IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Before:

Mr M H Rosen QC sitting as a deputy High Court judge

Claim No HC- 2015-004402

BETWEEN:

MYCK DJURBERG
(trading as HAMPTON RIVIERA) **Claimant**
- and -
(1) OLIVER SMALL
(2) JENNIFER SMALL **Defendants**

Claim No HC- 2015-003785

AND BETWEEN:

(1) FIONA JOHNSTONE
(2) LOUIS SYDNEY **Claimants**
- and -
MYCK DJURBERG
(trading as HAMPTON RIVIERA) **Defendant**

Mr Steven Thompson QC (instructed by **Bivonas Laws**) for Myck Djurberg

Mr Adam Rosenthal (instructed by **IBB Solicitors**) for

Oliver & Jennifer Small and Fiona Johnstone & Louis Sydney

Hearing dates: 11-23 May 2017 Date of Judgment: 1 September 2017

JUDGMENT

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(1) Introduction

1. The Hampton Riviera boatyard and marina is located on the northern bank of the River Thames, not far from Hampton Court Palace in the non-tidal stretch above Teddington Lock. Mr Myck Djurberg, the Claimant in the first action and Defendant in the second, owns and manages that business. He is referred to sometimes below as "the Seller".

2. These two actions concern luxury houseboats known as HRB3 and HRB4 which Mr Djurberg built and sold to order for £1,250,000 and £850,000 respectively to two couples, the Defendants in the first action ("the Smalls") and the Claimants in the second action ("the Johnstone-Sydneys"), to whom together I refer as "the Buyers".

3. The parties' various cross-claims are largely in contract and the essential facts are not complex, although their various ways of dealing have rendered some aspects more so. The Smalls and the Johnstone-Sydneys have similar but not identical complaints and are represented by the same solicitors and counsel.

4. Among other things, both the Smalls and the Johnstone-Sydneys claim that Mr Djurberg induced them to buy the houseboats by representing that their purchases included long-term rights to moor the houseboats at Hampton Rivera and lawfully to occupy them there as their permanent family homes.

5. In the case of the Smalls, they paid the full price of £1.25 million for HRB3 (and more) and moved in with their young children in Spring 2014. But they then faced further charges and disputes with Mr Djurberg and vacated HRB3 in May 2015. It was subsequently removed from its mooring in the dry dock of Hampton Riviera in April 2016 and has been since unoccupied at temporary moorings on the Thames nearby.

6. In the case of the Johnstone-Sydneys, they paid £550,000 towards HRB4 (including their deposit of £70,000 on a smaller houseboat HRB2 which they had initially sought to purchase) and moved in with their young son in February 2015. But they still owed £300,000 and in the face of further charges and other disputes with Mr Djurberg, they also moved out in May 2015. Mr Djurberg repossessed and then resold HRB4 first to a young employee Mr Mykolus Stark and then to another customer Mr Ian Cairns in late 2015.

7. These events have given rise to considerable acrimony between Mr Djurberg the Seller and the Smalls and Johnstone-Sydneys as buyers and would-be co-residents and (despite certain obvious aspects as analysed below) various complications in the accounting and other liabilities between them, and remedies, set out below.

8. The Buyers essentially accuse Mr Djurberg of serious misrepresentation and breaches of contract. Whilst they originally claimed specific and injunctive relief as regards the vessels, their claims are now essentially for damages. On his part the Seller accuses them of owing him more money and mounting a vendetta against him, involving other disgruntled customers and police action, including the removal of his records, on which he blames gaps and discrepancies in his documentation.

9. In the event, the documentation available is, as regards some of the detail, incomplete and somewhat muddled and much turned on witness evidence and argument. In that and in other respects I am thankful for the able assistance of solicitors and counsel – Mr Steven Thompson QC for the Seller and Mr Adam Rosenthal for the Buyers.

10. Whilst there is much contention between the Seller and the Buyers, the background to the issues to be resolved at trial can be summarised sufficiently as follows - starting most conveniently with the Smalls, although their dealings with Mr Djurberg began later than the Johnstone-Sydneys, and it is important not to lose sight of the overall chronology.

(2) Background – HRB3

11. In and from late 2012, Mr Djurberg marketed luxury houseboats for purchase and occupation at Hampton Riviera, together with various ancillary facilities including private gardens, car-parking and communal amenities for residents. The Smalls responded to an advertisement placed by one of his estate agents, Foxtons, for such a houseboat priced at £1.25 million, including a 125-year mooring licence. In due course HRB3 was built to their order as a 3-storey houseboat with an internal floor area of nearly 5,000 square feet.

12. On or about 15 December 2012, the Smalls met with the Seller at Hampton Riviera. They told him that they were intending to sell their nearby house and relocate their

family home and he explained to them the communal facilities he was intending to establish at Hampton Riviera and showed them the dry dock, where the proposed houseboat (HRB3) was to be located pursuant to their mooring licence.

13. The Smalls were to have 2 parking spaces at Hampton Riviera and also expressed interest in buying a small office building there known as "The Lodge" which had been made into a studio flat; but whilst negotiations for the latter continued for some time - and Mr Djurberg claimed that the discussions extended to the whole site and not just "The Lodge" - it did not ultimately proceed.

14. On 10 January 2013, the Smalls were told on enquiry by email to Mr Djurberg that references which they had found on the internet to breaches of planning control at Hampton Riviera were *"old stuff and has been dealt with"*; and they paid the £125,000 deposit for HRB3.

15. On 14 February 2013, the Seller and his then 16-year old assistant, Henrikas Dzyra, visited the Smalls at their home and, with reference to the lawfulness of permanent residential moorings at Hampton Riviera, told them as freehold owner he had *"historic rights"* to that effect. That seemed to remain his case at the trial.

16. On 25 February 2013, Mr Djurberg provided to the Smalls a written contract for the sale and purchase of HRB3 (called a *"*Bill of Sale of Water Craft") which he had signed and an invoice for the next instalment of £312,500. The Smalls signed the Bill of Sale on 4 March 2013 and paid the invoice in stages, on 6 and 27 March and 19 April 2013. They received an example of a mooring licence in respect of another vessel and customer but no other signed or draft contractual documents from Mr Djurberg.

17. Subsequent instalments of the agreed purchase price of £1.25 million were paid by the Smalls in 3 instalments of £250,000 in May, June and September 2013 and then by a final instalment of £47,500 in May 2014, when the Smalls took possession of HRB3. In addition, the Smalls paid further invoices from Mr Djurberg for additional fixtures and fittings they had selected, for £71,885 and £30,746 in September and November 2013, and then £17,485 for a veranda, walkway and grating fitted around the outside of HRB3 so as to secure it to the sides of the dry dock.

18. After they began their residence in HRB3 on 25 March 2014, the Smalls made various requests for the formal mooring licence. Mr Djurberg appears to have put that off but then, in September 2014, he stated that the price for HRB3 had not included mooring rights (or indeed car parking spaces) at Hampton Riviera. And thereafter, he proposed to charge variously an additional premium of £125,000 for a 125-year licence; a premium of £25,000 for a 25-year licence; an annual fee of £12,500 for a 25-year licence; and finally a fee of £2,400 per month for an annual licence renewable for up to 25 years.

19. By November 2014, following the failure of negotiations between the parties and an informal mediation attempt involving a Mr Gabor Moser (who had supervised the construction of HRB3 for the Seller), the Smalls apparently felt unable to make ends meet financially and decided to market HRB3 for sale.

20. Such a sale was discussed with Mr Djurberg at a meeting on 14 November 2014 - which with other such meetings subsequently, the Smalls secretly recorded. However, their estate agents, Waterview, were told by a Trading Standards officer of the local planning authority the London Borough of Richmond upon Thames ("LB Richmond") not to market the houseboat for sale with permanent residential mooring rights at Hampton Riviera as such use would be unlawful, and Mr Djurberg forbad them also from doing so.

21. On 25 March 2015, Mr Djurberg told the Smalls that two parking spaces at Hampton Riviera would be subject to an annual payment of £25,000 to £30,000 (plus VAT) and on 13 April 2015, he wrote to them claiming mooring fees back-dated to 19 March 2014, and enclosing a draft licence, restricted for the first time to a "leisure mooring".

22. In May 2015, the Smalls and their children vacated HRB3 and rented Huf Haus nearby, storing their furniture (and allegedly incurring charges) at Mr Small's workplace. Then, in June 2015, they gave notice of their intention to remove HRB3 from the dry dock at Hampton Rivera. In response Mr Djurberg claimed mooring fees from 14 May 2015 at £250 (plus VAT) per day and served a "Lien Notice". Correspondence took place between the solicitors, and on 28 August 2015 the Seller issued his claim against the Smalls for some £74,000 and an ongoing £9,600 odd per month for mooring fees and other charges and costs as below.

23. In April 2016 HRB3 was removed from the dry dock at Hampton Riviera and the Smalls arranged temporary moorings elsewhere, initially at Taggs Island and then at Platts Eyott. The Smalls say that because of its size, HRB3 cannot fit under any bridges. An so like a localised Flying Dutchman, it is condemned eternally to sail part of the River Thames (- to quote from the eponymous opera, "*Never shall I reach my home – what avails the wealth I've won?"*).

(3**) Background – HRB4**

24. An earlier three-bedroom houseboat built by the Seller, HRB2, was advertised for sale by another of his estate agents Waterview, again with a 125-year mooring licence at Hampton Riviera, for £699,950 (plus VAT on the mooring element of £70,000, amounting in all to £713,950). The Johnstone-Sydneys responded and met Mr Djurberg on 26 February 2012 and stated their intention to sell their existing house and relocate to HRB2 with their son Max.

25. On 27 February 2012, Mr Djurberg wrote to the Johnstone-Sydneys seeking a deposit of £70,000, which they paid with borrowed money. He knew that they needed to sell their house to pay towards the houseboat and might not raise enough and so offered to a loan repayable to him over 15 years.

26. The deposit invoice and subsequent emails and documents from Mr Djurberg in October 2012 made it clear that the purchase included a 125-year mooring licence (supplied in draft) priced at £95,000 plus VAT within the total of some £714,000.

27. The Johnstone-Sydneys eventually told Mr Djurberg on 18 August 2013 that they had accepted an offer to buy their house but in the meantime he had put HRB2 back on the market and agreed to sell it to another couple, the Keightleys.

