Neutral Citation Number: [2021] EWCA Civ 807

Case Nos: A3/2020/1046 & A3/2020/1073

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)
ANDREW HOCHHAUSER QC SITTING AS
A DEPUTY JUDGE OF THE HIGH COURT
BL-2018-002267

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 May 2021

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE STUART-SMITH
and
SIR NICHOLAS PATTEN

- -

Between:

(1) EUROPEAN FILM BONDS A/S
(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE
(3) ERGO VERSICHERUNG AG
(4) KRAVAG-LOGISTIC VERSICHERUNGS-AG
(5) BASLER SACHVERSICHERUNGS AG
(6) AXA VERSICHERUNG AG
(7) BAYERISCHERVERSICHERUNGSVERBAND VERSICHERUNGSAKTIENGESELLSCHAFT
(8) SV SPARKASSEN-VERSICHERUNG GEBÄUDEVERSICHERUNG AG

Claimants/Respondents

and

(1) LOTUS HOLDINGS LLC
(2) LOTUS MEDIA LLC
(3) LARKHARK FILMS LIMITED

Defendants/Appellants

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Edmund Cullen QC (instructed by **Clintons Solicitors**) for the **Second to Eighth Respondents**
Robert Howe QC and **Laura John QC** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP** and **Wiggin LLP**) for the **Appellants**

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Hearing date: 19 May 2021

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10:30 am on 28 May 2021.

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Approved Judgment

Stuart-Smith LJ:

Introduction

1. This appeal concerns the meaning of the word "return" in a commercial contract that forms part of a suite of contracts relating to a film called "Starbright".

2. The contract was in the form of a Completion Guarantee ["the Completion Guarantee"] providing for the payment by the Respondents[1] of substantial sums in the event that the film was not completed and delivered on time. Schedule 2 of the Completion Guarantee, which was entitled "Delivery Procedure", governed what should happen upon delivery and, specifically, what should happen if it was alleged that contractually satisfactory and timely completion and delivery had not happened.

3. Schedule 2 provided for certain steps to be taken within defined time limits, which included the passing back and forth between the parties of materials that were known and defined as "the Lotus Delivery Materials". The steps were designed to conclude in acceptance of delivery of the film or a contractual route to dispute resolution.

4. Paragraph 5.2 of Schedule 2 provided at a certain stage in the process that, if the Appellants served an "Additional Objection Notice" alleging that some or all of the Lotus Delivery Materials were not suitable, then "to the extent that the Lotus Delivery Materials [which are contended not to be suitable] had been physically delivered to [the Appellants]" then "within three … days after … receipt of the [Respondents'] written request … the [Appellants] shall return those Lotus Delivery Materials requested by [the Respondents] … in order to allow [the Respondents] to cure the defects in such Lotus Delivery Materials as appropriate." If the Appellants failed to comply with this requirement, paragraph 9 of Schedule 2 provided that completion and delivery of the film would be conclusively presumed, with the effect that no payment would fall to be made under the Completion Guarantee

5. It is common ground that a request for the return of the Lotus Delivery Materials was made on 12 September 2018. It is also common ground that (a) within three days of that request the Appellants entrusted the requested Lotus Delivery Materials to FedEx in Los Angeles for onward transmission to the Respondents in London; but that (b) the Lotus Delivery Materials were not delivered to the Respondents until more than three days after the request. Hence the concentration on the word "return" in paragraph 5.2.

6. The Appellants contend that, on the proper interpretation of the Completion Guarantee, they effected the "return" of the Lotus Delivery Materials when they handed them to FedEx for onward transmission. The Respondents contend that handing the Lotus Delivery Materials to FedEx did not effect their "return", and that the "return" of the Lotus Delivery Materials did not occur until their delivery to the Respondents in London outside the permitted three-day period.

7. After a hearing that lasted two days, the Deputy Judge, Mr Andrew Hochhauser QC, provided a judgment that was detailed, thorough and carefully crafted: [2020] EWHC

[1] I shall usually refer generically to "the Appellants" and "the Respondents" unless it is necessary to the issues to be more precise, or where quoting from the Judgment below.

[1115] (Ch) ["the Judgment"]. He held that the interpretation of the word "return" that had been proposed by the Respondents was to be preferred.

8. The Appellants now appeal on the basis that the Judge was wrong and should have preferred their proposed interpretation of the word "return".

9. In my judgment, the Judge came to the right conclusion for essentially the reasons he gave.

The background

10. The background was set out fully by the Judge and is, for present purposes, uncontroversial. What follows is drawn very largely from the Judgment.

The parties

11. The First Respondent ("EFB") is (or was) a company involved in the provision of completion guarantees in relation to film and TV projects. We were told that it is now in some form of liquidation, but that does not affect the issues to be determined on this appeal. The remaining Respondents ("the Underwriters") are insurance companies which underwrite those guarantees. The Respondents are all parties to the Completion Guarantee either originally or by virtue of a Deed of Amendment dated 31 January 2017. In the Completion Guarantee the Underwriters are referred to as the "Guarantor".

12. The First and Second Appellants (collectively "Lotus") are sales agents who are responsible for marketing and selling films to distributors around the globe. They are also parties to the Completion Guarantee. The Third Appellant ("Larkhark") is an investment company. Larkhark was the financial producer and the main financier of the film. It is a Beneficiary under the Completion Guarantee, where it is referred to as "the Producer". The Fourth Defendant below ("Lip Sync") is the other Beneficiary under the Completion Guarantee. It has taken no part in the proceedings.

The Completion Guarantee

13. The central obligations of the Completion Guarantee (subject to the various exclusions and conditions) are contained in clause 2.1, pursuant to which the guarantee is provided for the benefit of the "Beneficiaries", which are defined to include Larkhark, Lip Sync and Lotus. The inclusion of Lotus within that definition appears to be an error, but it does not matter. Clause 2.1(c) provides that "if the Guarantor [i.e. the Underwriters] fails to effect Sales Agent Delivery or discontinues production of the Film" the Guarantor shall make various payments to Lip Sync and Larkhark. The aggregate sum payable under this provision is defined as the "Payment Sum". The sum at stake is said to be something over $17 million.

