance, not the original Conveyance, despite the fact that it is the Original Conveyance which concerns the Flat."

Given that the description of the premises in the second schedule of the Benady conveyance—1 Boschetti's Steps—matches the description of the premises in the original conveyance, another interpretation is that the reference to the 1989 conveyance is to the original conveyance.

23 The evidence of Ms. Wink was that in 2004 Mr. Benady, who was a tenant at 1 Boschetti's Steps, was purchasing the freehold at "a knock down price." At the time Ms. Wink, who worked for Hassans, was representing Mr. Benady in the purchase, although before she took over Ms. Gillian Guzman, also of Hassans, had been acting for Mr. Benady. Later in 2012–13, Ms. Wink also acted for the claimant in her purchase of 1 Boschetti's Steps.

24 In 2004, TSN were the solicitors acting for the vendors, the second and third defendants. On September 29th, 2003, they sent to Hassans the following letter:

> "Dear Gillian
>
> Re: Moses Benedy—Boschettis' Steps, Gibraltar
>
> I refer to our previous correspondence in this matter and our subsequent telephone conversation.
>
> I confirm that I have now located the title Deeds to the property which were retained by the Vendors of the premises when they sold on to Baw Holdings Limited and Andres Holdings Limited. The title Deeds are in my possession, however due to their deteriorated state I would rather not try and make photocopies. I confirm that they are available for inspection.
>
> In the meantime I am pleased to enclose herewith copy of the last Deed of Conveyance. I look forward to receiving from you a draft Deed of Conveyance. In the meantime could you kindly confirm your client's agreement to the purchase in writing by return.
>
> Yours sincerely,
>
> Guy C Stagnetto"

25 Accepted by Mr. Stagnetto that the reference to "Moses Benedy" was erroneous and should have read Isaac Benady. That aside, evident that TSN sent Hassans "a copy of the last Deed of Conveyance," the presumption must be that it was one of the December 31st, 1989 conveyances. Then on December 16th, 2003 TSN wrote to Hassans on the following terms: "I am again pleased to enclose herewith a copy of the Conveyance dated the 31st December 1989 . . ." Once again we do not know if this was the original conveyance or the Benzimra store conveyance, it should have been the original conveyance, but the evidence suggests that by mistake it was the Benzimra store conveyance. On December 18th, 2003, Ms. Wink sent to TSN a draft deed of conveyance for their perusal and approval on behalf of the vendors. In her evidence, Ms. Wink confirmed that she had prepared a draft (the Benady conveyance) using as a template the copy of the conveyance sent to her by TSN. She then sent the draft back to TSN for approval. It is clear when one looks at that draft that it is based on the

Benzimra store conveyance, given that it replicates it almost identically. TSN amended that draft deed and sent it back to Hassans under cover of a letter of March 11th enclosing:

> "(1) draft Agreement for your perusal and approval on behalf of the purchaser
>
> (2) approved and amended Conveyance
>
> (3) Abstract by way of Epitome for your perusal and
>
> (4) copy of the Indenture dated 31/12/89 which I previously faxed to your offices"

The material amendments effected by TSN related to the description of the premises in the Second Schedule which initially read as:

> "ALL THAT Store forming part of the property and situate on the ground floor of No 6 Benzimra's Alley Gibraltar which store is for the purposes of identification delineated in red on the plan annexed to the Conveyance."

This was crossed out by TSN and substituted with the description of premises such as appears in the Benady conveyance, *i.e.* 1 Boschetti's Steps. TSN however made no amendments to the references in the draft to the fifth and sixth schedules or to easements and covenants *etc*.

26 The evidence of Ms. Wink was that the references in the Benady conveyance to the 1989 conveyance should be read as a reference to the original conveyance. She thought that when she prepared the Benady conveyance she was using the original conveyance from which to work, but accepted that the original conveyance only has three schedules whereas the Benzimra conveyance has six. She said that the reference in the Benady conveyance to the fifth and sixth schedules was an "obvious error" and that they remained in the deed because it passed her by. Ms. Wink gave evidence that her recollection of her understanding at the time was that Mr. Benady was purchasing a freehold so it should not have been subject to reservations.

27 The draft agreement referred to in TSN's letter of March 11th, 2004 recites a conveyance dated December 31st, 1989 and describes the property to be purchased in terms of the second schedule to the original conveyance.

28 I find on a balance of probabilities that when Ms. Wink drafted the Benady conveyance the property she had in mind as the one being sold pursuant to deed was 1 Boschetti's Steps and that the conveyance she used as a template to prepare a draft was erroneously the Benzimra's store conveyance provided to her by TSN solicitors for the vendors, which explains the reference in her draft to the fifth and sixth schedules and

covenants, and to the store as the description of the premises. Solicitors for the vendors spotted the erroneous description of the premises and changed it from the "Store" to 1 Boschetti's Steps, thus confirming that the premises under deed was 1 Boschetti's Steps, however neither they nor Ms. Wink spotted the redundant references to the schedules and covenants and consequently those stayed in. I find that the reference in the Benady conveyance to the conveyance of December 31st, 1989, is therefore a reference to the original conveyance.

29 In light of this finding and against the backdrop of the consensus that the original conveyance transferred both the house and the cellar beneath it, the starting point must be, that unless there is a compelling reason to show otherwise, what passed in the original conveyance passed in the Benady conveyance.

30 The second and third defendants identify various errors in the Benady conveyance and for the avoidance of doubt I set them out:

(i) That 1 Boschetti's Steps is conveyed together with easements set out in the fifth schedule to the conveyance except and reserving as set out in the sixth schedule—there are no fifth and sixth schedules in the Benady conveyance, there are only three.

(ii) That the purchaser covenants to perform the covenants set out in the conveyance—there are no covenants.

(iii) That the grant was "for an unencumbered fee simple in possession"—the third defendant was and is in occupation of the cellar.