28. The Johnstone-Sydneys met him at Hampton Riviera on 28 September 2013, and he offered them HRB4 instead at a price of £850,000, to include a "floating garden", less the deposit of £70,000 which they had paid towards HRB2. He offered to accept £390,000 "on account", with a further payment "on signing the drawing" of £110,000, with the balance of £280,000 on a 15-year loan at 5% per annum.

29. Contractual documents signed by Mr Djurberg - another "Bill of Sale" and a houseboat construction contract - were sent by him to Anne Byard of Owen White & Caitlin LLP, the Johnstone-Sydneys' solicitor, on 16 October 2013 and they paid him the £390,000 on 18 October 2013 from the sale proceeds of their house. There appears to be a countersigned copy of the construction contract (although Mr Sydney's signature on it looks odd) but not of the Bill of Sale to which it refers.

30. The construction of HRB4 (with an internal floor area of some 1,235 square feet - less than a quarter of the massive HRB3) was to take up to 6 months and in the meantime the Johnstone-Sydneys took a 6-month lease on rental accommodation; but construction was delayed. On 1 July 2014, Mr Djurberg invoiced them for the £110,000 but they only paid £90,000, claiming that their rental costs were for longer than expected and that Mr Djurberg had agreed to add the balance of £20,000 to the loan of £280,000.

31. By December 2014, HRB4 was still not ready for the Johnstone-Sydneys and their tenancy was due to expire on 17 February 2015. They were to move to HRB4 on 13 February 2015 but on 9 February 2015, Mr Djurberg emailed them to say that the monthly repayments would be £2,500 rather than £1,500, which they apparently could not afford. They moved in on 16 February 2015 but Mr Djurberg was unhappy.

32. Mr Djurberg withdrew their loan offer and introduced them to a mortgage-broker (Christopher Dailly of Jumbo Finance, based in Dubai) so that they could raise the £300,000 owing to him. According to the Johnstone-Sydneys Mr Dailly could only arrange bridging finance and they decided that their only option was to sell HRB4; but they then learnt, as apparently confirmed by an officer of Richmond BC, that it could not be lawfully moored as a permanent dwelling at Hampton Riviera.

33. Mr Djurberg demanded the monthly sum of £2,500 together with assurances as to the future payment of the £300,000 and on 2 April 2015, sent to the Johnstone-Sydneys a revised "bill of sale" and a draft annual mooring licence at a fee of £1,334.40 per month. When he then threatened to evict them from HRB4, they left, on 5 May 2015.

34. Mr Djurberg disputed that the Johnstone-Sydneys had any mooring rights and took possession of HRB4 and marketed it for sale himself. Following correspondence

between the parties' solicitors, the Johnstone-Sydneys issued proceedings on 22 October 2015 (a few weeks after the Smalls' counterclaim against Mr Djurberg) seeking a declaration that title to the houseboat had passed to them, an injunction restraining Mr Djurberg from selling HRB4 and an order for delivery up, as well as damages for misrepresentation or breaches of contract.

35. However, Mr Djurberg had apparently already sold HRB4, first for £30,000 to his employee Mr Stark and then to a customer called Ian Cairns for £650,000 plus £140,000 for the floating garden and £60,000 for fixtures and fittings (all elements which appear to have been included in the Johnstone-Sydneys' purchase at the same total, £850,000).

(4) The Proceedings

36. As against the Smalls, Mr Djurberg claimed:-

    (a) Various invoices, totalling £74,360.44, relating mainly to (i) mooring fees including "additional mooring space" for the gangways installed around HRB3 in the sum of £34,331 and (ii) some storage charges, together with an ongoing charge for occupation of the dry dock put at £9,617.17 per month and unparticularised *"damages based on lack of profit availability due to occupation of the dry-doc by the Defendant"*; and

    (b) a lien over HRB3 and an order for sale (the basis for which was not pleaded but is relevant to remedies generally, including any in favour of the Smalls).

37. The Smalls admitted a sum of £989.34 for utilities, subject to a set off by way of their counterclaim dated 8 October 2015 for:

    (a) damages (i) for misrepresentations that they would be entitled to a 125-year mooring licence for the agreed purchase price for HRB3, that the permanent mooring of HRB3 at Hampton Riviera was lawful and that they would be entitled to park two cars in the car park at Hampton Riviera for the agreed purchase price for HRB3, or alternatively (ii) for breach of contract;

    (b) the sums of (i) £28,340 paid on 24 April 2015 for alleged (and back-dated) mooring fees, allegedly under duress by a threat of eviction (ii) £17,485.60 by way of damages for the removal of the grating installed around HRB4 to

create a veranda (that being the price paid) and (iii) £17,033.33 which they allegedly overpaid towards the kitchen costs on presentation of an erroneous invoice; and

(c) declaratory relief and an injunction restraining Mr Djurberg from taking possession of and selling or seeking to dispose of HRB3.

38. The Johnstone-Sydneys claimed:

(a) declarations that (i) the balance of the purchase price (£300,000) was subject to a loan by Mr Djurberg and (ii) title to HRB4 had passed to them;

(b) damages (i) for breach of an implied term entitling the Johnstone-Sydneys to peaceable and quiet enjoyment of HRB4 whilst moored at Hampton Riviera and (ii) for misrepresentations that they would be entitled to moor HRB4 at Hampton Riviera on a long-term licence and that the use of HRB4 at Hampton Riviera as a permanent dwelling was lawful, or alternatively (iii) for breaches of contract in which these representations became terms; and

(c) once Mr Djurberg (as he did) transferred title to HRB4 to a third party - the claim for an injunction restraining Mr Djurberg from marketing, selling or otherwise disposing of HRB4 and an order for delivery up of HRB4 then becoming moot - (a) damages equating to the value of HRB4 and then (b) by amendment after Mr Djurberg claimed in his Defence that he had lawfully terminated the contract for sale and sold HRB4 to Mr Stark for £30,000, repayment of the £550,000 paid by them towards the purchase price.

39. By his counterclaim against the Johnstone-Sydneys in late 2015, Mr Djurberg sought damages for statements made by them and their solicitors to estate agents about the planning status of Hampton Riviera amounting to wrongful interference with his efforts to sell and slander of his title, in the sum of £620,000 (as the difference between the £30,000 allegedly obtained and the £650,000 alleged market value of HRB4). This claim was not pursued at the trial, by the end of which Mr Djurberg admitted that he had sold HRB4 to Mr Cairns, he claimed, for £650,000 following the sale and return of HRB4 to and from Mr Stark.

40. On 14 April 2016, it was ordered that the two actions be tried together and directions were given down to trial.

41. Within 2 weeks, on 22 April 2016, a warrant was issued - in circumstances not fully explained at the trial, but alleged by the Seller to be at the complaint of Mrs Small - for the search of Hampton Riviera.

42. The Metropolitan Police searched Hampton Riviera on 26 April 2016 and various documents and hardware were seized. Mr Djurberg brought judicial review proceedings in respect of the execution of the search warrant and various interim orders were made in those proceedings to enable him to recover documents seized by the police. In the meantime HRB3 was towed away from Hampton Riviera (Mr Djurberg says, in defiance of his lien).

43. By an order of 1 August 2016 Mr Djurberg obtained extensions of time as regards various steps in the present proceedings but his application to stay the actions pending the outcome of his proceedings in the Administrative Court (and any criminal proceedings in the event that he was charged) was dismissed on 8 March 2017. Revised directions were given to trial and there was a pre-trial review on 10 April 2017.

44. The trial took place between 11 and 23 May 2017 and involved many factual witnesses (to whom I will refer below) and voluminous written and oral submissions (including supplemental submissions). A core bundle was produced by the court in the course of the hearing from some 12 bundles of documents (including some produced during the hearing) to much of which there was no reference.

45. On behalf of Mr Djurberg caution was urged as regards the documents. Indeed, they do not fully record the relevant transactions and indeed, as I find, the Bills of Sale, the HRB4 construction contract (with its "entire agreement" clause to which I refer below) and Mr Djurberg's apparently organised emails following meetings, do not include all the relevant contractual terms. But despite omissions and complications, in the end, with the benefit of the parties' explanations or attempted explanations, they enabled a sufficient picture to emerge as regards the main issues.

46. It is important to emphasise that the claims in misrepresentation against Mr Djurberg are made not on the basis of fraud, but in negligence and under section 2(1) of the Misrepresentation Act 1967, on the basis that he had no reasonable grounds for believing them to be true. That more easily sits with the complaint as

regards the alleged unlawfulness of the permanent residential moorings offered than the question of whether they (and the car parking spaces) would be provided without further consideration, which is more obviously characterised as contractual rather than a misstatement of fact. And in the event the factual questions as to unlawfulness turned out to be simpler to resolve than those as to the latter questions.

47. The disputes had generated a great deal of emotion, with the Buyers accused on one side of conspiracy together to harm Mr Djurberg, and on the other side Mr Djurberg's youthful staff lining up to defend him. Again it is important to note that despite the hail of arrows alleging impropriety on all sides, the essential battle was about what was stated and agreed. Some of the more extravagant accusations were eventually tempered, but the lay participants suffered in the process.

48. A different casualty of the trial, so-to-speak, appears to have been Mr Djurberg's expert boat valuer Mr Guy Barlow, in that, at the last moment (and after a late joint report with Mr Heath) his reports were withdrawn without explanation and he was not tendered in evidence, so that the Buyer's expert Mr John Heath was cross-examined without any opposing independent opinion evidence.

(5) The protagonists and witnesses

49. In *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm), Leggatt J drew emphatic attention to the fallibility of human memory and suggested (in paragraph 22) that in commercial cases at least the court's decision on contested facts should be largely based on documents and inference, adding that the value of oral testimony

> *"… lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth...*".

50. In this case, the Buyer Mr Djurberg struck me as an unusual man, with a complex relationship with the truth. His background was not much explored at the trial but he stated that he was born, raised and educated to a PhD in economics in Portugal (seemingly unclear as to his university) and then changed his name (from "Salvador Priost") and moved to this country. Whilst his English is very good, his oral evidence was largely evasive – circling questions or going off at tangents - and at times nonsensical.

