WHEN ONE PURCHASER SIGNS THE CONTRACT FOR SALE AND THE OTHER DOES NOT ...

And indeed never authorised the co-purchaser to enter into a contract on her behalf without her consent, did not know that he was entering into a contract, or consent to his doing so on her behalf. That was the remarkable situation in the case of ***Rabiu v. Marlbray Ltd*** [2016] 1 WLR 5147. At first blush one might have thought, in line with the decision in ***Suleman v. Shahsavari*** [1998] 1 WLR 1181, that in the absence of the signature of one of the co-purchasers, there was no binding contract and that that would be the end of the matter. So the trial judge concluded, but the Court of Appeal held that on the facts of the case the purchaser who had signed had rendered *himself* liable as between himself and the vendor of the property, notwithstanding the absence of the signature of his co-purchaser. In so doing it distinguished ***Suleman***. The decision of the Court of Appeal, which runs to 111 paragraphs, considers a number of issues and repays careful study. This casenote will consider the questions of the validity of the contract between the vendor and the co-purchaser and the formalities required by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. A second casenote (to follow) will consider whether, on the assumption that there was no valid contract as between the vendor and the co-purchaser (either because the contract had not been signed by the other co-purchaser, or because of want of the formalities required by s.2), the vendor was required to return the co-purchaser's deposit or could retain it.

The Facts

Simplifying the facts somewhat and ironing out the procedural wrinkles for the purposes of exposition, C2 and C3 were husband and wife and D was the owner of the 1,021-bed four-star Park Plaza Westminster Bridge Hotel which was to be run as an "aparthotel". Without his wife's authorisation, C2 signed a contract with D, purportedly on behalf of both himself and his wife, in respect of their joint and several obligations for the purchase of a 999-year lease of a room in the hotel at a launch day "sales fair" on 23rd October 2005 at which some 225 units were sold. Clause 24 of the standard form contract provided that *"Where two or more persons constitute the purchaser all obligations contained in this agreement on the part of the purchaser shall be joint*

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and several obligations on the part of such persons". Contracts were exchanged the same day and over the next two years C2 paid the balance of the 25% deposit.

As it transpired, C2 and C3 were unable to obtain a mortgage and so, when the hotel was completed and they were given notice in May/June 2010 requiring them to complete the purchase of the unit, they were unable to do so. On 30th November 2010 D gave notice rescinding the contract and forfeiting the deposit. Subsequently C2 and C3, in proceedings brought on 8th August 2011 with other claimants who had purchased similar leases, issued a claim against D, seeking declarations that they had not entered into enforceable contracts with the vendor and the return of their deposits.

Cs' case originally was the same as that of the other claimants, that the sales fairs were a deliberately created high-pressure environment in which they fell for an orchestrated hard sell of a product which was in truth such a bad investment as to be an unconscionable bargain; that there was no contract, alternatively the contract was void for uncertainty and/or for non-compliance with s.2 of the 1989 Act. They all claimed return of the deposits on the grounds of no contract and/or unconscionable bargain and/or penalty, and/or in reliance on s.49(2) of the Law of Property Act 1925. There was no suggestion at that stage that C3 was not party to the contract or that she had not authorised its exchange. On the contrary, it was (among other things) expressly pleaded that C2 had signed an authority to the purchasers' solicitors, who had exchanged contracts on behalf of both husband and wife. It was not until late 2012 that the purchasers' solicitors were sent a copy of the sales particulars signed by C2 and noticed that C3's signature was not on the document.

D's case was that, far from being an unconscionable bargain, units at the hotel were in fact outperforming the income guarantees given to the purchasers, but it accepted that the banking crisis led to the disappearance of 75% mortgages secured on the units and that capital values had fallen since the contract date. D further argued that there was a valid exchange of contracts, that the buyers failed to complete and that there was valid rescission and forfeiture of the deposits.

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The Preliminary Issue

A preliminary issue was ordered to be tried as to whether the contract between C2 and C3 and D was valid and enforceable. Issues such as whether or not contracts for the purchase of units at the hotel were an unconscionable bargain, whether the 25% deposits were a penalty, or whether they should be returned pursuant to s.49(2) were held over for later determination.