31 The second and third defendants acknowledge the general rule as affirmed by Wilberforce, L.J. in *L. Schuler A.G.* v. *Wickman Machine Tools Sales Ltd.* (9) ([1974] A.C. at 261) that "extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained on legal principles of construction, from the words they have used." However they rely on the exception in relation to the construction of conveyances of land as explained in *Neilson* v. *Poole* (10) (20 P. & C.R. at 915) by Megarry, J.:

> "The prime function of a conveyance is to convey . . . The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were. Yet modern conveyances are all too often indefinite or contradictory in their parcels. In such circumstances, to reject any evidence afforded by what the common vendor has done in subsequent conveyances seems to me to require justification by some convincing ground of judicial policy; and I have heard none."

32 The point was reinforced by Carnwath, L.J. in *Ali* v. *Lane* (2) ([2007] 1 E.G.L.R. 71, at para. 36):

> "In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence being of probative value in determining what the parties intended."

33 Collins, L.J. in *Haycocks* v. *Neville* (7) ([2007] EWCA Civ 78, at para. 31) added the qualification that the admissibility of evidence of subsequent conduct was "subject always to that evidence being of probative value in determining what the parties intended."

34 The principle is clear: where there is ambiguity, extrinsic evidence should be admitted so long as its value is probative. Submitted on behalf of the second and third defendants that the errors in the Benady conveyance result in ambiguity and imprecision of drafting and because of this the construction of the Benady conveyance should be approached with caution favouring a commercial and purposive approach rather than a literal reading.

35 For the claimant submitted that the errors are not ambiguities but words which by the evidence of their author are errors which have been left in by mistake. The claimant relies on *Nicolene Ltd.* v. *Simmonds* (11) for the proposition that words in a deed or contract which are meaningless in context ought to be rejected and ignored. Denning, L.J. summarized the facts and the principle thus ([1953] 1 Q.B. at 550):

> "This case raises a short but important point which can be stated quite simply: the plaintiffs allege that there was a contract for the sale to them of 3,000 tons of steel reinforcing bars, and the seller broke his contract. When the buyers claimed damages the seller set up the defence that, owing to one of the sentences in the letters which constituted the contract, there was no contract at all. The material words are: 'We are in agreement that the usual conditions of acceptance apply.' There were no usual conditions of acceptance at all, so the words are meaningless. There is nothing to which they can apply. On that account it is said there never was a contract at all between the parties. In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all because the parties have not agreed on all the essential terms."

36 *Halsbury's Laws of England*, vol. 32, "Deeds and other instruments" para. 410, at 275 (2012) makes the point that:

> "Since an instrument is to be construed according to the intention of the parties as appearing from the whole of its contents, it follows that that intention must not be defeated by too strict an adherence to

> the actual words, and any corrections may be made which a perusal of the document show to be necessary. Thus wrong grammar and spelling may be corrected; words that are merely meaningless or that are repugnant, or that have obviously been left in by mistake , or that are immaterial and surplusage and even whole provisions may be rejected . . . Hence comes the rule that when the court can clearly collect from the language within the four corners of a deed , or other instrument in writing the real intention of the parties it is bound to give effect to it by supplying anything necessarily to be inferred from the terms used and by rejecting as superfluous whatever is repugnant to the intention so discerned."

37 I am of the view that these errors bring no ambiguity to the deed, the reason for their insertion is traceable to the use of the wrong indenture as a template; they have very obviously been transposed by mistake; they do not operate to exclude from the Benady conveyance the cellar; they do not operate at all. They refer to schedules and covenants which do not exist; they are in reality meaningless and should be ignored; without them the Benady conveyance makes perfect sense. The information contained in the conveyance is not unclear; the parcels are neither indefinite nor contradictory; in fact the parcels clause is quite unequivocal. The errors do not amount to ambiguities and must be rejected as repugnant to the intention of the parties. Against this background I move on to consider the material aspects of the deed.

"ALL THAT piece of ground"

38 The original conveyance and the Benady conveyance described "the premises" in their respective second schedules, the opening words in both those schedules read: "ALL THAT piece of ground with the dwelling house and buildings erected thereon . . ." The determination of the definition of these words is made clear by the Conveyancing and Law of Property Act 1881 (c.41), s.6(2) (applicable in Gibraltar by virtue of the English Law (Application) Act 1962):

> "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

39 Apparent from the provisions of the statute that a piece of land with buildings and dwelling houses upon it, includes a cellar beneath it. This view is reinforced by *Grigsby* v. *Melville* (6). It is helpful to reproduce the facts set out in the headnote ([1973] 3 All E.R. at 455–456):

> "Two adjoining properties, P and D, were both occupied by a butcher who used property P as his residence and property D as a shop for the purposes of his business. The properties, which fronted on to a street known as Church Hill, had separate entrances, but were interconnected by doors on the ground floor and an upper floor. On the ground floor of property D, behind a door, were steps leading down to a void or cellar beneath the sitting room of property P. The vertical plane of the ground line party wall boundary cut the flight of steps almost at the bottom treads. The cellar had stone retaining walls. There was no access passage from property P to the cellar but in the yard of property P was an aperture through the top of one of the retaining walls which provided the cellar with light and air and which enabled inspection of the cellar to be made from property P. The cellar had no independent roof or vaulting; it was covered only by the floorboards and joists of the sitting room of property P. The cellar contained a number of wooden uprights designed to support the floor of the sitting room. The butcher used to keep brine tubs in the cellar for salting beef and tongues. After the butcher's death the business ceased and the properties came into the hands of H who decided to sell them separately. He bricked up the interconnecting doors, other than the stairs to the cellar, and conveyed property P to the plaintiff's predecessor in title. The conveyance was expressed to be of 'ALL THAT dwellinghouse and premises situate on the west side of Church Hill . . . as the same is for the purpose of identification only more particularly delineated on the plan annexed hereto and thereon edged with pink . . .' The plan correctly delineated the boundaries of property P at ground level. He subsequently conveyed property D to the defendant's wife and the defendant thereafter began to store various articles in the cellar. In an action by the plaintiff for an injunction restraining the defendant from entering the cellar, the defendant claimed that in the conveyance of property P the words 'ALL THAT dwellinghouse and premises' were to be construed in relation to the observable facts on the ground which demonstrated that, at the date of the conveyance, the cellar was not part of the 'dwellinghouse' which was property P, but was rather part of property D and thus excepted from the conveyance."