51. Some witnesses have a tendency to use the opportunity to advance their allegations and explanations without facing up to the points specifically put at issue. Mr Djurberg seemed to have a constant strategy for obfuscation, for turning the simple into the complicated and for constructing arguments and possibilities which seemed to have little relation to reality, not least as regards mooring rights and the ability to impose new and ever more burdensome terms on his customers.

52. He gave an impression of dishonesty and at least ruthlessness in wriggling away from any certainties and exploiting any perceived uncertainties. His responses to questioning seemed to regard the process as a means for assertive negotiation rather than requiring an effort to recount any genuine recollection of events. He made dogmatic but unlikely allegations without providing any basis; he claimed mastery of facts and history clearly outside his knowledge, and disputed the obvious; his recollection was often poor but he made out that it was strong.

53. His inability to explain sensibly the nature and history of these transactions and his attempt among other things (a) to disclaim any buyer's rights to moor HRB3 at Hampton Riviera (particularly in the dry dock for which it was built) and (b) to claim to have incurred a huge loss on HRB4 by a sale at £30,000 (less than 5% of its real price) provided many telling examples of extreme concoction. These examples do not prove that he was deliberately false in everything he said, but I would not trust Mr Djurberg to tell the truth, especially when his interests and emotions are at stake, and would not accept anything he said without independent corroboration.

54. On the Buyers' side, Mr Small was also in many ways an unsatisfactory witness. He is an experienced and resourceful businessman but was concerned principally to justify himself as a victim. His recollection of detail was poor and he made little

effort to grapple with factual questions, preferring to repeat his generalised excuses. I was unimpressed by the way he sought to deal with the dispute with Mr Djurberg, campaigning against him unscrupulously and claiming, for example (a) false naivety for apparent concessions and (b) storage charges which were in fact never incurred.

55. Mrs Small, a former journalist, appeared a far better, clearer and more concise witness. But her evidence too was tainted, by her editing of transcripts of secretly recorded conversations with Mr Djurberg, in particular at a meeting on 6 March 2015.

56. In that regard the Seller had said at a meeting on 7 November 2014 that the 125-year mooring licence was included in the sale of HRB3 but had to be paid for in addition to the £1.25 million price. The Smalls had said that their understanding had been that the price was included.

57. In the transcript of the 6 March 2015 meeting Mrs Small altered a passage in which Mr Small had said that whilst the Smalls had thought the price was included, it was their fault "*for not reading the fine print or it had not been explained to them properly*", so that it read instead that they had always been told that. Her explanation for this, that the transcript as so edited was solely for her own use, made little if any sense.

58. Ms Johnstone (a teacher) was also a rather unsatisfactory witness, driven by pervasive hostility to Mr Djurberg (with whom she had obviously had, at least by 2015, a very acrimonious relationship) rather than anything like a comprehensive or precise recollection. Thus she struggled to explain how she said that the terms of a loan from Mr Djurberg as regards the outstanding £300,000 for HRB4 were finalised.

59. On the other hand Ms Johnstone's apparently controversial contentions that the Bill of Sale for HRB4 was agreed and that her family were allowed to take possession in mid-February 2015 were supported by other evidence and obviously correct. Mr Sydney (a psychotherapist) was a far more careful and moderate witness and ready to admit it when he could not recall details or documents – as was often the case. His evidence supported the case against the Seller in general terms and to that extent I have no reason not to accept it.

60. In the end, despite my reservations, I largely accepted the evidence of the Buyers on the key factual issues when in conflict with Mr Djurberg's, especially as to what he stated and agreed in meetings with them as regards the mooring of the houseboats for them to live at Hampton Riviera. I set out my analysis of the factual disputes as to this in the next sections (6) and (7) of this judgment and address the legal consequences later in sections (11) and (12).

61. The other factual witnesses called on the two (or three) sides were all, to varying extents, partisan. Mr Djurberg called two loyal employees Mr Stark and Hubert Schwandt, and the would–be mediator Mr Moser, none of whom was party first-hand to crucial dealings with the Buyers or added significantly to the documented record in relation to the main issues.

62. Having said that, in any event (a) I treat with caution Mr Moser's evidence in the light of the fact that he was convicted and fined at Kingston Crown Court in January 2017, for aiding and abetting Mr Djurberg to act as a director while disqualified; and (b) I specifically reject any contention that the purported sale of HRB4 by Mr Djurberg to Mr Stark at £30,000 was a genuine outright arm's length transaction.

63. On the other hand, Mr Djurberg's former assistant Henrikas Dzyra was called on behalf of the Buyers and wh gave dispassionate and direct evidence. I do not accept that he exaggerated his role or knowledge and the suggestion that his falling out with Mr Djurberg caused him to distort his account of the material events, still less in any way to mislead the court. Whilst young, he seemed to me by some distance the most impartial and reliable of this group and had direct knowledge of the Seller's dealings in particular as regards (a) the planning aspects and (b) the transfer of the Johnson-Sydney's proposed purchase from HRB2 to HRB4.

64. Two estate agents who had been at Foxtons at the relevant time were also called: Mr Gabriel Cunningham-Walker by the Buyers and Mr Lewis Knollman by the Seller, via video link from Dubai where he now works for Sotherby's Real Estate. Mr Cunningham-Walker's evidence was more directly relevant and to my mind straightforward.

65. Mr Knollman considered himself, for whatever reason, as participating in order to support Mr Djurberg. He claimed that his "friend" Mr Cunningham-Walker had

told him that he had been threatened into giving evidence by the Buyers and that he Mr Knollman had overheard Foxton's manager (a Mr Jamie Wilmot) being told off by Mr Djurberg by telephone in January 2013 (which it was said must have related to the advertisements' including 125-year mooring licences). For what it is worth, I did not accept Mr Knollman's evidence as against Mr Cunningham-Walker's.

66. As for the expert evidence regarding the values of HRB3 and HRB4, Mr Heath was clearly an experienced and practical marine surveyor and there was no contrary evidence to gainsay his figures, or his opinion that without a residential mooring HRB3 was a liability.

67. Whilst Mr Djurberg's counsel forcefully raised a debate as to whether any houseboat must have some value, at least assuming that some mooring somewhere is a possibility, and gallantly sought to argue for internal-area-based calculations of the same, his hands were rather tied by the lack of any independent opinion evidence to support this as against Mr Heath's opinions - and even more obviously so regarding Mr Heath's view that because of its unusual size, HRB3 could not be permanently moored as a residence in the non-tidal Thames and would require uneconomic dismantling and rebuilding if it was sought to take her under bridges.

(6) The mooring issues

68. Although the analyses in the two actions must be kept distinct in some respects, it is convenient to deal together with the issues in each relating to the mooring rights allegedly offered with the two sales of HRB3 to the Smalls and HRB4 to the Johnstone-Sydneys.

69. There was great debate as to terms and effect of what was said by Mr Djurberg to the Buyers regarding mooring licences and whether the 125-year residential mooring licences at Hampton Riviera canvassed in the documents were included in the sales agreements and prices for HRB3 and HRB4. However, on the issue of lawfulness, the position is more straightforward.

70. The starting point for my analysis is that the terms of the "Bills of Sale" which are in differing terms for HRB3 and HRB4, included mooring rights. That for HRB3 merely says that "VAT is applicable on the mooring licence"; that for HRB4 said that "mooring licences are sold by separate agreement".

71. But in my judgment, that does not take away from the fundamental basis for the sale and purchase of the houseboats, which was for the Smalls and the Johnstone-Sydneys and their families respectively to live in them moored at Hampton Riviera; and Mr Djurberg's repeated assertions at trial that they could moor them anywhere on licence terms to be negotiated was no more than an empty excuse, which disregarded the heart of the relevant transactions on both sides.

72. The differing terms of the Bills of Sale are far from comprehensive and do not exclude oral agreements to grant, or prescribe any formal requirements for, the mooring licences clearly necessary for these particular purchases. It should be borne in mind that Mr Djurberg was effusive, and no doubt charming, in initially welcoming the buyers to what he stated were their future homes at Hampton Riviera (or "your 'bubble' for many years to come' when he sent the Smalls the "draft copy of the 125 year licence for your home" after the meeting on 15 December 2012).

73. I reject the contention that this was no more than "sales puff" and find that the Buyers relied on Mr Djurberg that this was true and would be honoured. Part of the reason for the hostility between the Buyers and the Seller, as events moved on, was that what was sold to them as a haven became a jungle, and Mr Djurberg flouted their fair expectations to the extent that even the lawfulness of their occupation was disregarded. Mr Djurberg's position, that nothing mattered unless finalised in signed contractual documents, was symptomatic of how he came to destroy their trust in him and their new homes.

74. In the case of HRB4 the references in the Bill of Sale to separate licences and VAT for mooring and to other services and other "leisure" vessels cannot be read as providing for a fundamentally different transaction than HRB2 which it replaced. Indeed Mr Djurberg's explanation to the Johnstone-Sydneys in his email of 13 October 2013 was that the "*floating house and moorings are dealt with separately as you might (if you wish) sell the house to anyone and still keep the mooring*". That was a far cry from saying that a residential mooring licence might not be granted or might require additional consideration.

75. I will come shortly to the issues ventilated as to what if anything the Seller "separately" stated and promised at the time and in the circumstances, in a legally

binding way (whether expressly or impliedly) as regards (a) the lawfulness and (b) the cost of mooring HRB3 and HRB4 at Hampton Riviera for the Buyers to live in.

76. Before further analysing those issues, one central point stands out: there is no room for any real doubt on the evidence but that Mr Djurberg was not in a position properly to offer or grant residential mooring licences to purchasers of his houseboats, because there was no public right by which they could lawfully moor their houseboats for permanent or residential use at Hampton Riviera.

77. On 28 May 2014, an Appeal Decision was issued by Mr Keith Turner, the Inspector appointed to deal with 8 planning appeals by Mr Djurberg in respect of Hampton Riviera, including questions relating to the mooring pontoons, on an inquiry which opened on 25 February 2014.

78. Among many other things, that Appeal Decision recited:

    (a) at paragraph 22, that "*no evidence had been presented which indicated that residential moorings had ever existed at the site, or indeed any long-term moorings being let*"; and

    (b) at paragraphs 65 and 71: (i) that – apparently in the light of concerns by the local authority that Mr Djurberg was advertising residential moorings - he had given assurances through his counsel and stated clearly that Hampton Riviera was not intended to be used for such moorings and (ii) that "*the lawful use of the land is as a boatyard, a sui generis use…residential development in this location would be unacceptable … [and] contrary to planning policy at both national and local level…*".