14. "Sales Agent Delivery" is defined in clause 1.12, where it is a component of "completion and delivery of the Film". Clause 1.12(a) required "tender of delivery to Sales Agent [i.e. Lotus] by 31 December 2017 subject to an extension to those dates equal to the duration of any delays caused by the occurrence of Events of Force Majeure and/or Events of Essential Element Force Majeure (up to ninety 90 days) (the "Delivery Date") of the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk ("Sales Agent Delivery Materials") and thereafter such

action, such notices and such remedies as the Guarantor is required to take, provide and/or effect in accordance with the delivery procedure attached hereto as Schedule 2 (such delivery being defined herein as "Sales Agent Delivery")".

15. Thus, in broad terms (and subject to applicable exclusions and conditions), the Underwriters undertook to pay the Payment Sum if "Sales Agent Delivery" was not effected. "Sales Agent Delivery" entailed:

    i) tender of delivery of the Sales Agent Delivery Materials by the Delivery Date; and

    ii) such action, notices and remedies as the Underwriters might be required to take, provide and/or effect in accordance with the delivery procedure in Schedule 2.

    The definition of "Sales Agent Delivery Materials" in clause 1.12 of the Completion Guarantee appears to be synonymous with "Lotus Delivery Materials". I shall refer simply to "Lotus Delivery Materials".

16. The procedure set out in Schedule 2 is at the heart of the issue to be determined in this action. It provides for various notices and objections to be provided between the parties, and for the Lotus Delivery Materials to be sent back and forth as part of this process. In particular, paragraph 5.2 of Schedule 2 imposed the requirement to "return" the Lotus Delivery Materials within three days and paragraph 9 of Schedule 2 stated the consequences for a failure to comply with that time period. I set out paragraphs 5.2 and 9 of Schedule 2 in full below: see [18]-[19].

17. The language of Schedule 2 is convoluted. The procedure would start with EFB or Larkhark confirming delivery of the Lotus Delivery Materials to Lotus. Lotus then had 30 days to verify that the Lotus Delivery Materials had been delivered before taking subsequent steps. At [36]-[39] of the judgment, the Judge set out the steps involved and the consequences of those steps with a simplifying clarity that bears repeating virtually in full:

> "36. [I]n outline:
>
> (1) The procedure consists of two 'rounds'. First, after receipt of the Delivery Notice, Lotus had to give either an Acceptance Notice (as defined in paragraph 1.1.1 of Schedule 2 …), in which case the Film was accepted and completion and delivery of the Film was effected, or an Objection Notice (as defined in paragraph 1.1.2 of Schedule 2 …), specifying the ways in which the delivered materials were said to be defective.
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> (2) In the event of an Objection Notice, EFB[2] could then request additional information in relation to it and/or request return of the delivered materials, such return to be "at the requesting party's expense in order to allow … EFB … to cure the defects in such Lotus Delivery Materials" (paragraph 1.1.2 of Schedule 2 …). *[I interpose that any request for the materials to be*

[2] The Delivery Procedure permits steps to be taken by EFB or the Guarantor. For convenience, the Judge's outline referred only to EFB.

returned had to be made, if at all, within three days after receiving the Objection Notice or a Response and the materials were to be returned within five business days of receipt of the request.]

(3) After Lotus had complied with these requests, EFB could either redeliver the materials (with defects cured as necessary) with a Cure Notice or serve an Arbitration Notice. This latter course would, in effect, constitute a challenge to the justification for the original Objection Notice. *[I interpose that these steps were covered by paragraph 3 of Schedule 2]*

(4) In the former event (redelivery of materials with defects cured as necessary), the second 'round' commenced: Lotus could again either give an Acceptance Notice or it could give an Additional Objection Notice. In the latter event, EFB would have a further entitlement to request additional information in relation to the Additional Objection Notice and/or to request return of the re-delivered materials "physically delivered" to Lotus. *[I interpose that it is at this stage that the material part of paragraph 5.2 may operate: as to which see below.]*

(5) Once these requests had been complied with, EFB could either again redeliver the materials (with defects cured as necessary) with an Additional Cure Notice or serve an Arbitration Notice. This latter course would, in effect, constitute a challenge to the justification for the Additional Objection Notice.

(6) In the former event (second redelivery of materials with defects cured as necessary), Lotus could then either give an Acceptance Notice or it could give an Arbitration Notice.

37. Each of these steps was subject to a time limit. As a general proposition, the second 'round' was intended to be more compressed than the first 'round' for both Lotus and EFB. Thus:

(1) On Lotus's side, in 'round' one, Lotus had 30 days from its receipt of the Delivery Notice in which to give an Objection Notice or an Acceptance Notice (paragraph 1.1 of Schedule 2 …). In 'round' two, Lotus had 15 Business Days from its receipt of the Cure Notice in which to give an Additional Objection Notice or an Acceptance Notice (paragraph 5 of Schedule 2 …). ("Business Days" were defined in clause 2.2 … as being "any day other than a Saturday, Sunday or a day on which banks in Germany or England are required to be closed".)

(2) As for EFB, in 'round' one, if it received an Objection Notice, EFB had to redeliver the cured materials and give a Cure Notice within 30 days of the later of "(i) receiving the Objection Notice or the Response, as applicable, or (ii) the return of any Lotus

> Delivery Materials … " (paragraph 3.1 of Schedule 2 …). In 'round' two, if EFB received an Additional Objection Notice, the time for redelivery of the cured materials and the giving of an Additional Cure Notice was no later than within 15 Business Days of the later of "(i) receiving the Additional Objection Notice or the Second Response, as applicable, or (ii) the return of any Lotus Delivery Materials…" (paragraph 6.1 of Schedule 2 …). *[I interpose that the periods of 30 days and 15 Business Days respectively were described as the "Cure Period".]*
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> 38. A tight timetable was maintained in Schedule 2 … from the giving of the original Delivery Notice through to the end of any arbitral process. For example, paragraph 11 of Schedule 2 … provides that any arbitration was to be "expedited"; two arbitrators were to be appointed within five Business Days of any Arbitration Notice, with a third to be appointed three Business Days later; the arbitration was to commence within seven Business Days thereafter; the arbitrator was to issue an award not later than one day after the conclusion of the arbitration.
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> 39. Schedule 2 … also spelt out the consequences of any failure to complete a step within the specified time:
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> (1) In the event of a failure by Lotus to respond with either an Acceptance Notice or an Objection Notice within the time periods specified, it would be deemed to have given an Acceptance Notice (see paragraphs 2 and 9 of Schedule 2 …). It would no longer be possible for any objection to be made, an Acceptance Notice shall be conclusively presumed to have been given and "completion and delivery of the Film shall be conclusively presumed to have been effected".
>
> (2) In the event of a failure by EFB to deliver either a Cure Notice or Arbitration Notice with the time periods specified, an Arbitration Notice would be deemed to have been given (paragraphs 4 and 7 of Schedule 2 …). The provisions permitting the cure of defects would therefore come to an end. EFB would thus be deprived of the opportunity to cure any of the defects alleged and be compelled to arbitrate on the basis of the Film as it was."