40 The similarities between the facts of *Grigsby* v. *Melville* and the present case are self-evident particularly in relation to the footprint of the cellar being smaller than the property above it, inaccessibility to the cellar

from the interior of the property, and the use made of the cellar by the alleged non-owner.

41 Dismissing the appeal, James, L.J. made the point that ([1973] 3 All E.R. at 463):

> "It is a fundamental proposition that a conveyance of land includes, unless the conveyance is to be construed to the contrary, everything directly beneath the surface of the land conveyed and the space directly above: see *Mitchell v Mosley* and *Laybourn v Gridley* to which reference has been made in the judgments already delivered. There is nothing I can find in the conveyance which enables it to be construed as excluding that which lay beneath the surface conveyed."

Stamp, L.J. said (*ibid.*, at 460):

> "It is, however, axiomatic that a conveyance of land carries with it all that is beneath the surface and it is quite clear that the parcels in the conveyance, whether you regard only the verbal description 'ALL THAT dwellinghouse and premises', or whether you pay regard to the plan thereon, did convey the surface over the cellar. And be it ever so unlikely that Holroyd intended to include the cellar, it was not in terms excepted from the property conveyed. Read without regard to the surrounding circumstances, it could not in my judgment be doubted that the conveyance operated to convey all that was beneath the surface of what was admittedly conveyed."

42 Of interest that despite the fact that the description of the premises in *Grigsby* v. *Melville* (6) did not include a reference to the piece of ground upon which the dwelling house was situate, but only to "ALL THAT dwellinghouse and premises," the reference to "dwellinghouse" was, notwithstanding, held to include what lay beneath. The position is I think strengthened when the reference in a conveyance is to the actual piece of ground with the dwelling house erected upon it, as indeed it is in both the original and Benady conveyances.

43 The Court of Appeal was unanimously emphatic that unless the contrary is specified land which is the subject of a conveyance includes that which lies beneath. There is no such specific exclusion in the Benady conveyance, so that the starting point in light of the provisions of statute as well as their Lordships' rulings in *Grigsby* v. *Melville*, must necessarily be that the land conveyed as 1 Boschetti's Steps included the cellar.

44 The point is well illustrated by drawing a comparison with two other conveyances of neighbouring properties. The first is a conveyance dated December 31st, 1990 made between the Stagnetto trustees and Lionel Perez, Lilian Perez and Suyenne Sabina Suzanne Perez ("the Perez conveyance"). The second is a conveyance dated October 21st, 1993 made

between the Stagnetto trustees and Lorenzo Soiza and Matilda Patricia Astrid Soiza Herrera ("the Soiza conveyance"). The Perez conveyance relates to a maisonette situate at 6 Benzimra's Alley and specifically excludes from its grant a cellar lying beneath the property, which is in fact the "Store" itself, the subject of the Benzimra store conveyance. The specific exclusion of that cellar operates to remove it from the grant of the maisonette. By contrast the Soiza conveyance which relates to premises at 3 Boschetti's Steps transfers property described as: "ALL THAT piece of ground with the dwelling house and buildings erected thereon known as No 3 Boschetti's Steps." It is not in dispute that there was no specific exclusion of a cellar beneath the dwelling house at 3 Boschetti's Steps and that therefore this grant included the cellar underneath the ground at 3 Boschetti's Steps.

Relevance of plans

45 The description of the premises in the second schedule of the original conveyance is supported by a reference to a plan annexed to it, "for which the purpose of identification is coloured in red in the plan annexed." Not in dispute that the plan correctly delineates the property at ground level by the colour red and that it is the only plan. Also not in dispute that although the plan is referenced in the Benady conveyance it is not attached to it. The reference to the plan in the original conveyance differs from the reference to it in the Benady and Balban conveyances, in that in the latter two the plan is said to be for identification purposes "only." Counsel for the defendants urges caution against the imputing of precise reliance on plans stated to be for identification purposes only. Submitted for the second and third defendants that the addition of the word "only" in the Benady (and later Balban) conveyance is material; such a reference should not be considered to have been intended to control or prevail over any verbal description of the property conveyed in the Benady conveyance. Counsel submits that in the original conveyance the plan was not expressed to be for identification purpose only but rather the premises were stated to be as described in the schedule: "the situation whereof is shown on the plan annexed hereto and hereon delineated in red." It is submitted that the use of the language in the original conveyance is more prescriptive than in the Benady conveyance. Counsel relies on the judgment of Briggs, L.J. in *Parmar* v. *Upton* (12) ([2015] EWCA Civ 795, at para. 51):

> "It is hornbook law . . . that, where a conveyance refers to an attached plan for identification purposes only, it cannot be relied upon as delineating the precise boundaries. It does no more in that regard than the filed plan or General Map in registered conveyancing, namely indicate the general boundaries only."

And on the judgment of Lord Hoffmann in *Alan Wibberley Building Ltd.* v. *Insley* (1) ([1999] 1 W.L.R. at 896):

> "The parcels may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed."

And further the judgment of Hooper, L.J., who said in *Brown* v. *Pretot* (4) ([2011] EWCA Civ 1421, at para. 24):

> "An attached plan stated to be 'for the purposes of identification' does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land."

46 I do not ignore the fact that, whilst the plan accurately depicts the footprint of the dwelling situate at 1 Boschetti's Steps, the footprint of the cellar is significantly smaller, amounting to approximately half of the footprint of 1 Boschetti's Steps, with a second vault beneath the flat which is occupied by a third party neighbour. Mr. Stagnetto submits that because of this 1 Boschetti's Steps can never really have been regarded as including anything below the ground, and the plan annexed to the original conveyance cannot be determinative of the land conveyed in all respects, therefore a conclusion that the Benady conveyance excludes the cellar would not be a conclusion inconsistent with the plan. With respect to counsel, this argument is intrinsically flawed, first because the defendants have admitted that the original conveyance did in fact transfer the cellar beneath the dwelling at 1 Boschetti's Steps (albeit that the footprints were different) and secondly because a natural extension of that submission would mean that the owner of a property could only ever own a surface area beneath his property if it matched exactly the footprint of the property above it, and that cannot be right. In any event the point is addressed by the judgment of the Court of Appeal in *Grigsby* v. *Melville* (6), the cellar and property in question in that case were of different footprints and that did not defeat the passing of the cellar with a property above it of different size.