79. That the houseboats could not be used as permanent residences at Hampton Riviera was consistent with what the Smalls and the Johnstone-Sydneys were each told by LB Richmond's planning officers after they had commenced occupation. Mr Dzyra's evidence supports the Buyers on this aspect.

80. Mr Djurberg claimed that his counsel had not been authorised to give such assurances to the Inspector and that further proceedings had or were to ensue as regards this and/or other planning related issues, but there was a dearth of any acceptable evidence as to this or indeed any right he might claim regarding permanent residential moorings at Hampton Riviera.

81. As I understood it, Mr Djurberg still contended that there were common-law 'historic rights' to that effect and that planning was irrelevant because there was no need to 'develop' Hampton Riviera and its moorings to provide for residential use. However, there was no comprehensible explanation or support for this and if he ever believed it, it was probably no more than self-delusion.

82. Whilst it might have been said that there had been some historic residence on houseboats ancillary to work in the boatyard (eg whilst the boats were being built and/or for the use of workers at the boatyard - such as, indeed, Mr Stark), that could not apply to third party purchasers and indefinitely.

83. In any event, that was not an explanation or even part of any explanation profferred by or on behalf of Mr Djurberg. Instead, when he was asked in his cross-examination about the mooring rights at Hampton Riviera, and what licences he offered to and discussed with the Buyers at various stages, he lapsed into circumlocution about the alleged range of possibilities – 'general', residential or leisure moorings among them – allegedly depending on what might or might not be negotiated and agreed, repeatedly rambling away from this key point.

84. As for what was stated and/or agreed by Mr Djurberg regarding the Buyers' rights to moor and live in the houseboats he was building and selling to them, there can be no legitimate dispute but that:

    (a) Mr Djurberg was well aware that the Buyers were selling their principal dwellings and purchasing the houseboats in order to reside therein (permanently and lawfully, of course) at Hampton Riviera;

    (b) Mr Djurberg's estate agents' marketing particulars at the relevant time stated that the property was offered for sale with a 125-year mooring and in the case of the Johnstone-Sydneys that was explicitly recorded in the documents relating to HRB2;

    (c) mooring rights at Hampton Riviera must have been discussed between Mr Djurberg and the Buyers as crucial to their purchases, and they pointed to emails in which they plainly expected and were encouraged to expect formal licences to ensure that their rights were lawfully recorded; and

    (d) Mr Djurberg did not at any point, despite umpteen opportunities when it would have been appropriate, suggest that he would require additional

payment for their mooring licences until after they had paid the price instalments (albeit in the case of the Johnstone-Sydneys, leaving £300,000 outstanding) and taken up occupation.

85. In context and in the light of the evidence and history as a whole I am satisfied – again see further below - that at his initial meetings with each of the Buyers, Mr Djurberg told them that their purchase of the houseboats at the prices offered included 125-year residential mooring licences at Hampton Riviera, and they relied on that and would not have proceeded otherwise. That of course meant lawful residential use of the moorings and he deflected all and any enquiries which would have revealed otherwise.

86. In the case of the Smalls this included the meeting on 15 December 2012. Subsequent emails (for example those on 9/10 January 2013 asking how often the completed HRB3 would have to leave the dry dock to which it would be fitted) show that its mooring there was a "given" which must have been agreed. In the case of the Johnstone-Sydneys, Mr Djurberg must have confirmed, and I find did confirm, that the price for HRB4 would include equivalent long-term mooring to HRB2. It would make no sense at all for that to be left open to future negotiation, especially given what had passed between them as regards HRB2 and its replacement.

87. To that extent I accept the Buyers' evidence on these key points as (a) consistent with the contemporaneous documents; (b) given my observations of all the witnesses at trial; (c) supported by my inferences and common sense; and (d) notwithstanding its other deficiencies.

88. As for the first and decisive question of the lawfulness of permanent residential moorings in favour of houseboat purchasers, the Buyers claim that the Seller expressly or impliedly represented that such moorings at Hampton Riviera were lawful and did not require planning permission by reason of his statements about the Buyers living in their respective boats at Hampton Riviera, as part of the "community" which he was establishing, with the benefit of communal facilities, for years to come.

89. In my judgment, that is the correct interpretation of what was stated by Mr Djurberg. He intended to and did thereby encourage the Buyers as regards a

specific vital part of the transactions as a whole – transactions which one would expect to be among the most important in their lives as involving new (and tranquil) family homes. And whilst Mr Djurberg's spoken English might conceivably let him down on occasions, it is more likely that the obscurities in his well-organised written emails (and formal or "draft" documents) suited him - and did not arise because the moorings had not been firmly offered and agreed.

90. I accept the Buyers' case as to the representation and promise as to the lawfulness of the residential moorings. Where property is sold for a particular purpose, it will usually be implied that the purpose is lawful: see *Laurence v Lexcourt Holdings* [1978] 1 WLR 1128; *Atlantic Estates Plc v Ezekiel* [1991] 2 EGLR 202.

91. The disclaimer of merchantability and fitness for purpose in the HRB3 Bill of Sale may have excluded any implication under section 14(3) of the Sale of Goods Act 1979 - a claim which in any event the Smalls abandoned at the trial - but not liability in respect of the lawfulness or otherwise of the residential moorings also (necessarily but in a sense collaterally) to be provided.

92. I have no doubt moreover that, on the proper construction of Mr Djurberg's statements, this was indeed expressly represented and promised by the Seller to the Buyers. Thus (a) had he told the Smalls that they should satisfy themselves on planning matters, rather than satisfying them himself, he would not have responded to their inquiry by email of 10 January 2013 to the effect that "*this is old stuff and has been dealt with*"; and (b) it seemed to me obvious that his evidence that the Johnstone-Sydneys had switched from HRB2 (to be bought with a residential mooring) to HRB4 as a "leisure" boat was a late fabrication designed to mask the importance of the residential location.

93. Mr Djurberg was enthusiastic in marketing his houseboats to be moored at Hampton Riviera as a wonderful place to live, both in person at meetings and through estate agents (as Foxtons' former staff agreed in evidence). He was also keenly aware of planning problems. I accept Mr Dzyra's evidence that he kept two sets of images, one to market the houseboats and their residential moorings and one to maintain a façade for the authorities, that Hampton Riviera was used and intended only as a boatyard and for occasional leisure mooring.

(7) The Seller's case

94. A key ingredient of the Seller's case was to argue that there were no concluded contractual promises to the Buyers that HRB3 and HRB4 could be lawfully moored at Hampton Riviera for permanent residential use (without further charge) and it is not the function of the Court to rewrite poor bargains.

95. In that regard, Mr Djurberg (a) suggested that the Buyers made bargains which did not include concluded licences for and costs of mooring (as to which they had a choice), failed to act reasonably by not taking and/or following legal advice and securing the formal documentation if they thought such licences necessary, and later regretted it; and (b) pointed to the absence of formal terms and paucity of written communications supporting the Buyers and for example to Mr Small's evidence that he did not engage a solicitor because he and his wife were *"buying a vessel…not buying land; it was like buying a car. There were no surveys like a land registry…."*.

96. For my part however, I do not think that the written record in this case is comprehensive or that the parties, including Mr Djurberg, made it so. After all (to take up Mr Small's comment), unlike land, a signed document was not necessary in law for an oral promise by the Seller to be enforceable, nor is it suggested that he expressly made such promise conditional upon further payment.

97. It is also worth recalling (not for the first time, nor I suspect the last) what Steyn LJ said in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409, 1410:

> *"… A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness…"*.

98. For the reasons summarised above, I reject as any answer regarding lawfulness, Mr Djurberg's submission to the effect that whilst the houseboats he sold could be used for leisure and occasional occupation (like a holiday home) or as a full-time

home, it was not for the Seller to decide and the lawfulness of use as a dwelling was up to the local council, and application for any change of use made by the Buyers, not him. The Buyers relied on him in this regard and his contention that it was for them to make planning applications if they needed to was entirely unrealistic.

99. The Seller's other submissions as regards the mooring issues and generally, included the following in summary:

    (a) that the sales documents – the "bills of sale" and in the case of the Johnstone-Sydneys the HRB4 construction contract did not contain the terms of any mooring (and in the case of HRB4 referred to a mooring licence as a "separate" agreement) and a right to moor the houseboats, once built, would be available to the Buyers conditional on a detailed written licence of the sort they were shown *and* at an additional price;

    (b) that the Buyers acquiesced in the postponement of such written licence and the Smalls indeed paid some mooring fees in the meantime (showing that they did not rely on any promise or representation by the Buyer) until their own financial circumstances, rather than any wrongful act by Mr Djurberg, caused them to give up the houseboats;

    (c) that whilst Foxtons (if not other estate agents) had the Seller's ostensible authority in respect of the marketing particulars, and in general, a principal may be liable for misrepresentations made by his agent (see eg *Gosling v Anderson* [1972] EGD 709), in this case, the inclusion of 125-year mooring licences in the offer prices was not actually authorised and was swiftly withdrawn; and in the meantime was mere "puff" subject to disclaimers and on which the Buyers could not reasonably rely.

100. As to the last point (c) above, regarding the marketing particulars, I do not accept (i) that Mr Djurberg was himself innocent – he signed to approve at least one form of the marketing particulars and if he was later annoyed at the reference to the mooring licence it was because of LB Richmond's reaction; or (ii) that the agents' disclaimer negatived Mr Djurberg's responsibility for the statement that a 125-year mooring licence was included in the offer price. The case of *McCullagh v Lane Fox* [1996] PNLR 205, 226 does not require that conclusion.

101. Of course estate agents' advertisements are often, even usually, not actionable representations. But the statement in this case was what was offered and formed the fundamental basis of the transactions, consistent with what the Buyers wanted and what the Seller told them at their meetings, when he vaunted the proposed community and facilities at Hampton Riviera where they and their families would reside.

102. It is true that the contemporaneous emails on their own do not establish that but on this point I believe the evidence of the Buyers and Mr Dzyra. The Buyers may be regarded as foolish in not ensuring that the draft mooring licences (referable to other vessels) which they were shown were not finalised as regards their houseboats, at no additional consideration, before completion.