18. The material part of paragraph 5.2 of Schedule 2 provides as follows:

> "If [ ] gives an Additional Objection Notice and in such notice the Sales Agent contends that some or all of the Lotus Delivery Materials are not suitable for the making of commercially acceptable release prints or broadcast materials, to the extent that the Lotus Delivery Materials which the Sales Agent contends are not of technical quality suitable for the making of commercially acceptable release prints or broadcast material (as appropriate)

> have been physically delivered to the Sales Agent within three (3) days after the Sales Agent's receipt of … EFB's … written request (which request … EFB … shall make (if at all) within five (5) Business Days after receiving the Additional Objection Notice), the Sales Agent shall ***return*** those Lotus Delivery Materials requested by … EFB at the Guarantor's expense, in order to allow EFB… to cure the defects in "such Lotus Delivery Materials as appropriate." (Emphasis added to highlight the critical word – return)

19. Paragraph 9 provides as follows:

> "If (i) the Sales Agent fails to give any of the notices described in paragraphs 5.1, 5.2, 8.1 or 8.2 above or (ii) the Sales Agent fails to return to EFB… the Lotus Delivery Materials within the time period specified in paragraph 5.2 above, then completion and delivery of the Film shall be conclusively presumed to have been effected and the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice. EFB … shall thereupon give notice to the Beneficiaries that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice but failure to give such notice by EFB … to the Beneficiaries shall not affect the fact that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice."

What happened

20. EFB delivered the Lotus Delivery Materials and gave a Delivery Notice on 30 May 2018. The Judge set out the history of what happened thereafter at [40]-[42] of the Judgment. Once again, his summary bears repeating virtually in full:

> "40. Following EFB's delivery of the Lotus Delivery Materials and giving of the Delivery Notice on 30 May 2018, the subsequent steps of the Delivery Procedure were followed. In particular, pursuant to paragraph 1.1 of Schedule 2 to the CGA:
>
> (1) Lotus's response was required within "30 days from and after its receipt of … the Delivery Notice" (i.e. by 29 June 2018). On 27 June 2018, Lotus gave an Objection Notice stating: "This notice constitutes an Objection Notice for the purposes of Schedule 2 of the [Completion Guarantee]". … The Objection Notice made various complaints, which included complaints that the Lotus Delivery Materials were not in accordance with the Approved Picture Specification, defined in paragraph 1.1.2 of Schedule 2 to the CGA and attached a quality control report alleging objections that the delivered materials were not if technical quality suitable for the making of commercially acceptable release prints.

(2) Any request for additional information was required "within 3 Business Days … after receiving [the] Objection Notice" (i.e. by 2 July 2018). On 2 July 2018, EFB made such a request for additional information.

(3) Lotus had "3 Business Days after its receipt of [the] request" in which to respond in good faith thereto (i.e. by 5 July 2018). On 5 July 2018, Lotus responded, stating "This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure" clause 1.1.2 of the [Completion Guarantee] … All of [Lotus's] rights in each and any jurisdiction are reserved."

(4) Any request for return of the Lotus Delivery Materials had to be made "within 3 Business Days after receiving the Objection Notice or a Response, as applicable". On 10 July 2018, EFB requested return of the Lotus Delivery Materials to "EFB c/o Paul Dray at Lip Sync Productions LLP, 195 Wardour Street, London W1F 8ZG."

(5) Lotus were required to return the Lotus Delivery Materials to EFB "within 5 Business Days after the Sales Agent's receipt of … EFB's … written request" (i.e. by 17 July 2018). On 16 July 2018, the Lotus Delivery Materials were delivered to EFB (c/o Lip Sync as requested). They had been collected by FedEx from Lotus at 3.45pm (LA time) on 13 July 2018 (a Friday) and had arrived at Stansted Airport the following day. Since it appears that Lotus had not elected for weekend delivery, they were not delivered until Monday 16 July 2018.

41. Pursuant to paragraph 3.1 of Schedule 2…, the cured Lotus Delivery Materials had to be delivered to Lotus, and a Cure Notice had to be given, "no later than 30 days after the later of (i) receiving the Objection Notice or the Response as applicable, or (ii) the return of any Lotus Delivery Materials as appropriate which … EFB … has requested in order to cure any claimed defects" (i.e. by 15 August 2018, "30 days after … the return of [the] Lotus Delivery Materials … which … EFB …. ha[d] requested"). On 14 August 2018 the Lotus Delivery Materials were delivered to Lotus by EFB. They were collected by a courier, Team Air, at 6.00pm (London time) on 13 August 2018 and delivered to Los Angeles the following day at 5.55pm (LA time). The Cure Notice was given on 15 August 2018.

42. That led to 'round' two. Lotus had "15 Business Days from and after receipt of [the Cure Notice] and the relevant Lotus Delivery Materials" in which to give an Additional Objection Notice or an Acceptance Notice: paragraph 5 of Schedule 2 to the CGA (i.e. by 6 September 2018).