47 In *Hopgood* v. *Brown* (8), the relevance of the use in an original conveyance and in subsequent conveyances thereafter of the same and consistent descriptions of a property, together with reference to the same

plan, was made clear. I am cognizant that that case also dealt with a boundary dispute, but its relevance lies in the fact that the Court of Appeal found that a plot of land described in an original conveyance, which was described in materially the same way in successive conveyances, will pass undisturbed from one conveyance to another, so that the plot of land described in a conveyance in 1932 was the same plot of land which passed in 1952 via various conveyances. In addition the relevance of the plans attached to the conveyance was recognized, this is what Jenkins, L.J. had to say ([1955] All E.R. at 561–562):

> "One, therefore, starts with a conveyance, as I think, of a plot with a straight southern boundary between the points which I have mentioned. In every subsequent conveyance the same description in all material respects is used, and there is in each such conveyance a reference back to the same plan. It is true that the plan is referred to as being for the purpose of facilitating identification only and, therefore, cannot control the parcels in the body of any of the deeds. Nevertheless, the use of the same plan, I think, makes it clear beyond argument, having regard to the repetition of precisely the same dimensions, that what was conveyed on each occasion so far as the northern land was concerned, was precisely the same plot as was conveyed in 1932."

48 I am of the view that of itself a plan cannot be determinative of the land conveyed, and I agree with counsel for the claimant that the plan must necessarily be read in conjunction with the parcels clause. In this case given that there is only one plan, that plan should be read in conjunction with the parcels clause of the original conveyance and each subsequent conveyance. Materially the same formula is used with regard to the plan except for the word "only." Given that the description of the premises matches in the original and subsequent conveyances, and that the plan supports that description and correctly sets out the footprint of the ground, I agree with counsel for the claimant that the use of the plan should not be limited in the manner suggested by the second and third defendants. The plan sets out the boundary lines to the property, but those are not in dispute, this is not a case about boundary disputes, and therefore little rides on the addition of the word "only" in the Benady and Balban conveyances.

49 Importantly the description of the premises in all three conveyances is materially identical and it is the description of the premises taken together with the plan which enables identification of the premises. Consideration of the plan cannot be divorced from the conveyances it supports and viewed in isolation, and by itself, it cannot be relied upon to evidence title.

"Known as"

50 The second and third defendants make a submission in relation to the use of the words "known as" in the second schedule. That schedule opens with the words: "ALL THAT piece of ground with the dwelling house and buildings erected thereon . . ." and continues with the words: "known as No 1 Boschetti's Steps Gibraltar . . ." Counsel for the second and third defendants relies on the Court of Appeal case of *Freeguard* v. *Rogers* (5) ([1999] 1 W.L.R. at 381, *per* Gibson, L.J.), for the proposition that—

> ". . . when a property, the subject matter of a conveyancing document, is described as 'the property known as . . .' it is permissible, indeed inevitable, that recourse will be had to extrinsic evidence to identify the property so known. In *Spall v. Owen* (1981) 44 P. & C.R. 36, in which there was a description of a property as 'the property known as plot No. 1,' I said, at p.43, that such a description cried aloud for evidence of the surrounding circumstances. That dictum was quoted by the court of Appeal in the *Targett* case with approval."

51 *Spall* v. *Owen* (15) and *Freeguard* v. *Rogers* are necessarily distinguishable. Both were cases which concerned boundary disputes and one can immediately see the importance of correctly defining words such as "known as" when delineating a plot in a boundary dispute case. As I have said this is not such a case. The use of the words "known as" in the original conveyance is consistent in the Benady and Balban conveyances. In the original conveyance the words "known as" lend no confusion to the subject matter of the conveyance. The plot of ground is not only quite extensively described in the first and second schedules but is also clearly and accurately marked on the plan annexed to the original conveyance. The property does not call for identification. In the Benady (and Balban) conveyance the description of the premises is materially the same and the plan in support is the original plan annexed to the original conveyance. There may be a dispute as to whether that plot of ground carries with it what is below, but there is no dispute as to the boundary or identification of the piece of ground itself, nothing therefore rests on the impact of the words "known as" and their inclusion does not in my view justify the admission of and reliance on extrinsic evidence to "identify the property so known."

Relevance of records of the Valuation Officer

52 Submitted on behalf of the defendants that 1 Boschetti's Steps has long been regarded as comprising only the dwelling house to the exclusion of the cellar. They rely on records from the Office of the Valuation Officer in support:

(i) A record sheet from the Valuation Office dated 1923 in respect of 1 Boschetti's Steps which recorded the property as comprising of a ground and first floor.

(ii) A record sheet from the Valuation Office dated 1947 in respect of 1 Boschetti's Steps which recorded the property as comprising ground and first floor.

(iii) A record sheet from the Valuation Office dated 1960 in respect of 1 Boschetti's Steps which recorded the property as comprising ground and first floors.

Essentially what the defendants say is that these records strengthen their claim that the cellar was not included in 1 Boschetti's Steps, and at the very least it indicates a general perception that 1 Boschetti's Steps comprised the dwelling and not the cellar. There are with respect several flaws to that argument. In the first place it seems to me that for the purposes of establishing title it matters not what the general perception may or may not be, even if these reports and indeed entries in the Land Titles Register are referenced together with occupation through time, it is the conveyance which supersedes such records and references title. Secondly in 1989 (by virtue of the original conveyance) the cellar was in fact included with 1 Boschetti's Steps, so any references prior to 1989 (in the valuation or other records) to its being excluded or absent are largely irrelevant, because the fact of the matter is that as at 1989 the cellar was included by virtue of deed in 1 Boschetti's Steps. Thirdly, the three record sheets relied upon by the defendants were, it is not disputed, created for the purpose of calculating the rates payable. Mr. John Baw who is a director of the second defendant but also a Director of Land Property Services confirmed that although the landlord is ultimately liable for the payment of rates, it is primarily the occupier who pays rates and each occupier is rated separately in respect of the occupation which they enjoy. He confirmed that the levelling of rates against an occupier is not a reflection of ownership. Fourthly in all three sheets the information contained under the heading "Description of Premises" is "Dwellings." It seems to me that this indicates that what was being valued for the payment of rates was the dwelling part of the building. Cellars may have been a part of the building but they were not dwellings and so were rated separately. This view is reinforced by the fact that on all three sheets as well as a reference to 1 Boschetti's Steps there is a reference to 3 Boschetti's Steps. The description of 3 Boschetti's Steps for the three years in question is:

(i) 1923 Ground and first floor,

(ii) 1947 Ground, first and second floors,

(iii) 1960 Ground, first and second floors,

with no mention of the cellar beneath it. Not in dispute that pursuant to the Soiza conveyance the property at 3 Boschetti's Steps included the cellar beneath it, and I do not think it is being suggested that absence of a reference to a cellar in the valuation report means that it should be excluded from the Soiza conveyance. The records of the Valuation Officer therefore do not in my view support the defendants' case.

53 For these reasons I conclude that the cellar passed with the original conveyance and that it also passed to Mr. Benady through the Benady conveyance and to the claimant through the Balban conveyance.

Rectification

54 Said for the second and third defendants that in any event the Benady conveyance was contrary to the mutual intention of the parties in 2004 and that it failed to give effect to the true and actual agreement between the parties. It should therefore be rectified to exclude from its scope the cellar so as to give effect to the parties' true and common intention.

The law

55 The basic principle of rectification was recognized by Gibson, L.J. in *Racal Group Servs. Ltd.* v. *Ashmore* (13) ([1995] STC at 1154):

> "Equity has power to rectify a written instrument to make it accord with the true intention of the maker of that instrument . . . As it is put in *Snell's Principles of Equity* (29th edn, 1990) p 626: 'What is rectified is not a mistake in the transaction itself but a mistake in the way in which that transaction has been expressed in writing.'"

56 The Court of Appeal in *Swainland Builders Ltd.* v. *Freehold Properties Ltd.* (16) set out the conditions to be satisfied in order for the court to order rectification in a case where there has been a mistake common to the parties so as to give effect to their common intention. Gibson, L.J. stated that the party seeking rectification had to show that ([2002] EWCA Civ 560, at para. 33)—

> "(1) the parties had a common continuing intention, whether or not amounting to an agreement in respect of a particular matter in the instrument to be rectified;
>
> (2) there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake the instrument did not reflect the common intention."

Gibson, L.J. went on to add to those conditions (*ibid.*, at para. 34):

> "I would add the following points derived from the authorities:

(1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities.

'But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself': *Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at page 521 per Brightman LJ.

(2) Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained: *Cooperative Insurance Society Ltd v Centremoor Ltd* [1983] 2 EGLR 52 at page 54, per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed.

(3) The fact that a party intends a particular form of words in the mistaken belief that it is achieving his intention does not prevent the court giving effect to the true common intention: see *Centremoor* at page 55 A–B and *Re Butlin's Settlement Trusts* [1976] Ch 251."

57 In *Thomas Bates & Sons Ltd.* v. *Wyndham's (Lingerie) Ltd.* (17), Brightman, L.J. expanded upon the need for "convincing proof" ([1981] 1 W.L.R. at 521):

"It is not I think the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties."

58 Counsel for the claimant takes no issue with the principle that rectification is a remedy available in certain circumstances but he submits that rectification is not an available option in the case of a bona fide purchaser for value without notice. Mr. Serfaty draws my attention to *Halsbury's Laws of England*, vol. 77, "Effect of third party rights," para. 38, at 31–32 (2016), for the proposition that:

"The court will not intervene to set aside a transaction or to rectify a document on the ground of mistake as against a third party who has become a purchaser for value of a legal estate or interest without notice."

And prays in aid the case of *Smith* v. *Jones* (14). The parties appear to be agreed on this principle, Mr. Stagnetto points out that Gibraltar has no system of registered land and no general statutory scheme governing the

priorities and enforceability of legal and equitable interests against purchasers of land, therefore the position remains that which applied to unregistered land in England, that a bona fide purchaser for value without notice will take free from any other equitable interest in the property including a right to have a conveyance rectified. Logic would dictate that the first question to be determined is whether the claimant was a bona fide purchaser for value without notice, because it is only if she is not that the issue of the common continuing intention of the parties falls to be determined in the context of rectification.

Bona fide purchaser for value without notice

59 It is not in dispute that the claimant was a purchaser for value. Not in dispute that there are three forms of notice which fall to be considered; actual, constructive and imputed notice of someone else's title to the cellar.

Actual notice

60 For the first and second defendants said that the entry of the description of the premises at the Land Registry in respect of the Benady conveyance put the claimant on actual notice that she was acquiring a dwelling situated on the ground and first floor of 1 Boschetti's Steps. The entry reads:

> "Address: Boschetti's Steps 1—Dwelling
>
> Grantor: Baw Holdings & Another
>
> Grantee: Isaac Benady
>
> Deed Details: Baw Holdings Limited and Andres Holdings Limited as beneficial owners convey unto the Grantee the dwelling situate on the ground and first floors at 1 Boschetti's Steps and being part of F.P.Nos 330 332 and 333 in fee simple.
>
> Warning: The above is produced for information only and should not therefore be construed to guarantee title."

61 Whilst the second and third defendants accept that by itself the entry in the Land Registry is not sufficient to define title, they submit that it does serve to put her on notice that the acquisition was only in respect of ground and first floor premises and nothing more. The claimant's evidence is in fact that she thought she was acquiring a dwelling on the ground and first floor, she said she was at all times prior to purchase in ignorance as to the existence of the cellar. It seems to me that the entry in the Land Titles Register was consistent with her belief and would only have served to confirm it. If the claimant did not know of the existence of the cellar, or of a prior claim over it, I fail to understand how the entry in the Land Titles

Register could have even begun to displace her of that belief, quite the contrary, it would, I think, merely serve to confirm what the claimant says she thought she was purchasing.