103. However, foolish or not, I am satisfied that they were exploited by their trust in Mr Djurberg's word that their purchase of the houseboats as their residences included 125-year licences to moor them at Hampton Riviera. The copy emails from Mr Djurberg to the Smalls which refer to a mooring licence being drafted or coming into effect later, when the houseboat would be finished and ready for occupation, are consistent or at least not inconsistent with that.

104. I dismiss as at best fanciful Mr Djurberg's denial that he confirmed at those meetings what he was offering for sale at the prices advertised – luxury houseboats to be moored and lived in permanently at Hampton Riviera. Indeed

    (i) his contention that the grant of a mooring licence to the Smalls was not under consideration because they were throughout discussing the purchase of the whole boatyard (as opposed to the garden and office) was in my judgment barely short of absurd;

    (ii) his contention that his emails of 9 and 13 October 2013 to the Johnstone-Sydneys (stating among other things that *"mooring ... will be dealt separately from house [and I] will agree something sensible with you")* showed that a mooring for HRB4 after completion was expressly subject to additional consideration and contract, was in context wholly unrealistic; and

    (iii) that Foxtons may have considered him still free to negotiate individual moorings to any purchaser on a case-by-case basis according to the buyer's

preference is in the circumstances neither here nor there – especially as he notably did not seek to do so until after completion.

105. As for the first point (a) summarised above, regarding contractual documents, in my judgment there were concluded, legally enforceable bargains between the Seller and the respective Buyers, partly oral and partly in writing, which included obligations by the Seller to provide lawful moorings at Hampton Riviera for permanent residential use of HRB3 and HRB4.

106. It is correct that the "Bills of Sale" signed in the case of the Smalls in March 2013 and referred to in the construction contract signed by the Johnstone-Sydneys apparently around October 2013, were for the sale and purchase of vessels as homes for occupation without stating that mooring would be granted at no additional cost.

107. But these were not exhaustive - and did not exclude the granting of mooring licences without additional consideration. On the contrary (i) Mr Small asked how much he might have *"to allocate extra for VAT based on the mooring costs"* consistent with the mooring costs being included in the £1.25 million payable; (ii) the Johnstone-Sydneys had seen the calculations for HRB2 as including the mooring element and extra VAT thereon; and (iii) an inference might be drawn against Mr Djurberg, if an honest seller, from his never suggesting otherwise, clearly or at all.

108. In the circumstances of this case, Mr Djurberg caused and allowed the Buyers to proceed on the basis that they had secured, as part of the very large sums they paid, moorings at Hampton Riviera. Why and how they (a) failed to obtain the appropriate formal documents and (b) later came to regard it as necessary or appropriate to concede further payments, should not in my judgment fatally detract from their claims.

109. Nonetheless the most significant point against the Smalls at least is their acquiescence, mentioned in point (b) above (although Mr Djurberg does not use that precise term in his pleadings). They failed to explain their case to the satisfaction of Mr Moser, who pointed out the lack of a documented right, and then appeared to accept that they had to pay something more, albeit limited to what they could afford, for a mooring licence.

110. Thus:

(i) at the meetings with the Seller in November 2014 and March 2015, Mr Small stressed their financial hardship and said that they knew they had to pay something more and that it was considerate of Mr Djurberg to allow them so far to moor at Hampton Riviera without paying: indeed in April 2015 they paid £18,600 for mooring fees in respect of HRB3 for the period March to November 2014;

(ii) however, whilst Mr Small acknowledged the lack of a mooring licence and characterised it as *"an oversight on our part"* or *"our fault",* he insisted (knowing of course that the meetings were secretly recorded) that it was "*not fair*" and they had not understood that further payment would be required.

111. However, I consider it credible that the Smalls (and indeed the Johnstone-Sydneys to some extent) acted as they did after completion out of confusion and concern if not fear that their homes were dependent on Mr Djurberg, who sufficiently displayed his mercurial temperament and absolute control over Hampton Riviera and its moorings to put their homes at risk and divert them from confrontation.

112. Thus whilst the Smalls' conduct of the matter after completion was regrettable, and I have found the evidential uncertainties more difficult in relation to deciding what was represented and promised as regards the cost of the moorings than as regards their lawfulness, it has not dissuaded me from my conclusion on all the evidence that 125-year mooring licences for both HRB3 and HRB4 were stated and agreed to be included in the respective sale and purchase and specified consideration for each.

113. Mr Djurberg had so offered and the Buyers had agreed and relied on that up to completion. Moreover, it was the reasonable expectation of the parties and fair, whereas Mr Djurberg's attempts to allow for the withdrawal of mooring rights and/or the foisting of additional charges on the Buyers, however vulnerable they were to his negotiating skills, was the opposite.

114. Indeed my conclusions as regards the mooring issues are supported, to my mind, by a scrutiny of Mr Djurberg's evidence at the trial. He continued to maintain that residential moorings of purchasers' houseboats at Hampton Riviera would be lawful, in the way (as I find) he represented to the Buyers. And if, as I find, such

moorings were "included" in the sale and purchase of the houseboats, to claim after the event that unspecified and ever-increasing further sums would have to be paid not only smacks of sharp practice, but flies in the face of commercial common sense, consistently with Mr Djurberg's myriad, fantastical attempts at justification.

(7) The Johnstone-Sydneys - contract issues

115. The issues concerning the Johnstone-Sydneys developed significantly in the light of Mr Djurberg's repossession of HRB4 and its sale by him, as eventually emerged, to Mr Cairns for a total of £850,000 (including fixtures and floating garden). Thus they no longer pursued injunctive claims but mainly sought financial relief by way of repayment of the instalments which they paid totalling £550,000 and/or damages for misrepresentation or breach of contract.

116. The questions which had been argued included (a) the effect of the HRB4 construction contract and in particular the "entire agreement" clause 21, on the Johnstone-Sydneys' claims as regards mooring rights; and (b) whether Mr Djurberg was bound by a loan agreement to leave outstanding the £300,000 balance in respect of the HRB4 purchase price on allegedly agreed terms as to monthly instalments and interest, relevant to (c) the parties' rights regarding delivery, title, repossession and sale on termination under clause 13 of the construction contract.

117. Clause 21 of the construction contract provided:

> *"This Agreement forms the entire agreement between the Parties and unless specifically agreed by the Designer/Builder in writing after the date of this Agreement, no warranty, condition, description or representation is given or to be implied by anything said or written in the negotiations between the Parties or their representatives prior to this Agreement."*

118. In my judgment that does not avail Mr Djurberg for a number of reasons (i) on the facts as to what he represented and promised and its effect and as a matter of interpretation and (ii) if necessary, by reason of the section 3 of the Misrepresentation Act 1967, section 8 of the Unfair Contract Terms Act 1977 ("UCTA") and Regulation 5 of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").

119. As to the contractual effect of clause 21, whilst the court must have regard to the written contractual documents above in considering the terms allegedly agreed orally between the parties, the construction contract was clearly not the entirety of their agreement nor could clause 21 make it so or be read properly to that effect. Its subject-matter was the building of HRB4 and it referred to the Bill of Sale (apparently unsigned by the Johnstone-Sydneys) for payment provisions. The representations and promises as to the mooring of HRB4 at Hampton Riviera were not covered by either document but were basic to the parties' bargain.

120. By section 3 of the 1967 Act, a contractual term which purports to exclude or restrict any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made or any remedy available to the other party by reason of such misrepresentation, is of no effect except in so far as it satisfies the requirement of reasonableness in section 11 of UCTA.

121. Section 3 of UCTA applies between contracting parties where one of them deals on the other's written standard terms of business. By section (2)(b)(i), as against that party, the other cannot, by reference to any contractual term *"... claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him"* save insofar as the contract term satisfies the requirement of reasonableness in section 11. This can apply in the case of an entire agreement clause: see *AXA Sun Life Services Plc v Campbell Martin Ltd [2011]* EWCA Civ 133 at paras 13, 50, 76 and 108.

122. By section 11 of UCTA, a term satisfies the reasonableness requirement if *"it is a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"* having regard to the matters specified in schedule 2. In each case, it is for Mr Djurberg as the party relying on it to prove that clause 21 satisfies the requirement of reasonableness in section 11 of UCTA.

123. Under Regulations 5 and 6 of UTCCR:-

    (a) "*5…. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a*

significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

(b) A term is to be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not, therefore, been able to influence the substance of the term.

(c) "*6… the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending on the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent*."

124. Applying these various criteria, clause 21 (if it would otherwise apply to oust liability for the representations and promises which I have found were made as regards the mooring issues) would be unfair and unreasonable. Among other things:

(a) the bargaining position of the Johnstone-Sydneys was weak and exploited by Mr Djurberg. They had devoted considerable time and effort to their "new life" in a houseboat and had sold their house;

(b) they had then "lost" HRB2 and their deposit of £70,000, saving it only because it was agreed to be applied to HRB4. The purchase was presented on a "take it or leave it" basis by the Seller and did not deal with the mooring of HRB3, which was so emphasised in the discussions and bargain; and

(c) although the Johnstone-Sydneys had solicitors, there was no negotiation about the terms of the agreement (in distinction to land purchase contracts and cases such as *Lloyd v Browning* [2014] 1 P & CR 11).

(8) The alleged loan and delivery of HRB4 to the Johnstone-Sydneys

125. As for the questions of loan and delivery, the Johnson-Sydneys alleged that there was a binding agreement that Mr Djurberg would allow them 15 years to pay by monthly instalments the balance of £300,000 for their purchase of HRB4 (including £20,000 left outstanding from an invoice dated 1 July 2014 for an instalment of £110,000).

126. Mr Djurberg denies this and claims that their failure to pay the balance of the purchase price (a) disentitled them from taking "Delivery", possession and ownership of HRB4 in February 2015 and (b) put them into repudiatory breach of contract, which repudiation Mr Djurberg accepted.

127. He relies on clause 7(a) of the construction contract which provided that the delivery date was to be postponed in the event that Instalments were unpaid and (b) clause 13 which provided that the Seller could terminate the Agreement if any "Instalment" was unpaid within 28 days of such payment being due. His case is that the Johnstone-Sydneys did not gain title to HRB4 and he exercised this right on or after 6 May 2015 when the Johnstone-Sydneys vacated HRB4 and he validly re-took possession of it.