> (1) On 17 August 2018, Lotus wrote confirming that, under paragraph 5 of Schedule 2 …, and in the light of the intervening August bank holiday in England on 27 August 2018, the date required for a response was 6 September 2018. On 5 September 2018, Lotus gave an Additional Objection Notice (again including a quality control report). On that occasion reference was made only to "clause 5.2 of Schedule 2 …". … .
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> (2) Any second request for additional information was required "within 3 Business Days … after receiving [the] Additional Objection Notice ": paragraph 5.2 of Schedule 2 (i.e. by 10 September 2018). On 10 September 2018, EFB made a request for additional information.
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> (3) Lotus had "3 Business Days after its receipt of [the] request" in which to respond: paragraph 5.2 of Schedule 2 … (i.e. by 13 September 2018). On 13 September 2018, Lotus responded. The letter stated: "This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure" clause 5.2 of the [Completion Guarantee] … All of [Lotus's] rights in each and any jurisdiction are reserved".
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> (4) Any request for the return of the Lotus Delivery Materials "physically delivered" to Lotus had to be made "within 5 Business Days after receiving the Additional Objection Notice": paragraph 5.2 of Schedule 2 (i.e. by 12 September 2018). In contrast to 'round' one, the time for the request for the return of materials was fixed by reference to the date of receipt of the Additional Objection Notice alone. EFB could not wait until after the receipt of the second response to the request for additional information. On 12 September 2018, EFB requested the return of the Lotus Delivery Materials. Once again, the request specified that the return should be made to "EFB c/o Paul Dray at Lip Sync Productions LLP, 195 Wardour Street, London W1F 8ZG." Given the 8 hour time difference between the UK and Los Angeles, the request would have to be received early in the morning by Lotus.
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> (5) Lotus were required to return the Lotus Delivery Materials to EFB "within 3 days after the Sales Agent's receipt of … EFB's … written request": paragraph 5 of Schedule 2 … (i.e. by 15 September 2018). It is common ground that the Lotus Delivery Materials were not delivered to EFB by that date. Part of the Lotus Delivery Materials were delivered on 17 September 2018 and part were delivered on 18 September 2018."

The hearing below

21. In the Court below, as before us, the Respondents submitted that the Lotus Delivery Materials had not been returned to EFB within the time specified under paragraph 5.2 of Schedule 2 to the Completion Guarantee and that, as a consequence in light of paragraph 9 of Schedule 2, there had been deemed acceptance of the film. They sought declaratory relief to that effect.

22. The Appellants resisted the claim on three main grounds. The first was on the basis of their interpretation of the word "return" in paragraph 5.2 of Schedule 2. The second was that, when the Completion Guarantee was interpreted in the light and context of another of the suite of agreements relating to the film, known as the Interparty Agreement, the proper construction of paragraphs 5.2 and 9 of the Completion Agreement was that Lotus had complied with its obligations under paragraph 5.2 and/or that any failure to comply with the applicable time period under paragraph 5.2 did not result in presumed completion and delivery. The third was that paragraph 9 of the Completion Guarantee was unenforceable as a penalty.

23. The Judge found against the Appellants on all three grounds of their resistance. Undeterred, the Appellants sought permission to appeal on all grounds. They were refused permission on the second and third. It is therefore unnecessary to say more about those grounds or the Judge's reasoning. I will merely outline the reasons why the Judge found against the Appellants on their first ground.

24. The Appellants submitted that the ordinary meaning of the word "return" supported their interpretation. In the context of returning an object, they submitted that the word "return" is used to mean the process of sending something back to somewhere or someone and does not connote physical receipt by the person or destination. Second, it was submitted that in other parts of Schedule 2 (and in paragraph 5.2 itself) words such as "deliver" or "physically deliver" or "received" are used, that the use of the word "return" in paragraph 5.2 (and elsewhere) is not an accident, and that it is used in context to differentiate what is required from the use of those other words in other places. It was submitted that, if the parties had intended the requirement to be that the Lotus Delivery Materials were to be received by EFB within three days, the contract could and would have said so. Third, it was submitted that the parties would know the various steps that were required to be taken after receipt of a request for the return of the Lotus Delivery Materials, some of which would be outside Lotus' control, before they would be delivered to EFB. It might be nigh on impossible to comply with a requirement for delivery to EFB to be effected within three days of receipt of the request, whereas three days for committing the Lotus Delivery Materials to a carrier in Los Angeles would be more reasonable to be achieved. In answer to the objection that their interpretation meant that the Cure Period available to EFB would be eroded while the Lotus Delivery Materials were in transit, the Appellants responded that EFB did not really need them in order to start working on their cure because EFB retained the master copies and could have started work with them. On the other hand, when taxed with the possibility that Lotus could and should have utilised a quicker mode of delivery, the Appellants' response was that post-contractual behaviour should not be used as an aid to construction.

25. In an attempt to make the potential erosion of EFB's time for complying with its obligations after the "return" of the Lotus Delivery Materials by entrusting them to a carrier less onerous, the Appellants proposed an "obvious" implied term (which was subject to various formulations) that the mode of transport or carrier to whom the Lotus

Delivery Materials were entrusted should be consistent with and cognisant of the contractual time-table. Quite what this would mean in practice was not spelt out, though it was the case that the Appellants could have used a faster service than the FedEx one they in fact chose. The Appellants proposed a further implied term (to be implied because of necessity or obviousness) that Lotus was obliged to notify EFB when it "returned" the Lotus Delivery Materials to the chosen carrier. As a matter of fact, if such a term were to be implied, Lotus was in breach of it as it did not notify EFB when the Lotus Delivery Materials were committed to FedEx for onward transmission.

26. Finally, the Appellants submitted that the combined effect of paragraphs 5.2 and 9 was to create an exclusion clause because they purported to restrict or exclude the liability of the Guarantor which would otherwise attach to its breaches of contract (such as the liability to be sued in respect of the Completion Guarantee) in circumstances where one party (Lotus) was in breach of certain technical requirements under the delivery procedure. As part of this submission the Appellants submitted that the contra proferentem rule fell to be applied adversely to the Respondents.

27. The Judge's reasons for preferring the Respondents' interpretation were set out at [81] of the Judgment. Although his reasons were set out in a sequence of sub-paragraphs, he had prefaced his consideration with the summary of principles that I set out at [43] below; and it is clear that he attempted to be true to them, including treating the process of interpretation as a unitary exercise.

28. In summary:

    i) The Judge commenced his reasons at [81(1)] by saying "[i]n my view the starting point is that the normal use of the word "return" means arriving at the destination to which it was intended to return."

    ii) Second, he regarded the tight timetable, with deadlines becoming increasingly short as the process progressed as "indicative that the parties regarded time as being of the essence."

    iii) Third, having noted that the "return" triggered the commencement of the Cure Period in "round 1" or the Additional Cure Period in "round 2" to enable EFB to remedy any defects, he expressed the view that this must be tied to the date of receipt of the Lotus Delivery Materials and not the date of sending them. He reinforced the point by reference to the definition of the Additional Cure Period in paragraph 6.1 of Schedule 2 which states that "no later than 15 Business Days after the later of (i) receiving the Additional Objection Notice or the Second Response as applicable, or (ii) the return of any Lotus Delivery Materials as appropriate requested by EFB". Given that the first of these two limbs was clearly based upon receipt, he considered it would be odd if the second was subject to a different approach.