62 In any event, searches requested from the Land Titles Registry come with a footnote warning that the entries are not a guarantee of title. Mr. Serfaty in his skeletons helpfully sets out the history behind the registration of deeds thus:

> "In 1989 when the Original Conveyance was granted and registered the Land (Titles) Order of 1888 (*Auth no. 3*) was in force under which all deeds and wills relating to land *required* to be registered in the Registry of the Supreme Court of Gibraltar. In the case of deeds, every deed had to be submitted for 'Governor's Approval'—see Section 4 of the Land (Title) Order 1888 (*Auth no. 3*). The purpose of such Governor's Approval was to ensure that only persons qualified under the Order became the owners of lane [*sic*] in Gibraltar. A redacted form of application for Governor's Approval (*TB No. 78*) shows what information was required to be submitted. Originally, only persons who were natural born British subjects could hold land. As is clear from Section 2a. of the 1888 Order as a consequence of Britain joining the Common Market the right or ability to hold land was extended to nationals of members states of the European Economic Community in certain circumstances and to companies incorporated under the law of such a state. The Original Conveyance (*TB no. 15*) contains such a memorandum of approval of the Governor. There was no 'Land Registry' as such and the records manually maintained were run by the Crown Lands Department to which application was made for Governor's Approval. Even now the system of conveyancing in Gibraltar is essentially that which operated in the United Kingdom pre-1925—*i.e.* unregistered land.
>
> The Gibraltar Land Titles Act 1990 (No. 33 of 1990) (*Auth no. 4*) replaced the Land (Titles) Order and, while maintaining the need to register deeds and wills in the Supreme Court Registry (Section 3 of 1990 Act) substituted 'registration' in the Land Titles Registry for the former Governor's approval, as provided for in Section 3(4)(b) of the 1990 Act. It follows, therefore, that the entries in the manually maintained registers at Crown Lands were never intended to be a register of title but simply to record that particular transaction had received the Governor's Approval without which it could not be *registered* in the Registry of the Supreme Court."

I agree with Mr. Serfaty that entries in the Land Register cannot prevail over the actual content of a deed, and in the circumstances I am satisfied that such entries cannot fix a purchaser with notice of adverse interests.

Constructive notice

63 Not in dispute that "notice" extends beyond actual notice to include constructive notice. *Halsbury's Laws of England*, vol. 47, para. 135, at 120 (5th ed.) has this to say on the subject of constructive notice:

> "A purchaser of land without actual knowledge by himself or his agent of a matter prejudicially affecting his vendor's title may yet be regarded as having constructive notice of it.
>
> Constructive notice has been defined as the knowledge which the courts impute to a person upon a presumption of the existence of the knowledge so strong that it cannot be allowed to be rebutted either from his knowing something which ought to have put him upon further enquiry or from his wilfully abstaining from inquiry to avoid notice."

64 Further light is shed on the doctrine of constructive notice by s.3 of the Conveyancing Act 1882 which provides that a purchaser is deemed to have notice of any matter which would with reasonable diligence have been discovered by himself or his lawyer. Browne-Wilkinson, L.J. in *Barclays Bank plc* v. *O'Brien* (3) ([1994] 1 A.C. at 195–196) made it clear that a purchaser's duties include inspection of the land and enquiries with regard to title:

> "The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on enquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."

65 Not in dispute that constructive notice entails a duty of diligence to ensure that all usual and proper enquiries are made including the inspection of the land itself and enquiries regarding anything that appears inconsistent in the title offered by the vendor. Further not in dispute that should the purchaser fail to take those steps he is deemed to have constructive notice of that which would have been apparent to him had he conducted the proper enquiries.

66 Submitted for the second and third defendants that there are various reasons pointing to the fact that the claimant was on constructive notice of another person's claim to the title of the cellar.

Occupation of the cellar

(i) The first defendant was in possession of the cellar in 2004 at the time of the Benady conveyance and indeed continued to be so in 2013 at the time of the Balban conveyance. This is not in dispute but physical possession by a purported tenant of the illusive cellar does little in my view to strengthen the case for the second and third defendants. There is no access from the residential premises to the cellar, the entrance to the cellar is a street away in Benzimra's Alley, there is no visible clue from the exterior or interior of the property as to the presence of a cellar. Its occupation therefore might be relevant to tenancy rights of its occupant, but not to a claim on title and certainly not from the point of view of fixing the claimant with notice.

Physical composition of the building

(ii) Said that the very composition of the building and the surrounding buildings called for further enquiry. Quoting from Mr. Stagnetto's skeletons:

> "The door to the flat is located at Boschetti's Steps which in itself rises steeply from Governor's Street. From the corner of Boschetti's Steps and Governor's Street the road falls away as one walks north towards Benzimra's Alley. Benzimra's Alley again rises steeply to the east. The difference in ground levels all around the block are such as to at the very least put a reasonable purchaser and those advising her on notice of a potential horizontal misalignment of the properties comprised in the block . . ."

I do not think the rise of a building up the hill upon which it is built creates the assumption that there must be a hollow under that building in the form of a habitable cellar, any more than a building lying at a 90 degree angle to the ground would create the converse assumption, that there would be no cellar beneath it. The claimant and her husband gave evidence that they inspected the outside of the property, they walked around the building and they went up to the top of the building and looked down. There was no externally visible trace of the existence of the cellar underneath the residence at 1 Boschetti's Steps and there has been no evidence that such existence could be discerned from Benzimra's Alley. In fact the evidence of Mr. Benady was that he lived in the residential property for approximately 66 years in complete ignorance that there was a cellar beneath the property. In fact he was only alerted to its presence in 1996 when the late Albert Baw told him about the cellar. So that its presence cannot have been obvious from the physical composition of the building. It seems to me the layout and composition of the building did the opposite to what is suggested, it quite neatly and effectively kept its

subterranean aspect hidden, offering no clues which would have alerted to its presence.