128. The construction contract defined "Instalments" as *"payments due in accordance with Bill of Sale"*. The Bill of Sale provided for payment in instalments of £70,000 already paid towards HRB2; £390,000 immediately; £110,000 on signing the variation drawings; and the balance of £280,000 to be the subject of a loan repayable over 15 years with 5% per annum interest.

129. Ms Johnstone's evidence was that Mr Djurberg agreed to add £20,000 to such loan during a discussion about the payment of the £110,000 instalment on or about 27 July 2014 and so the Johnstone-Sydneys subsequently used a bank loan they had obtained to pay a further £14,049 "extras" (fixtures and fittings which exceeded the agreed budget). I accept this as more likely than Mr Djurberg's evidence that he had merely agreed to postpone this element of the final payment *"for a few days"* especially in the absence of any chasing correspondence until 11 December 2014.

130. Whilst the Johnstone-Sydneys did not sign the Bill of Sale, it was signed by Mr Djurberg and referred to the terms of the alleged loan and was incorporated by reference in the construction contract, clause 6 of which also provided for *"Remaining (Balance) of Contract to be paid monthly via Mortgage/Loan Agreement with Designer/Builder*".

131. As for whether HRB4 was "delivered" within the meaning of the construction contract, "Delivery" was defined as *"the presentation of the Floating House on the completion of the Build by the Designer/Builder to the Purchaser"*. Ms Johnstone's evidence was that Mr Djurberg agreed that they would be allowed possession of

HRB4 on 16 February 2015 (the hand-over date having been postponed on 13 February) and they duly turned up at Hampton Riviera with their furniture and were assisted by Mr Djurberg's staff.

132. For his part Mr Djurberg accepts that from October 2013 the parties did discuss a loan, and Mr Djurberg indicated in principle that he would be prepared, but - in an echo of his argument about the mooring licences - contends that his emails of 13 to 17 October 2013 (which referred to the Bill of Sale) show that a binding contract would require a signed document, and the Johnstone-Sydneys' solicitor was involved in that.

133. Mr Djurberg contends that the Johnstone-Sydneys did not bind themselves to the loan terms consistently required by him (monthly instalments of £2,500 and interest at 5% per annum on the outstanding balance) and it was not until they were desperate to move into HRB4, that they claimed – contrary to the documents - that there was a concluded agreement as to a loan of the £300,000.

134. Whilst (a) the Johnstone-Sydneys may have delayed in concluding the loan terms (b) Mr Djurberg made it clear that he did not wish the Johnstone-Sydneys to take possession of HRB4 until they had paid or agreed payment terms for their debt and (c) there was clearly some argument when they moved in to HRB4 on 16 February 2015, I am satisfied that he consented to their taking possession and thus "delivery", albeit amid some continuing controversy, on and/or after 16 February 2015.

135. Mr Djurberg had the Johnstone-Sydneys over the proverbial barrel. On being asked how she claimed that he had consented, Ms Johnstone could do no more than (a) refer to "an agreement in writing" which turned out to mean the Bill of Sale (which she had not signed) and (b) say that Mr Djurberg knew the lease on their previous home was running out.

136. Mr Djurberg's position was that his loan offer was no longer open and the Johnstone-Sydneys (and their young son) were occupying HRB4 on sufferance - on a mooring licence at will only - and at risk of eviction if the finance was not speedily addressed. That, given the Bill of Sale and the parties' conduct in reliance on his express willingness to allow the balance to remain outstanding, cannot be right. At the very least, he should have stuck to the "agreement in principle" which

required no further essential terms, unless and until he gave reasonable notice in the light of their failure expressly and directly to sign to it.

137. It was not surprising that, as the Johnstone-Sydneys stated in cross-examination, they were mentally *"reeling"* and *"spinning"* and that when they failed to raise the finance elsewhere, some 3 months after taking up possession, they vacated HRB4. In the meantime, in addition to the £550,000 towards the purchase price, they had paid £14,049 (for extras) and £2,500 being the first monthly payment instalment which Mr Djurberg was demanding in March 2015.

138. Ironically, the Johnstone-Sydneys' residence in HRB4 moored at Hampton Riviera, was insecure anyway, given the Seller's attitude to their mooring licence, and was unlawful in the absence of residential planning permission. In that context but in any event, I also reject the Seller's submission that the Johnstone-Sydneys renounced or repudiated the relevant agreement. At the very least, again, their conduct was not sufficiently unequivocal, against the background of Mr Djurberg's threats to evict them - see the textbook summary of relevant principles in *Chitty on Contracts* (32nd Edition) volume 1, para 24-018.

139. By 27 April 2015, the Johnstone-Sydneys had learned from an officer at LB Richmond (a Mr Staff) that there was no planning permission for HRB4 as a residential houseboat at Hampton Riviera; and at the meeting with Mr Djurberg on or about that date, they informed him that they wished to sell HRB4 and pay him what was owed out of the sale proceeds, not that they were giving up possession of it to and for Mr Djurberg to sell. They did not demonstrate unequivocally an intention not to perform the agreement.

(9) Mr Djurberg's resale of HRB4

140. By the time that the Johnstone-Sydneys vacated HRB4, they were the owners entitled to possession subject only to continuing rights and obligations under their agreement with Mr Djurberg, their claim to damages for misrepresentation and/or breaches of contract in respect of the mooring issues having already accrued.

141. In any event, clause 13(c) of the construction contract provided that on Mr Djurberg exercising any right to terminate the agreement, he was obliged to repay the "balance of the proceeds of sale" after deducting the sums owing to him and

expenses incurred, that is £550,000, against which he has no set-off in the light of his withdrawal of his counterclaim. Any failure by the Johnstone-Sydneys to cooperate with such sale under clause 13(d) was or became irrelevant.

142. As well as damages, the Johnstone-Sydneys seek repayment of the instalments paid on account of the purchase price for which the consideration has wholly failed, which are not to be characterised as deposits or earnests of due performance liable to be forfeited: see *Dies v British & International Mining and Finance Corporation* [1939] 1 KB 724, 744; *Rover International v Cannon Film Sales* [1989] 1 WLR 912, 923-5.

143. I disagree with the Seller's argument that there was no total failure of consideration because the Johnstone-Sydneys *"occupied HRB4 (with their son) for 3 months and so they cannot say they received nothing at all"* or that such occupation had a value to be credited against damages. Their occupation was at the very least fraught and far from what they were entitled to. Indeed Mr Djurberg was adamant that they were "squatters" and appears sometimes to have treated them as such.

144. The position became (in one sense) simpler once Mr Djurberg conceded (in his supplemental closing submissions) that he was accountable to the Johnstone-Sydneys under clause 13(c) of the construction contract in respect of the proceeds of his sale of HRB4 to Mr Cairns.

145. In the above circumstances and given Mr Djurberg's liability for damages as regards the mooring issues (see further below):-

    (a) I do not believe that there is any need to address the Johnstone-Sydneys' alternative attempt to recoup the sums which they paid for HRB4 on the basis of an implied terms permitting such recoupment (which seems to me questionable in the light of the express agreement between the parties) and/or by way of a covenant for quiet enjoyment (which seems to me more plausible); and

    (b) the Johnstone-Sydneys' claims under section 3 of the Torts (Interference with Goods) Act 1977, for an injunction and order for delivery up of HRB4 are no longer appropriate in the light of Mr Djurberg's sale to Mr Cairns, and damages on this score should not be added to those to be awarded for misrepresentation and breaches of contract as below.

146. The crucial facts as regards Mr Djurberg's resale of HRB4 after the Johnstone-Sydneys had vacated are now clear. He had claimed in opening the trial (as he had in his verified statements of case and witness evidence) that his sale of HRB4 to Mr Stark in August 2015 for only £30,000 was at a price seriously depressed because of the Johnstone-Sydneys' claim that HRB4 had become and still remained theirs, thus thwarting any other sale by him and rendering them liable on his counterclaim for injurious falsehood and wrongful interference with economic interests.

147. This counterclaim and its factual basis was a false manufacture. Whilst Mr Djurberg and Mr Stark may have agreed on a sale and purchase, and while £30,000 may have been transferred and refunded as between them and Mr Stark may briefly have lived on HRB4 in the meantime, the purpose as far as Mr Djurberg was concerned must have been or included (as I find it did) the furthering of his disputes with the Johnstone-Sydneys and in particular his counterclaim.

148. In the event, by the end of the trial Mr Djurberg did not maintain such a counterclaim and eventually accepted that HRB4 was sold by him to Mr Cairns (introduced as a purchaser possibly by Mr Stark), he said for £650,000, and that he was therefore accountable to the Johnstone-Sydneys for £350,000. The correct figures as I find were £850,000 and £550,000 respectively. I add only, as relevant to the Johnstone-Sydney's damages, that Mr Djurberg wrongfully deprived them of the value of HRB4.

(10) The Smalls – mooring and other charges

149. These proceedings began with Mr Djurberg's claim against the Smalls on unpaid invoices relating to HRB3:

1286	*14-May-15*	*2015-75*	*£*	*1,296.00*	*mooring second half of May*
1316	*27-May-15*	*2015-88*	*£*	*989.34*	*utilities*
1318	*01-Jun-15*	*2015-76*	*£*	*2,400.00*	*mooring fees June*
1364	*01-Jul-15*	*2015-90*	*£*	*15,072.00*	*mooring fees for 6 months*
1365	*01-Jul-15*	*2015-91*	*£*	*35,368.76*	*mooring fee gangway and bikes*
	01-Jul-15	*2015-92*	*£*	*9,617.17*	*mooring fees July*
	01-Aug-15	*2015-93*	*£*	*9,617.17*	*mooring fees August*

150. Since then, Mr Djurberg has rendered further invoices to the Smalls:

1387	*01-Sep-15*	*2015-120*	*£*	*9,617.17*	*mooring fees September*

1396	*01-Oct-15*	*2015-135*	*£*	*9,617.17*	*mooring fees October*
1397	*01-Nov-15*	*2015-147*	*£*	*9,617.17*	*mooring fees November*
	01-Feb-16	*2016-177*	*£*	*9,617.17*	*mooring fees February*
	01-Mar-16	*2016-178*	*£*	*9,617.17*	*mooring fees March*
1404	*01-Apr-16*	*2016-158*	*£*	*5,437.56*	*mooring fees April*

151. Apart from the utilities bill which is admitted by the Smalls subject to set off, Mr Djurberg contends that the "base price" for mooring a houseboat the size of HRB3 was set out in his brochure and website at £250 per day and whilst he offered the Smalls a moratorium on such charges for the period from November 2014 to March 2015, he "felt cheated" when he learnt how much the Smalls were paying in rent for the Huf house and withdrew this concession.