    iv) Fourth, he regarded it as clearly important that EFB should know when the Additional Cure Period begins, so as to put in place a timetable of works to enable it to meet the deadline for the redelivery of the cured materials and the giving of an Additional Cure Notice. The Appellants accepted that, on their interpretation, the Respondents would not know when "return" took place and the Additional Cure Period commenced, and therefore would not know the

extent of any erosion of the Additional Cure Period caused by time in transit. He was unpersuaded by the suggestion of an implied term requiring the Appellants to notify the Respondents when the Lotus Return Materials were handed over to the carrier; and he was unpersuaded by the suggestion that the Respondents' interpretation also required an implied term that they would notify the Appellants upon delivery, because the Appellants would always have access to tracking information that would include the time of delivery.

v) Fifth, the Judge referred to the fact that there was no prescribed method of delivery by which to return the Lotus Delivery Materials, which meant that it was open to the Appellants to choose a method that substantially eroded the Respondents' Additional Cure Period. He did not consider that this was the intention of the parties, given the tight timetable they had agreed and the apparent symmetry by which, in "round 2" Lotus had 15 Business Days to give an Additional Objection Notice and EFB had 15 Business Days to give an Additional Cure Notice after the "return" of the Lotus Delivery Materials.

vi) Sixth, he was unconvinced by the suggestion that the Respondent did not need the "returned" Lotus Delivery Materials in order to commence remedial works. In his view, paragraph 5.2 envisaged that the Lotus Delivery Materials that were required to be remedied would be physically available to the Respondents throughout the Additional Cure Period.

vii) Seventh, he was also unconvinced by the suggestion that there should be a further implied term (in any one of a number of its formulations) to the effect that the mode of delivery had to be consistent with and cognisant of the agreed timetable. He was influenced in this conclusion by the fact that the proposed implied term would ameliorate but not obviate the underlying problem, namely that the Additional Cure Period available to the Respondents would be eroded by the period taken to deliver the Lotus Delivery Materials. No equivalent difficulty would arise with the Respondents' interpretation: the Appellants' obligation would be to tender delivery; and if the Respondents made delivery impossible, they could not rely upon that fact to establish a breach of the Delivery Process.

viii) Turning to the Appellants' exclusion clause argument, his primary reason for rejecting it was that no breach of contract by the Respondents had been or could be established, so that the question of excluding liability did not arise. If he was wrong on that, he did not accept that the contra proferentem principle applied to a contract negotiated by sophisticated businessmen, legally advised and of equal bargaining power.

ix) Lastly, he was not persuaded that there was such a difference in the gravity of outcome in the deeming provisions in paragraphs 2 and 9 on the one hand and paragraphs 4 and 7 on the other. "If [the Appellants] failed to deliver the Lotus Delivery Materials on time, the end result would be that the Beneficiaries would indeed lose the right to call upon the guarantee, but if [the Respondents] failed to deliver an Additional Cure Notice within the required time period, [they] would be deemed to have served an Arbitration Notice, and the arbitration would be based on the uncured Lotus Delivery Materials. If there were substance in the complaints contained in the Additional Objection Notice, which

> [the Respondents] would not have had the chance to remedy, it is likely that [the Respondents] would lose the Arbitration and the Beneficiaries would obtain the benefit of the Guarantee. Although the latter process will take longer, it would have serious consequences for [the Respondents], provided a justifiable Additional Objection Notice has been served."

The appeal

29. Before us the Appellants were represented by Robert Howe QC, who did not appear below, and Laura John QC, who did. The Respondents were represented by Edmund Cullen QC, who appeared below. I am grateful to all Counsel for the quality and clarity of their contributions.

30. By their skeleton argument, the Appellants repeated most, but not all, of the arguments that had been put before the Judge. The most notable omission was that the Appellants no longer contend for the existence of implied terms as proposed below; and they no longer contend that paragraphs 5.2 and 9 amount to an exclusion clause.

31. Their first written submission was that the Judge fell into error by describing the rival constructions as (for the Appellants) "the consignment interpretation" and (for the Respondents) "the delivery interpretation". Mr Howe wisely did not develop this point in his oral submissions. The Judge's descriptions played no part in his decision-making process and were adopted solely as a convenient shorthand. I need say no more.

32. More substantially, the Appellants submit that the Judge was wrong to assert that "the normal use of the word "return" means arriving at the destination to which it was intended to return." Since the Judge had taken that as his "starting point", they submit that he had fallen into error and had failed to give proper weight to the fact that there were two rival meanings, both of which are natural and ordinary meanings of the word.

33. In support of their interpretation, the Appellants point to the fact that the words "delivered", "physically delivered", "deliver", and "received" are all present in Schedule 2, with the first two being present in paragraph 5.2 itself. Two points were made. First, the use of different words within paragraph 5.2 and elsewhere suggests that the word "return" was intended to have and did have a meaning that was different from those other words. And, second, if the intention of the parties had been that the Cure Period should be triggered on receipt by the Respondents of the requested Lotus Delivery Materials, it would have been simple to say so.

34. The Appellants expressly criticise the third of the Judge's stated reasons, which I have set out at [28 (iii)] above. They rely upon paragraph 10 of Schedule 2, which provides that "any notices to be sent pursuant to this Schedule 2 shall be sent by email … and shall be deemed received when sent … ." Because an Additional Objection notice would be deemed received when sent, it was submitted that the first limb of paragraph 6.1 (which refers to "receiving the Additional Objection Notice") was in fact a provision about sending rather than receipt. On this basis it is submitted that the two limbs of paragraph 6.1 were both about sending and therefore support the Appellants' interpretation.

35. In their written submissions, the Appellants tackled head on the Judge's reliance upon the fact that their interpretation would have the twin effects that time when the Lotus

Delivery Materials were in transit would erode the Respondent's time for curing defects and that the Respondents would not know when their Cure Period would start. In written submissions, the Appellants maintained that the Respondents did not need the Lotus Delivery Materials that were the subject of objection and the request for return in order to start work on curing defects, because the Respondents could deduce what was required by looking at the Additional Objection Notice. This was described in the Appellant's skeleton argument as "the key point relied upon by the [Appellants]". However, in oral submissions, the Appellants conceded that, at least sometimes, the Respondents would need the Lotus Delivery Materials in order to start work on curing alleged defects. That concession was, in my judgment, rightly made, for reasons that appear later.