Survey and enquiry

(iii) The claimant commissioned a RICS (Royal Institute of Chartered Surveyors) Home Buyer Report from Richard Buckley of M.J. (Gibraltar) Ltd. which was completed on November 15th, 2012. The report appears comprehensive and runs into 27 pages. For the second and third defendants said that the surveyor's comments at p.17 of the report put the claimant on notice that further enquiries were called for and given that she conducted no further enquiries she is fixed with constructive notice of the existence and occupation by others of the cellar. Useful to set out the relevant paragraph:

> "It is understood that the property connects to mains sewer via a system of below ground drainage. It is believed that this extends to the front of the property and beneath the house connecting to a main manhole. The cover to this chamber could not be lifted for inspection purposes. This run off underground appears to run across the front of the property of all the surrounding properties in the terrace where a final change of direction occurs. We were unable to confirm this with any certainty and it is recommended that you contact the local mains sewer statutory authority to confirm the exact layout of the underground drainage system."

The surveyor's comments are under the heading "Drainage." The run-off of underground drainage was thought to run across the front of all the properties in the terrace. Evident from the detail given that the surveyor had a fairly good idea of the layout of the sewer system, the suggestion of further enquiry arose not from any concerns which had come to light as a result of his investigation, but from his suggestion that further enquiry would be necessary if the purchaser wanted to confirm the sewer layout as he believed it to be. There were no problems or suspected problems flagged by the surveyor in relation to drainage, his position was simply that if it were desired to establish the exact layout of the sewer system, the assistance of the sewer statutory authority would need to be sought. In light of this I am of the view that it was perfectly proper for the claimant upon consideration of the report to have come to the decision that further enquiry was not necessary. No potential problematic issues had been identified, and therefore the added expense of further enquiry was neither justified nor necessary. That said, the evidence of Mr. Diable, the husband of the claimant, was that whilst he did not himself approach the statutory authority he did raise the issue with his brother-in-law, who worked for the statutory authority AquaGib and he reassured Mr. Diable that there were no issues with the drainage. The surveyor having highlighted no issue, the

claimant and her husband took the matter no further. At p.6 of the report the overall opinion of the surveyor in relation to the property states:

> "We can advise you that in our opinion this property is on the whole in a poor condition. We found evidence of severe damp. Possible asbestos roofing and poor internal fixtures and fittings. A complete internal and external renovation is required to ensure the property complies with modern standards."

There was concern about damp, about asbestos, about poor fixtures and fittings but there was no concern expressed about drainage. The principle of constructive notice makes it incumbent upon a purchaser to follow enquiries in relation to the "possible existence of the rights of another." I do not think that important obligation fixes upon a purchaser the need to make *ad nauseaum* enquiries which have no ostensible nexus to the another's potential rights. Further said for the second and third defendants that:

> "The Claimant's Solicitors were advised by Mr Ian Farrell of Hassans, solicitors for Mr Benady, by an email dated 13 December 2012 (*TB no. 26*) that there was potential concern regarding drainage and related underground services which should be referred to a surveyor. In response to Section 4.3.2 of the 'Preliminary Enquiries before Contract' document by which it was requested that the vendor supply a plan showing the routes of the aforesaid services Mr Farrell stated,
>
> > 'N/A although presumably you can liaise with the relevant Government authority.'
>
> The evidence for all 3 of the Claimant's witnesses was that no further enquiries were deemed necessary.
>
> A surveyor was appointed and himself advised an enquiry should be made of the relevant Gibraltar authorities."

In fact the surveyors' report which I have dealt with above predates Ian Farrell's letter of December 3rd, so the request at 4.3.2 in the preliminary enquires before contract was, as I see it, a routine request to establish whether the vendor already had in his possession plans showing drainage routes. So far as I can see from the letter, Mr. Farrell did not advise that there was "potential concern regarding drainage," he merely answered "N/A" to the request for plans, and suggested the purchasers could liaise with the local authority. To my mind that is very different from, and does not translate to, Mr. Farrell raising any concerns which required action from the purchasers. Having examined the property internally and externally the report at p.10 states: "The property has the benefit of a roof terrace along with a rear yard area. There are no other facilities contained within the property."

Interesting to note that the possibility of there being a cellar is absent from the report, as is any clue, concern or indication which could suggest or point to the existence of a cellar beneath the property. For the second and third defendants said that the presence of the cellar was detectable from the roof terrace. The evidence of both the claimant and Mr. Diable was that they walked round the property, and were not alerted to the possible presence of a cellar. They went up to the roof and looked down and saw some corrugated plastic sheeting below (where we know to be above the cellar). The claimant's evidence was that this did not alert her to the fact that there might be a cellar underneath, she assumed it was the roofing to one of the gardens. Mr. Diable said it looked as if the corrugated sheeting was part of a garden. The surveyor himself at p.10 of his report specifically mentions the roof terrace in the same paragraph as he says "there are no other facilities contained within the property." It is unreasonable to suppose in the circumstances that the view from the roof terrace would have alerted to the presence of a cellar. Said for the second and third defendants that the surveyor's comments at page 19 under the heading "Risks" put the claimant on notice that further enquiries were needed, and that the claimant conducted no such enquiries. The paragraph reads:

> "The property is not known to be in an area affected by flooding or subsidence risk. It is recommended that you make reference to the local Authority to obtain information on relevant issues relating to the property i.e. susceptibility to flooding subsidence risk etc . . ."

The starting point is the comment that the area is not known for flooding or subsidence risk, and it is against that background that the claimant assesses what further steps to take. Mr. Diable's evidence was that in light of the surveyor's comments and given that the property was "pitched" on the steps he could not see any issue with flooding and therefore enquired no further. Again this conclusion seems justified to me, the recommendation to make reference to the local authority was by use of the abbreviation *i.e.* confined to the property's susceptibility to flooding and consequent subsistence. The claimant's assessment that that was not a problem is in the circumstances reasonably held.

Imputed notice

67 Not in dispute that a purchaser is deemed to have notice of an equitable interest if her agent, in this case her solicitor, has either actual or constructive notice of it.

68 In his skeleton Mr. Stagnetto makes the following point in relation to the evidence given by Ms. Colleen Wink in respect of the "erroneous language" used in the Benady conveyance and the Balban conveyance.

> "She confirmed the references were an error which must have passed her by. She also gave evidence that the references must have related

to the conveyance of the Benzimra Store and the flying freehold arrangements related thereto. Again it is submitted that had reasonable enquiries been made to get to the bottom of these obvious errors in the ownership and occupation of the seller [*sic*] by the Defendants would have been identified."