152. However (a) Mr Djurberg's alleged brochure was not referred to in any correspondence, even after the Smalls had moved into HRB3 and sought their mooring licence from Mr Djurberg and I accept their evidence that it was never provided to them; and (b) the evidence also suggests that his website (whether or not it then carried his "base price" for moorings) was not launched until well after his sale and purchase agreement with the Smalls, probably in November 2013.

153. In my judgment Mr Djurberg was and is not entitled to any of the mooring fees charged by these invoices and was never entitled to a lien over HRB3 by virtue thereof since, in particular (a) there was no agreement to pay any "base price" mooring fees as claimed; (b) the price for HRB3 agreed and paid, included a long-term residential mooring licence; (c) it is implausible that a daily £250 "base price" (amounting to more than £90,000 per annum) would be automatically applicable to a long-term mooring in the circumstances of this case; and (d) residential moorings at Hampton Riviera were in any event unlawful as contrary to the Town & Country Planning Act.

154. As for the charges claimed by Mr Djurberg (at a rate of £264.30 per month) for storage of the security grating around HRB3 in the dry dock (for the cost of which they seek repayment as below), no basis in fact or law is pleaded for this. In the circumstances his claim to having had a lien, on the basis of "standard terms" which the Smalls also deny, does not arise.

155. The fact that the Smalls acquiesced in making further payments to Mr Djurberg does not afford him any further cause of action for recovery of the sums claimed by

way of mooring fees, storage charges or at all. On the other hand, they counterclaim for (a) £28,340 paid in respect of their mooring, allegedly under duress; (b) £17,033, allegedly overcharged in respect of HRB3's kitchen and paid by mistake; and (c) £17,485 charged by Mr Djurberg for security grating which he subsequently removed and kept.

156. As for the first of these, the Smalls claim that when they paid the £28,340 to Mr Djurberg in April 2015, he was threatening to evict them from Hampton Riviera and therefore from their home and they were thereby forced into making the payment to *"buy time"*. A restitutionary claim lies in respect of money paid as a result of illegitimate pressure: see *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1; *Goff & Jones, Law of Unjust Enrichment* (9th Edition) para 10-01 ff.

157. As summarised in the leading textbooks – for example *Chitty on Contracts* (op.cit, paras 8–001, 8–003) -

> *"It is now established that [a person may claim duress by] wrongful threats to his property, including threats to seize his goods, and of wrongful or illegitimate threats to his economic interests, at least where the victim has no practical alternative but to submit…"*

158. However, I am not satisfied that in making this payment the Smalls acted solely or predominantly as a result of Mr Djurberg's threats. It is more likely that they had a choice as to how to proceed, bearing in mind that they were recording their discussions with Mr Djurberg. They could have taken legal advice and steps to regularise their position, paying if necessary expressly under protest or bringing proceedings to establish their right to moor HRB3.

159. Moreover, the Smalls occupied Mr Djurberg's dry dock for a considerable time and could have acted earlier if they wished: he should, in my judgment have some credit against their damages claims as set out below and this sum seems to me appropriate. This militates against granting the Smalls the relief sought by them as regards this item.

160. As for the £17,033.33 claimed by the Smalls to have been paid to Mr Djurberg by mistake, they say that whilst they believed it to be due, it was in fact an overcharge calculated as (a) £35,000 in original price for the kitchen plus (b) extras of £30,671.29 invoiced by Mr Djurberg and paid by the Smalls; less actual total price of £48,637.96 invoiced from LWK Kitchens to Mr Djurberg on 26 November 2013

- the only invoice produced to the Smalls at their request - before proceedings were issued and Mr Djurberg's documents seized by the police.

161. Again, I am not satisfied that this claim is made out (although the extras payment remains to be taken into account on damages as below). There is not pleaded any term that the Smalls would only have to reimburse to Mr Djurberg his actual expenditure on the kitchen units, without any profit. Given that the design and installation would be part of HRB3's construction to the Smalls' order, involving Mr Djurberg and his team, there is no reason for this to be assumed.

162. As regards the Smalls' claim £17,485 as the sum charged by Mr Djurberg for the security grating which he has removed (and for which he claimed storage costs), or alternatively, an order for delivery up of the grating which Mr Djurberg has retained, Mr Djurberg says that grating was installed by agreement, was "patently desirable" and was indeed paid for by the Smalls.

163. In June 2015, Mr Small and then IBB Solicitors on behalf of the Smalls, demanded that Mr Djurberg remove the grating. He did so and says that he has kept it for the Smalls, saying that it has always been available for their collection. It seems to me that this falls to be considered, again, as part of the Smalls damages, addressed further below, if the grating was paid as an extras charge.

164. Finally in this section, I must deal with the question of car parking spaces in favour of HRB3 and the Smalls, as regards which they claim for misrepresentation and breach of contract.

165. Mr Djurberg accepted in oral evidence, that parking spaces at Hampton Riviera were discussed at the meeting with the Smalls on 15 December 2012. He sent a plan of the car park to show the layout of the car park and the then single parking space allocated to HRB3, labelled "sold"; and in the email of 9 January 2013 he stated that two spaces rather than one would be included – "*if we were to keep matters between us I would be happy to compromise".*

166. The Smalls say that this was a representation and/or agreement to Mr Small's request to include two rather than one space because of the size of the houseboat. But Mr Djurberg says that (a) negotiations about taking a lease or a licence of particular car parking spaces were never concluded and the Bill of Sale stated that car parking was subject to agreement; and (b) nothing alleged to have been said by

him amounts to an actionable misrepresentation of fact or promise to permit the parking of two cars at the Hampton Riviera.

167. This is another illustration of the stand-off between Mr Djurberg and the Smalls. He clearly encouraged their belief that they would receive two parking spaces; they relied on his word and failed to formalise the position before they paid the £1.25 million plus for HRB3; and he then reneged and, if anything turned on it, I would find him in breach of contract. In the event however it adds nothing to the damages which are their remedy for his liability in respect of the mooring issues.

(11) Legal consequences

168. My factual findings as regards the moorings issues and otherwise as above are based on such documents and testimony as I regarded as credible, and the inferences to be drawn in the light of the trial process. I can now turn, without much elaboration, to their legal effect in terms of liabilities and remedies.

169. In my judgment, throughout the negotiations between the seller and the buyers, starting with the Foxtons and other estate agents' advertisements (and in the case of the Johnstone-Sydneys as documented regarding HRB2) the inclusion of permanent residential mooring rights in the sale of the houseboats was fundamental. Mr Djurberg knew that, and was at least slippery in managing not properly to document it by executed mooring licences specific to HRB3 and HRB4. His explanations and excuses for this were unacceptable.

170. The question of whether representations made before the contract was concluded became terms of the contract turns on the intention of the parties, objectively ascertained from all of the evidence: *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623; *Inntrepreneur Pub Company (GL) v East Crown Limited* [2000] 3 EGLR 31. I consider that in this case, objectively construed, that is the case.

171. However the claims in contract do not now add to the claim for misrepresentation. The measure of loss in contract would be different if the values of the houseboats with appropriate mooring rights were higher than their prices, but on Mr Heath's expert evidence, which I accept, they are the same, namely £1,250,000 for HRB3 and £850,000 for HRB4.

172. Whilst the inclusion of such mooring rights in the sales to the respective Buyers at no extra cost appears more a matter of contractual obligation (or not) than representation of fact, the effectiveness of such an obligation depended on the ability lawfully to use the Hampton Riviera for permanent residential moorings; and the Buyers put their case as regards the lack of documented lawful mooring rights primarily on the basis of misrepresentation, their claims for breaches of contract being an alternative and secondary case.

173. The Buyers claim that Mr Djurberg's misrepresentations were made negligently and in breach of a duty of care which he owed them, or that he is liable to them for damages under section 2(1) of the Misrepresentation Act 1967 which provides that

> "W*here a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.*"

174. Mr Djurberg said that the boatyard enjoyed certain common law, ancillary rights to entertain moorings and that is what he told Foxtons, according to Mr Cunningham-Walker, and repeated in his evidence. But while he twisted and turned in the witness box to explain this (and clearly to state whether or not this included residential moorings in favour of buyers or other third parties), there was no support for it factually or legally.

175. Thus as well as failing to perform his contractual obligations, Mr Djurberg undoubtedly misrepresented the factual position. There were no reasonable grounds for claiming any historic right or permission which would render permanent residential moorings at the Hampton Riviera lawful. Despite his eccentricities, Mr Djurberg did not reasonably believe that (if he believed it at all) - and his tendency to obfuscate, whilst it succeeded for a time in staving off the buyers' concerns, could not disguise this at trial.

176. I am satisfied that (a) the Buyers relied on Mr Djurberg as regards his promise and the lawfulness of the residential moorings at Hampton Riviera which they expected, in agreeing to buy and paying for HRB3 and HRB4; (b) Mr Djurberg did

not believe or have reasonable grounds for believing that such residential moorings were lawful; and (c) the Buyers suffered damage as a result since they did not receive lawful (or indeed any secure) moorings.

177. That of course does not mean in itself that the Seller also assumed a duty of care to the Buyers such that he was liable to them in negligence. Under the common law, this is for the Buyers to establish. The usual defendants in negligent misrepresentation are professionals or other advisors who owe a duty of care by reason of special skill or knowledge.

178. There are few examples of reported cases in which a vendor is found to have owed a duty of care to a purchaser, because the duties will usually be circumscribed by the contract or fit better under section 2(1) of the 1967 Act and require a "special relationship" between the parties - see *Esso Petroleum v Mardon* [1976] QB 801 (CA), 826:

> *"... if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion - with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages."*

179. The duty of care does not arise automatically between negotiating parties – on the contrary, they have opposing interests and are not usually to be relied on by their proposed counterparty. In *Esso v Mardon*, the proposed lessor had the expertise and put forward calculations upon which a proposed lessee would foreseeable rely.