The deputy judge (Nicholas Strauss QC) held that the contract was not valid or enforceable because one of the intended parties, namely C3, had not entered into it. He found that

> "121. On the other question, relating to C2's authority to sign for C3, it is unnecessary to rehearse the evidence in great detail. I accept C2's and C3's evidence that C3 was, throughout the day, looking after their two children, aged 1 and 2, was outside the hotel for most of the time, was paying little attention to what was going on even when inside, and was anxious to get away, having other plans for the day and no intention of staying so long.
>
> 122. I also accept C2's and C3's evidence that, whilst any purchase of a property would normally be made by them jointly, C3 never authorised C2 to enter into a contract on her behalf without her consent, and that she did not on this occasion know that he was entering into a contract, or consent to his doing so on her behalf. All she knew was that C2 had paid £1,000 to reserve the unit, and she was quite annoyed about that ...
>
> 123. It is clear from both C2's and C3's evidence that she was angry about the whole thing from the start, and increasingly so when she learned (as she did) that further and more substantial deposits had to be paid, for which she had to make some contribution. She did not think that the family could afford it, and the tension over this resulted in C2 telling her as little as possible ...
>
> 124. C3 was a patently honest witness, and I accept her evidence as [to] what happened later, which can be summarised as follows: She did not see, and was not aware of, the letter of 26 October 2005 in which Mr Mughal [the purchasers' solicitor] referred to a contract having been entered into by C2 and herself. She knew about the more substantial deposits which had to be paid, and realized that they must denote 'some kind of commitment', but did not appreciate that there must be a binding contract, let alone one to which she was a party. She knew of and participated in the

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> attempts to raise the finance during 2010 and intended, if they resulted in the successful purchase of the property, that she and C2 would own it jointly.
>
> ...
>
> 127. ... I do not think that th[e evidence] establishes any more than that she knew in 2010 that C2 had entered into a contractual obligation binding on him at some time (not necessarily in 2005, possibly at the time of the further deposits). It does not establish that she knew that he had purported to enter into a contract on her behalf at any time, as opposed to having the intention to ensure that the property which he was buying was transferred into her name."

In the light of the conclusion that C2 had signed on behalf of C3, but that he had not had her authority to do so, the judge held that (i) the solicitors had no authority to exchange contracts on behalf of C3 (ii) as was apparently accepted by counsel for D, there was no binding or effective contract (irrespective of any s.2 point) concluded on 23rd October 2005 because one of the parties to the intended contract did not enter into it, a concession apparently based on ***Suleman v. Shahsavari***; (iii) if C3 had indeed ratified the contract by her subsequent conduct, there would have been a binding contract which would apparently have complied with the provisions of s.2 (iv) but C3 had not, on the evidence, affirmed or ratified the contract and (v) neither C was bound by any estoppel or constructive trust.

The judge therefore concluded that

> "136. For these reasons, whilst a binding contract was purportedly entered into by C2 on behalf of himself and C3, it fails because he had no authority to enter into it and C3 never ratified it. C2's and C3's claim therefore succeeds."

The Appeal

Against that decision D appealed successfully. The Court of Appeal (Gloster, McFarlane and Jackson LJJ) therefore had to consider whether (i) the contract was void because (a) C3 had never

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given authority to her husband to sign the contract on her behalf or (b) there had been non-compliance with s.2 of the 1989 Act and (ii) in the event that the purchasers failed to complete the contract, D could insist on retaining the deposit as against the purchaser who had signed the contract and paid the deposit.

The Validity of the Contract between C2 and D

Gloster LJ concluded [at 53] that, where the contract expressly provided that where there were two or more persons constituting "the purchaser", the obligations of each of them should be joint and several, the several obligations of the one "purchaser", who did sign the contract and authorise the solicitors to exchange, should be contractually binding on him to purchase the property and to pay the deposit and the balance of the purchase price on completion. In a joint and several contract, the obligation was either joint or several at the election of the promisee, who might, if he chose, sue all the promisors in one action or bring separate actions against any one or more of the promisors in respect of their several obligations. That being so, D could have sued C2 alone on the several contract between himself and the vendor without joining C3 or relying upon the joint contract as between D, C2 and C3.

In her judgment [at 57] ***Suleman v Shahsavari*** provided no basis for the judge's conclusion that, in the absence of C2 having any authority to sign the sales particulars on his wife's behalf, there was no contract at all as between D and C2. Since the Court of Appeal distinguished ***Suleman v. Shahsavari***, it is important to understand what that case actually decided and why it was distinguishable.