69 Ms. Wink's evidence-in-chief was that:

"Having reviewed my file on the conveyance to the Claimant I have not come across any disclosure by or on behalf of Mr Benady, the vendor or Mr Farrell, his solicitor, or any third party of the fact that there was a cellar beneath the property which was not part of the property to be sold nor do I recall the same ever having been raised verbally between my former colleague Mr Ian Farrell of Hassans who was representing Mr Benady and myself (then also with Hassans).

I have also reviewed the disclosure made by the Defendants in this action relating to the 2004 conveyance in favour of Mr Benady in which I acted for Mr Benady, now produced and marked by me '*CW2*'. I also do not recall ever being informed by the vendors at the time, Baw Holdings Limited and Andres Holdings Limited, or their solicitors in that transaction, Messrs Triay Stagnetto Neish, that there was a cellar beneath the property which was not to be included in the sale to Mr Benady. There is also no such indication in the correspondence disclosed."

70 In cross-examination, Ms. Wink stated that the reference in the Balban conveyance to the fifth and sixth schedules was an obvious error (see para. 25 *ante*). Ms. Wink stated in evidence that there was no doubt in her mind that the grant of the premises in the Balban conveyance was the physical property described in the first schedule, references to the fifth and sixth schedule were a drafting error which "passed her by."

71 It is clear from the evidence that the references to the fifth and sixth schedules which stemmed from the use of the Benzimra store conveyance did not operate in the mind of Ms. Wink to raise the possibility of the existence of a cellar. Ms. Wink was not aware of the presence of an error in drafting until these proceedings arose, the errors were not obvious to her until now, so in the absence of that knowledge it is difficult to see how she could have been expected to conduct enquires.

72 The original conveyance it is agreed transferred the premises 1 Boschetti's Steps as well as the cellar. I have concluded that by operation of law the Benady conveyance also transferred the cellar. Although the second and third defendants and Mr. Benady say that the intention in 2004 was that the cellar should have been excluded from the sale, there is no evidence of any correspondence between TSN (solicitors for the second

and third defendants in 2004) and Ms. Wink (solicitor for Benady in 2004) which relates to the inclusion or exclusion of the cellar, in fact I can find no reference to the cellar at all in any of the correspondence which has been placed before me. At the time of the Benady conveyance there is silence on the subject of the cellar. The evidence of Mr. John Baw, a director of the defendant, was that he did not think he saw a draft conveyance in 2004, and whilst the sale of 1 Boschetti's Steps was discussed in his presence at Board level he was not involved in instructing lawyers.

73 The claimant bears the burden of proof to establish that she did not have notice in any form of a prior existing right. Having considered the matter with care I am of the view that she has established on a balance of probabilities that she had neither actual, constructive nor imputed notice of a prior existing right.

74 In the circumstances rectification is not an avenue open to the second and third defendants and, as a consequence, I do not need to deal with the issue of common continuing intention, estoppel or *laches*.

75 I find for the reasons given that the claimant is the true and rightful owner of the premises at 1 Boschetti's Steps including, for the avoidance of doubt, the cellar.

Tenancy

76 In addition to the above declaration the claimant seeks as against the first defendant an order for delivery up of vacant possession of the cellar and an order for the payment of *mesne* profits or compensation for use and occupation of the cellar from January 29th, 2013 until such date as vacant possession is given to the claimant, and as against the second and third defendants an account of rent received.

77 Not in dispute that the first defendant occupies the cellar as a store room for its business and has done so since 1980 or even before. It is the first defendant's case that he is a tenant of the second and third defendants. It is the claimant's case that no tenancy existed and that therefore the first defendant was a mere licensee.

78 Mr. Paul Baw is a director of the first defendant and his evidence was that:

> "Since prior to 2013 when the Claimant in these proceedings purchased the property and 1 Boschetti's Steps I can confirm that the rent paid in respect of the entire store has been £800 per month. The rent is paid 50% to Baw Holdings and 50% to Andres Holdings.
>
> Baw Holdings is a company beneficially owned by my mother my brother and I following the death of my father in 1996. Andres

> Holdings is officially owned by Rose Andres. In the circumstance because of the close relationship between Alfred Swantex and the Landlords it is fair to say that the rent is not necessarily paid on the same day every month and on a monthly basis. It is paid sometimes in arrears and sometimes in cash but I can confirm that a rental of £800 per month is paid by Alfred Swantex sales. The payments are recorded in the management accounts of Alfred Swantex and can be verified by reference to its annual accounts."

79 Mr. Baw produced a cash account spreadsheet for the period July 2014–June 2015 and July 2015–June 2016 showing all payments made by the first defendant in respect of various matters ranging from staff expenses, stationery and cleaning to rents, salaries and travel. These cash accounts showed that the total rent paid for the year July 2014–June 2015 was £4,400 out of an annual rent of £9,600. In the following year the total paid for the period July 2015 to June 2016 was £5,600 out of the total annual rent of £9,600. When challenged about the lack of accounts for previous years Mr. Baw stated: "if you check our accounts you'll see we've paid rent before." Not in dispute that the company accounts have not been produced. That said, Mr. Paul Baw (on behalf of the first defendant) has given evidence that there was tenancy in existence between the first defendant and the second and third defendants. Mr. John Baw (on behalf of the second defendant) has similarly given evidence that there is a tenancy. The evidence is that because of the close relationship between the defendants (the director of the first defendant Paul Baw is the brother of the director of the second defendant John Baw) the rental payments were sometimes made in cash and did not have to be paid promptly each month. The first defendant it appears has exclusive possession of the cellar and pays the rates, as a tenant would be expected so to pay. I agree with Mr. Stagnetto that any forbearance by a landlord in the payment of rent or any irregularity in payments does not of itself convert a tenancy into a licence. On a balance of probabilities I think the scales tip marginally in favour of the first defendant being a tenant and I so find.

80 The claimant submits that upon such a finding she would be entitled to rent *pro rata* according to area from the date she became the owner and to a full account of the rent paid by the tenant from January 2013 to date. That must be right. Orders accordingly and I shall hear the parties as to costs.

Orders accordingly.