180. Mr Djurberg was and is liable for damages for misrepresentations inducing both contracts under section 2(1) of the 1967 Act. But whilst he may have behaved and been treated as if an expert on mooring licences for Hampton Riviera, it is not necessary to go so far as to find that he owed the Buyers a duty of care. Neither their enthusiasm and possible naivety, nor his presumed knowledge, justifies the imposition of a duty on him as seller to advise them on the ambit of their purchase and they could have retained suitable advisers or checked the position independently.

181. The Buyers claim damages rather than rescission and their recoverable damages for misrepresentation are in my judgment referable to what they paid for the houseboats which they would not have bought were it not for Mr Djurberg's statements and promises as to mooring. Without moorings they were, as I find, of no value at least to the Buyers.

(12) Quantum of damages

182. In my judgment the Buyer's recoverable damages can best be measured as the difference between (i) what the Buyers paid to the Seller for the houseboats and (ii) their values taking into account the prospect of obtaining alternative appropriate moorings.

183. In the circumstances of this case, I would regard that loss (of what they paid, less what they gained, as a result of the Seller's misrepresentations) as also the appropriate measure of damages in respect of the Buyers' alternative claim for breach of contract (based upon what they failed to obtain under their purchases).

184. I find that the Seller's misrepresentations (and if necessary breaches of contract) caused such loss and reject his contentions on causation, including his submission that no loss can be established unless and until the Buyers applied for and were refused planning permission for mooring HRB3 and HRB4 respectively at Hampton Riviera. That would make no sense at all, given the dealings between the parties, the position as regards LB Richmond, and Mr Djurberg's extraction of further fees for, and ability to evade the grant of formal mooring licences.

185. I do not regard the use of the houseboats temporarily by the Buyers as requiring credit to Mr Djurberg or otherwise affecting this calculation (save as regards the sum of £28,340 already paid by the Smalls, as mentioned above). Moreover, no basis or figures to the contrary were submitted on behalf of the Seller.

186. The Buyers' occupation of HRB3 and HRB4 was in both cases stressful and hazardous, given Mr Djurberg's conduct and the additional mooring fees which he obtained from the Smalls (and as to £2,500 from the Johnstone-Sydneys, which again I will not order to be repaid) was at least sufficient. Whilst Mr Djurberg may have genuinely dreamt of Hampton Riviera as a community, for the Buyers it

became a nightmare. They found themselves, so-to-speak, swimming with the sharks and Mr Djuberg's version to the contrary was built on fantasy.

187. The opinion of the Buyers' independent expert, John Heath - on which as regards HRB3 he was cross-examined vigorously - was that without long-term residential moorings at Hampton Riviera (that is without a lawful licence) or elsewhere suitable, the houseboats were and are worthless.

188. Mr Heath considered it impossible that HRB3, because of its three stories and "foot- (web-?) print" and its position on the upper Thames, could be found an alternative mooring even if it were possible at a price to dismantle and re-assemble it floor-by-floor, for transportation purposes and to fit under bridges. (Less importantly HRB4 could theoretically be relocated in the non-tidal stretch above Teddington Lock with difficulty because of its overhang and freeboard, but suitable moorings were rare and none had been identified.)

189. I do not find these propositions implausible. A houseboat without a mooring seems to me in principle a potentially unuseable liability and I do not see why any and every houseboat must be assumed to have an appropriate mooring, in terms of location and economy. It depends on the facts and Mr Heath's analysis in the present case, absent any rival expert opinion, was credible and even persuasive.

190. In cross-examination, it was put to Mr Heath on instructions that HRB3 could be dismantled and transported to another appropriate location but no particular mooring was identified which could accommodate it, nor was the cost specified; and his response, having considered the specification of HRB3, was that this would require the perpendicular beams which hold the houseboat together to be cut apart, rather than simply "unbolting" one floor from the next.

191. On behalf of the Seller it was also put to Mr Heath and submitted that a houseboat without a mooring at a particular time must still have value:

    (a) many moorings for houseboats are insecure and expensive – running from year to year at a very high rate and/or terminable on notice without cause but the houseboat still has significant value; and

    (b) the price of £125,000 for a 125 year licence in Hampton Riviera for a 24 metre long mooring would be good value given that prices for long term

licences start at some £10,000 per metre along the Thames – i.e. 10 times higher.

192. These observations, to my mind miss the point, which I accept, that HRB3 needs the *possibility* of a long-term mooring to have value, and that on the evidence this is not available. I touch on the possible fate of HRB3 in such circumstances below.

193. The Seller invited the court to consider the other valuations Mr Heath provided, sketchy though some were, to reach a view on the likely value of residential space on a houseboat on this reach of the Thames. This proposed a £ per square foot approach, on which basis, constructing the below table (provided as a picture without written closing submissions), it was suggested that HRB3 is worth at least £750,000 *"although there is huge possible range given the paucity of data"*:

	cf	name	location	year of sale	length/m	width/m	int/ sqf	ext/ sqf	floors	state	mooring right	land included/ sqf	total price	value land alone	est. £psf	
Heath I 5.5	HRB3	Back of the Moon	Taggs	2015	30	7	3942	4520	2	uncompleted	FH res	20000	£ 1,500,000	£ 950,000	£ 143	
Heath I 5.6	HRB3	Carpe Diem	Taggs	2013	13.2	7.2	2046	2046	2	7 year old	unclear	some?	£ 950,000		£ 464	unreliable
Heath I 5.7	HRB3	Twin Peaks	Taggs	2010	28	5.5	2818	3315	2	not said	FH	garden	£ 1,000,000	£ 550,000	£ 160	
Heath I 5.8	HRB3		Taggs	2013			2800		2	not said	FH	garden	£ 950,000	£ 500,000	£ 161	
Heath II 5.5	HRB4	Carpe Diem	Taggs	2013	13.2	7.2	2046	2046	2	7 year old	unclear	some?	£ 950,000		£ 464	unreliable
Heath II 5.6	HRB4		Taggs	2014	13	6	714	840	1	1980s, £7k pa work needed	rolling licence	no	£ 256,000		£ 359	
Heath II 5.7	HRB4		Ash Island	not said	15	4.3	590	694	1	£6k pa work needed	y/y rolling licence	no	£ 186,000		£ 315	
Heath II 5.8	HRB4		Windsor	on offer	20	5	915	1076	1	purpose built, new	full res, 125y	no	£ 720,000		£ 787	offer accepted
		HRB3		2013	25	7	5000	5651	3	new						
		HRB4		2013	20	6	1235	1292	1	new						

194. I agree with the Buyers that this mathematical construct as regards some "comparable" sales by reference to £/sq. ft. values, does not detract from Mr Heath's evidence and conclusion that a hypothetical buyer would not pay for the houseboat without somewhere possibly to moor it and if it cannot be moored at Hampton Riviera and if there is nowhere else to moor it, there will be no market for it (as sadly appears to fit with the experiences of the Smalls).

195. Accordingly, the amounts by way of actual value to be credited against the sums paid by the Buyers are (a) nil in the case of HRB3, and (b) in the case of HRB4 also nil because whether or not it has or could have a suitable alternative mooring, Mr Djurberg deprived them of it and resold it to Mr Cairns as above.

196. Both the Smalls and the Johnstone-Sydneys also claim additional costs of £5,000 per month (ongoing) and £1,400 per month respectively by way of rental expenses which they say they incurred as alternative accommodation because they unable to live in HRB3 and HRB4 since May 2015.

197. I am not minded to award these additional costs as damages. Whilst there was no great exploration of the possible issues at the trial, they do not directly stem from Mr Djurberg's misrepresentations as regards the moorings; the housing obtained was very different from the use of the houseboats purchased; and in my judgment the award of damages on the latter basis is the fair outcome of this dispute and there may be an element of duplication if these alternative rental costs are added.

198. If there are other costs relating to the houseboats which I have mistakenly omitted from the above analysis, they should be brought to my attention before this judgment and the order to be made are perfected.

199. I have in mind in that regard also the costs of alternative mooring incurred by the Smalls, in respect of HRB3, which ties in with the final point in this judgment below. Documents in the trial bundle suggest moving and other costs for HRB3 in April and December 2016 totalling of some £5,900 and monthly charges since of £600 at Platts Eyot, but I will allow further submissions and finalise such claims at the consequential hearing.

(13) Conclusions

200. For the reasons set out above there will be judgment in favour of the Buyers against the Seller. Mr Djurberg's claims will be dismissed and he will be ordered to pay damages to the Smalls and to the Johnstone-Sydneys respectively as follows.

201. The Smalls are entitled to and will be awarded damages of £1,250,000 paid as the basic price of HRB3 and mooring, plus £30,671.29 for kitchen extras (and £17,485 if the grating was an extra) less £989.34 for utilities

202. The Johnstone-Sydneys are entitled to and will be awarded damages of £550,000 paid on account of the basic price of HRB4 and mooring (repayment of which out of the resale to Mr Cairns is also due from Mr Djurberg under the construction contract) plus £14,049 paid for extras.

203. The Johnstone-Sydneys cannot and do not pursue any claim for an injunction or other specific relief in respect of HRB4 following its resale to Mr Cairns, but maintain their claim for an historic declaration that title in HRB4 passed to them. The Smalls seek a similar declaration and, given Mr Djurberg's erratic conduct in

the past, an injunction to prevent him from trying to take possession of and/or sell HRB3.

204. I have decided to allow the parties to make further submissions immediately if they wish as regards such declaratory and injunctive relief, failing which I will not grant the same.

205. Finally, apart from corrections, interest, costs and other consequential matters in the light of this judgment, I am concerned as to the fate of HRB3, especially given its size and cost and the risk of its wasting away unused but as a continuing liability.

206. Mr Djurberg expended great effort in building HRB3 to very luxurious specifications and maintains (albeit that I have held on this against him) that it still has significant value, and I would wish him to have an opportunity to reacquire it, provided that he complies with the damages awards. Failing that, it may be that an order for sale would assist.

207. Although I have had to reach various findings against him, I should stress that the Buyers did not allege fraud in these proceedings and I have determined the rights and civil liabilities in issue on the evidence I heard regarding these parties' dealings and not on the findings in any other case (including *McGee v Djurberg* at Kingston upon Thames County Court in March 2015) nor on collateral allegations as to general misconduct. Regarding Mr Djurberg, as Montaigne put it so elegantly, "*no one characteristic clasps us purely and universally in its embrace*." It may yet be that something more positive can emerge from this unfortunate saga.