36. Finally, the Appellants' skeleton returned to the submission that there was a significant disparity in the severity of outcomes in the event that either the Appellants or the Respondents failed to comply with time limits. It was submitted that the disparity was so great that commercial common sense required that the Appellants should be held to be subject to the less onerous time limit that their interpretation would allow.

37. When developing these submissions orally, Mr Howe returned frequently to what he submitted were the "harsh and draconian" effects of the Respondents' interpretation. While abandoning any suggestion of implied terms or contractual obligation, he submitted that the Respondents could and should protect themselves against the potential erosion of the Cure Period by assuming that the Respondents would have "returned" the requested Lotus Delivery Materials on the day that the request for their return was made, whether by entrusting them to FedEx or some other carrier or by any other means. His other suggested work-around was that the Respondents could ask the Appellants to tell them when they had "returned" the Lotus Delivery Materials and would then be able to calculate the Cure Period in reliance on the Appellants' answer. He frankly acknowledged that there is no hint in the Completion Guarantee that either of these workarounds should be contemplated, let alone that they should be adopted.

38. Mr Howe developed the suggestion that business common sense supported the Appellants' interpretation by emphasising the severity of the consequences of failure to "return" the Lotus Delivery Materials in time and what he asserted was a significant risk of failure to comply with the time-limits contended for by the Respondents, describing the timetable (on the Respondents' interpretation) as very tight. His submission was that no commercially sensible person in the position and with the knowledge of the contracting parties would contemplate accepting such a risk. However, when pressed on what he meant by a "significant" risk, he was unable to provide a satisfactory answer. The information and evidence available to the Court is to the effect that there are many flights by many airlines and multiple consignors such as FedEx all of which are geared to flights lasting 8-10 hours. FedEx alone offers a range of services, from "FedEx International Priority" which FedEx says "reach major cities in Europe by noon typically in two business days … Saturday Service available" through "FedEx International First", which FedEx describe as "a premium, time-definite, customs-cleared, door-to-door express service with an early morning next day delivery commitment for shipments up to 68kg per package …" to "FedEx International Next Flight", which FedEx describe as "When time is critical, count on FedEx International Next Flight as the fastest possible delivery we offer for your most urgent export and import shipments … Export within hours between major cities worldwide,

24 hours a day, depending on flight availability. … Door-to-door, customs cleared service. Pickup in as little as 60 minutes after your call … ." In the course of the hearing below and before us the possibility of an employee (or other individual) taking a flight and delivering the Lotus Delivery Materials personally was also canvassed as a practicable alternative.

39. In the present case, the Respondents chose to use FedEx International Priority. They did not chose weekend delivery. Furthermore, as recorded by the Judge (at [42(6)] of the Judgment) after the request was received by Respondents at 9.10am LA time on Wednesday 12 September 2018 there was no apparent response until the next day "when Lotus's laboratory … sent an email on 13 September 2018 at 11.06am LA time to Lotus entitled "Starbright redelivery - NEED ANSWER ASAP" in which they said they were working on redelivery, but needed to know if Lotus wanted the materials copied and cloned before being returned. … Lotus's response was to say that they would check with Ingenious. Lotus made an urgent requests of Nadine Luque at Ingenious. For some reason, she did not respond until the following day, apologising for not getting back to Lotus the previous night … . As a result, it was not until the evening of 14 September 2018 that Lotus … arranged for the Lotus Delivery Materials to be collected by FedEx. This collection took place at 5.46pm (LA time) on 14 September 2018." No explanation for this lapse of time between request and pickup is apparent and there is no basis for assuming that it was either typical or necessary.

40. In this state of the evidence, Mr Howe was at a loss to explain why the Respondents' interpretation gave rise to a "significant" risk of failure to comply with the three-day time limit or to identify either quantitatively or qualitatively the likelihood of the risk eventuating. He was only able to point to the fact that the two parcels despatched by the Respondents were delivered at different times and to suggest possibilities e.g. that planes might crash, FedEx might lose the consignment, or there might be difficulties with customs clearance.

41. In summary, the thrust of the Appellants' submission was that the word "return" was ambiguous and that, faced with that ambiguity, the Court should adopt the Appellants' interpretation as being more consistent with business common sense.

42. I shall touch on the Respondents' submissions when giving my assessment below. But, in briefest outline, Mr Cullen submitted that:

    i) The Judge was right for the reasons he gave: there is no ambiguity and therefore no need to resort to an assessment of business common sense in order to resolve the dispute. This submission rested upon close analysis of the terms of Schedule 2 to which I return below;

    ii) The Appellants have not established that a three-day time period for delivery is unreasonable, unreasonably tight or such as reasonable commercial parties in the position of the contracting parties in the present case would have regarded as an unacceptable allocation of risk that was not in accordance with business common sense;

    iii) The Appellants now accept that the Respondents may well need to have the Lotus Delivery Materials before they can start work to cure alleged defects. This is because defects in the Lotus Delivery Materials can arise either (a) because

there is a defect in the master copy or (b) because of some glitch which occurred when compiling the Lotus Delivery Materials. It follows that the Respondents will typically need to have the Lotus Delivery Materials in their possession to see whether they agree with the allegation of defect and, if so, how it occurred. Reconstituting another set of the Lotus Delivery Materials from the master, as was suggested by the Appellants, is not satisfactory because the compiling glitch (if that was the cause of an alleged defect) may not be replicated. The contractual framework has to work for all eventualities, including those where the Respondents *need* to have the Lotus Delivery Materials;

iv) In any event, on a proper construction of paragraph 5.2, the contractual purpose of the "return" of the Lotus Delivery Materials is so that the Respondents can work on them.

The principles to be applied

43. The Judge, having referred to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015 UKSC 361 at [15] and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, summarised the relevant principles of contractual construction at [52] as follows:

> "(1) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.
>
> (2) Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications, given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause.
>
> (3) The court must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest. This exercise involves checking each suggested interpretation against the provisions of the contract and investigating its commercial consequences. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> (4) Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when

> interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.
>
> (5) Account should be taken of the fact that negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type."

44. The provenance of each element of this statement of principles is clear and uncontroversial. The principles were adopted by the parties for the purposes of the appeal. With one minor gloss, I fully endorse that approach: it is quite unnecessary for the Court to provide yet another iteration of the relevant principles or to cite chunks of the leading authorities which underpin the Judge's formulation. The only gloss that I would apply is to recognise that most iterations of these principles, even at the highest level, have subtle differences of emphasis. It is usually clear that these differences are because the Court will have in mind the facts of the particular case and so may highlight aspects of the general principles that are particularly relevant to the case that it has to decide. That said, I would normally include in any iteration of the principles, the principle derived from *ICS v West Bromwich Building Society* [1998] 1 WLR 896, 912H, reaffirmed with slight refinements many times since, that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person taking into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties to the contract.

45. With these principles in mind, I turn to assess the merits of the appeal.

Assessment and conclusion

46. There are few, if any, words in the English language which, when viewed in splendid isolation, are capable of only one meaning. The word "return" is not one of the few. I would accept that, viewed in isolation, it is capable of meaning either the process of returning or the act of placing something back in a place from which it had previously come.

47. I suspect, as a matter of impression, that the latter meaning (which accords with the Respondents' interpretation) is a more common usage than the former; but I would not base my decision upon that impression. That is for the simple reason that the meaning of the word is to be interpreted in context. I start by looking at the word in its immediate context of paragraph 5.2 of Schedule 2 (which replicates the terms of paragraph 1.1.2 in all material respects apart from the times allowed), and then placing it in the wider context of Schedule 2 and the Completion Guarantee as a whole, before (if necessary) looking outside the terms of the Completion Guarantee to see if there is any relevant

context to be found there. Although I adopt this sequential approach for the purpose of presenting a reasoned judgment, I bear in mind at all times that the exercise of interpretation is a unitary and iterative exercise which involves more than a simple sequence of analytical steps.

48. Turning first to the immediate context of paragraph 5.2 of Schedule 2, the first feature to note is that the "return" is made after receipt of a written request and what is to be returned is "those Lotus Delivery Materials requested". It is therefore plain that what is contemplated is a written request by the Respondents for return of specified Lotus Delivery Materials. To my mind, it is counter-intuitive to suggest that the written request should, could or would be a request for the specified Lotus Delivery Materials to be entrusted to FedEx or some other person or organisation with a view to onward transmission and delivery to the Respondents. What appears to be contemplated is that the Respondents' written request should be for the specified Lotus Delivery Materials to be returned to them. This supports the Respondents' submission that the requested return is achieved by effecting delivery to and receipt by them. It does not support the Appellants' submission that the requested return could be achieved by the act of giving the Lotus Delivery Materials to someone for later delivery to the Respondents.

49. The second feature to note is that the Appellants' obligation is that they "shall return those Lotus Delivery Materials requested by EFB or the Guarantor *to EFB or the Guarantor* at the Guarantor's expense …". In my judgment the plain meaning of the words I have emphasised is that the Appellants' obligation to return the requested materials is an obligation to return them by getting them *to the Respondents*. The Appellants' interpretation means that their obligation is to return them by delivering them *to FedEx or some other carrier or intermediary*. That seems to my mind to be frankly inconsistent with the terms of the contract and to be rejected on that ground alone.

50. The third feature to note is that the contractual purpose of the return is "in order to allow EFB or the Guarantor to cure the defects in such Lotus Delivery Materials as appropriate." This contractual purpose makes redundant the Appellants' submission that the Respondents may not always need to have the materials that are being returned in their possession in order to start work. The word "such" is significant: the contractual purpose of the return is not satisfied by the Respondents attempting to replicate them from the master, even if that were otherwise satisfactory, which it is not: see [42(iii)] above. It is only satisfied by the return of "such" Lotus Delivery Materials i.e. those Lotus Delivery Materials in the possession of the Appellants and requested by EFB or the Guarantor.

51. Mr Howe made a submission that the obligations were either tempered or qualified by the words "as appropriate" at the end of the sentence. I disagree. The words "as appropriate" are a recognition that the Respondents may not agree that the Lotus Delivery Materials are defective and in need of curing and that paragraph 6 of Schedule 2 permits the Respondents either to cure the alleged defects or to submit the issue of whether completion and delivery of the film has been effected for expedited arbitration. I do not understand the words "as appropriate" as having any bearing on the meaning of the word "return" in paragraph 5.2.

52. Given the strength of the immediate context in which the word "return" appears, I would not attach weight to the fact that words connoting receipt appear elsewhere in

the Completion Guarantee. Nor do I consider it compelling in either direction to rely upon the references in paragraph 6.1 to receipt and return respectively, since they are dealing with different things – one being the transmission and receipt of a contractual notice to which paragraph 10 of Schedule 2 applies and the other being the "return" of physical materials to which it does not. In any event, although it is the product of sophisticated businessmen assisted by lawyers, the drafting of the Completion Agreement is not of a quality or character that supports an inference that the same word will always be used to denote physical receipt. More importantly, to my mind it makes sense to use the word "return" in the context of paragraph 5.2 where it is dealing with the physical transfer back of something which has previously been physically delivered by the Respondents to the Appellants. This wider context, allied to the features of the relevant clause that I have already identified, mean that there is nothing remarkable or probative about the decision not to use the word "deliver" or some other alternative in place of "return". For similar reasons, I do not attach weight to the suggestion that, if physical delivery into the Respondents' possession was what was required, it would have been simple to say so. The question for the Court is what the contract entered into by the parties means, not whether it could have been better or differently expressed: see Lewison *The Interpretation of Contracts, 7th Edn.* at [2.113]-[2.116]

53. The wider context of the Completion Guarantee is consistent with and supports the Respondents' interpretation; it does not lend support to that of the Appellants. As the Judge noted, there is a symmetry about the timings for both "round 1" and "round 2". In round 1, the Respondents had 30 days from the receipt of the Delivery Notice in which to give an Objection Notice or an Acceptance Notice; and, if they received an Objection Notice, the Respondents had to redeliver the cured materials and give a Cure Notice within 30 days of the later of (i) receiving the Objection Notice (or additional Response) or the return of any Lotus Delivery Materials. In round 2, the Appellants had 15 Business Days (as defined) from their receipt of the Cure Notice in which to give an Additional Objection Notice or an Acceptance Notice; and, if they received an Additional Objection Notice the Respondents had 15 Business Days from the later of (i) receiving the Additional Objection Notice (or additional Response) or the return of any Lotus Delivery Materials.

54. This symmetry suggests that the parties were to have equal periods in which to carry out their works, with the time limits becoming tighter in round 2. The Appellants' interpretation would in practice destroy this symmetry because, as they acknowledge, the Respondents would not know when their Cure Period had started and would not have the allegedly defective Lotus Delivery Materials in their possession in order to allow them to cure any defects in them during their period of transit. Before the Judge below, the Appellants attempted to meet this difficulty by proposing implied terms that the mode of transport or carrier to whom the Lotus Delivery Materials were entrusted should be consistent with and cognisant of the contractual time-table; and that the Respondents should tell the Appellants when, on their interpretation, the "return" had occurred. The Judge rightly rejected any such terms. The problem for the Appellants is that they are left with no contractual mechanism for ensuring certainty about the start of the Cure Period. Furthermore, if entrusting the Lotus Delivery Materials to a carrier constituted return and there was no implied term about the speed with which the onward delivery should be effected, the Respondents would be at risk of erosion of their working time for the duration of the transit, which could be open ended. The solution proposed before this Court was that the Respondents would be prudent (but not obliged)

to assume that "return" had happened on the day of the request. This seems to owe everything to the ingenuity of lawyers faced by an insuperable problem and nothing to commercial common sense. It would have the empirical effect of triggering the Cure Period at a time when the purpose of the return (curing the defects alleged to exist in the requested Lotus Delivery Materials) could not be achieved. More fundamentally, since the Appellants accept that the Respondents were not obliged to act in this way, there is no basis for suggesting it as a panacea for the problem it is intended to solve. And, as the facts of the present case show, it is likely to require the Respondents to make an assumption that is untrue and unwarranted.

55. Before going beyond the four corners of the Completion Agreement, I note that there are other indicators in the text of Schedule 2 that suggest the Appellants' interpretation is wrong. Paragraphs 2 and 9 adopt the same structure. Paragraph 9 is set out at [19] above and is the provision relevant to "round 2". It provides that if the Appellants fail "to return to [the Respondents] the Lotus Delivery Materials within the time period specified in paragraph 5.2 above" then completion and delivery of the film shall be conclusively presumed to have been effected. It then provides that the Respondents "shall thereupon give notice" that completion and delivery of the Film shall be conclusively presumed to have been effective. Two points arise:

    i) Once again the word "return" does not appear in isolation, but the reference is to the Appellants failing to return the materials *to the Respondents*, which I take as another indicator that supports the Respondents' interpretation and not that of the Appellants;

    ii) The use of the word "thereupon" supports the Respondents' submission that the date on which the materials are "returned" should be capable of certain assessment by the Respondents so that they can tell when the Appellants are out of time and "thereupon" notify others of the conclusive presumption. On the Appellants' interpretation, this certainty cannot be achieved unless they inform the Respondents when they "return" the materials by entrusting them to the carrier or other organisation or person, which they are not obliged to do (and, as a matter of passing interest but not as an aid to contractual interpretation, did not do in the present case).

56. Similarly, if the Respondents do not know when the Cure Period starts, they cannot calculate the date either 30 days (in round 1) or 15 Business Days (round 2) by which they are required to give a Cure Notice or an Arbitration Notice. On any view, if this were to cause the Respondents to miss the date, the contractual consequences would be peremptory and significant. This provides a further indicator that the Appellants' interpretation is unworkable and the Respondents' interpretation is correct.

57. During the hearing of the appeal it became apparent that even the Appellants might lack certainty about when, on their interpretation, "return" was achieved. A number of factual permutations were aired. What if, instead of FedEx (or another carrier) picking up the packages (or having them delivered directly or through another intermediary), an employee of the Appellants takes a plane and takes the Lotus Delivery Materials with him? The materials are never consigned to a carrier or third party before being delivered to the Appellants, and perhaps the employee was always going to catch that plane – the permutations are almost endless: when do the employee or the Appellants "return" the materials? These considerations are not of themselves decisive: but, for

the reasons already given, it seems unlikely that a reasonable person in the situation of the parties at the time of the contract would treat them as tending to favour the Appellants' interpretation.

58. The Appellants' submission on the impact of commercial common sense can be shortly stated. It is said that the risk of failure to return in time (on the Respondents' interpretation) is significant and that the consequences of failure are so harsh and draconian – namely the loss of the benefit under the Completion Guarantee - that no reasonable person having all relevant background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract would have understood the word "return" as applied to the requested Lotus Delivery Materials to require physical delivery to the Respondents.

59. The consequences of failure for the Appellants are undoubtedly serious, but they are the same whichever interpretation is adopted. The real complaint therefore must be about the amount of time allowed for compliance. I can accept that if, for example, the time allowed was one hour (rather than three days), the fact that it would be quite impossible to get the materials to the Respondents within one hour would provide a strong argument in favour of the Appellants' interpretation. Given the apparent clarity of the wording of paragraphs 5.2 and 9 of Schedule 2 it might be necessary for the Respondents to invoke principles relating to the correction of errors in a commercial contract. But that is not this case. On the information available to the Court, some of which I have summarised above, the three days is sufficient time for compliance in the normal course of events and the Appellants have not shown, either qualitatively or quantitively, that the risks of non-compliance contra-indicate the Respondents' interpretation as a matter of business common sense. Tested against the Respondents' interpretation there is no evidence even on the facts of the present case that it was not possible for the Appellants to have returned the materials to the Respondents well within time; and I am not persuaded that the risks suggested by the Appellants in argument (e.g. plane crash, loss by carrier or customs problems) would have persuaded the objective observer that the Respondents' interpretation offended against business common sense or meant that paragraph 5.2 should be understood in accordance with the Appellants' interpretation.

60. Lastly, as I have said, the consequences of failure to "return" in time are the same, whichever interpretation is adopted. I am not persuaded that any asserted disparity between the consequences for the Appellants and the Respondents respectively of failure to comply with time limits is a material aid to interpretation. First, I would broadly accept the Judge's characterisation that I have set out at [28 (ix)] above, which shows that the consequences for each party were serious, if not equal. Second, the consequences were clearly set out in Schedule 2 and formed part of the overall package of rights and obligations that each side accepted. Once again, it seems to me that what matters in this submission is not the consequences but the timeframe. As I have explained, the particular timeframes in Schedule 2 are not a material aid to interpretation of the clear words of paragraph 5.2 in general or the word "return" in particular.

61. For the reasons set out above, I would hold that there is no ambiguity in the meaning of the word "return" as it appears in paragraph 5.2 and that the Respondents' interpretation is correct. I would therefore dismiss the appeal.

Sir Nicholas Patten:

62. I agree.

Asplin LJ:

63. I also agree.