Suleman v. Shahsavari

Mr and Mrs Shahsavari bought a house in 1983, borrowing a deposit of over £2,000 from Mrs Shahsavari's grandmother. In 1985, the grandmother decided to go and live with her daughter in New York and requested repayment of the loan. The house was put on the market and Mr Suleman agreed to buy it. Throughout the transaction Martinez, the solicitor for the Shahsavaris, communicated with his clients by letter addressed to both of them. Invariably, it was Mrs

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Shahsavari who communicated with him (English was her native language, but not his, although his command of English was adequate). Before exchange of contracts, Mr Shahsavari went to Iran, where his mother was ill, and Mrs Shahsavari was due to accompany her grandmother to New York. Both husband and wife said that, before leaving, he told her not to sign anything about the house. Prior to her departure, however, a telephone conversation took place with the solicitor from which he reasonably understood Mrs Shahsavari to have authorised him to sign and exchange the contract, which he duly did. On their return, the Shahsavaris withdrew from the transaction. Suleman claimed specific performance of the contract, which the Shahsavaris resisted on the grounds that they had not both signed it and the solicitor was not authorised to sign as their agent. Suleman added a claim against the solicitor for damages for breach of warranty of authority. Martinez denied liability, but claimed to be indemnified by Mrs Shahsavari.

The ultimate loser was Martinez. The judge rejected the claim for specific performance of the contract by Suleman on the basis that, although Martinez had express authority from the wife to sign and exchange the contract, he did not have any form of authority from the husband and, since authority from both vendors was required, there was no binding contract. However, he found that Martinez was liable for damages of breach of warranty of authority, but that he was not entitled to be indemnified by Mrs Shahavari

The judge, Andrew Park QC, who found that certain aspects of his decision left him "far less than happy" (at p.467), ruefully concluded (at p.478)

> "Mr Martinez had a difficult and demanding client, who wanted a solution to an intractable problem. As he said in a letter to Mr Suleman's solicitors, written after everything had gone wrong, "We endeavoured to assist our clients." It is very hard on him that his constructive efforts have rebounded on him as they have - all the more so since, as I suspect (but do not know), Mr Shahsavari might well have signed the contract himself (or given express authority to Mr Martinez to sign it) if he had been in this country on July 10.
>
> However, Mr Martinez did take a risk. He could, perhaps, have said to Mrs Shahsavari that he would only sign the contract and exchange it if he

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> received a letter from her instructing him to do so on behalf of herself and her husband and confirming that she had her husband's authority. In his letter to Mr Suleman's solicitors he wrote:
>
> > Whilst we understood or believed that we were receiving joint instructions and spoke mainly to Mrs Shahsavari, quite clearly it is open to Mr Shahsavari to say that he did not authorise an exchange of contracts.
>
> Unhappily for Mr Martinez, Mr Shahsavari has said precisely that. I believe on the evidence and the law that it protects the Shahsavaris, and leads to the unfortunate outcome for Mr Martinez which I have described in this judgment."

The Distinction Between *Rabiu* and *Suleman*

Gloster LJ explained that the point at issue in ***Rabiu*** was in fact conceded and not argued in ***Suleman*** and she cited the relevant part of the judgment of Andrew Park QC in the earlier case which made that clear. He said at pp.473-474 (with emphasis added):

> "*Neither Mr Geldart nor Mr Hamlin has disputed the proposition that, if Mr Martinez was authorised by Mrs Shahsavari but not by Mr Shahsavari, there is no contract.* It has not been suggested to me that there could be a contract which bound Mrs Shahsavari, and on which she is liable in damages. I think this must be right. Suppose that, instead of an exchange of part and counterpart, a single contractual document was drawn up, to be signed by all three; Mr Suleman and Mrs Shahsavari signed it, but Mr Shahsavari refused to sign. There would have been no contract. The position is the same if Mr Martinez had no authority from Mr Shahsavari."

Moreover, the Shahsavaris were the owners and vendors of the property, not its purchasers. In ***Suleman***, unlike ***Rabiu***, there was no question of either of the joint vendors being in a position to convey the property individually; furthermore there did not appear to have been any provision such as that in ***Rabiu*** imposing several (as well as joint) liability on each of the purchasers. In contrast, in ***Rabiu*** there was no reason why C2 as one of the proposed two "purchasers" of a unit, and given the express provisions of the contract, should not be contractually liable on his separate and several obligation to purchase the unit, given that he had certainly signed the particulars and authorised exchange on his own behalf. Moreover, there was nothing in the law of agency which would

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preclude a person, who contracted on his own behalf as principal, and who also purported to sign the relevant contract as agent for another party, from being contractually bound in his capacity as principal under a contract imposing joint and several liability, notwithstanding that he had no authority from his principal to sign the relevant contract on the latter's behalf.

Thus, the Court [at 63] allowed D to resile from the concession made on its behalf at first instance on the basis of ***Suleman*** to the effect that there was no binding or effective contract concluded on 23rd October 2005 because one of the parties to the intended contract did not enter into it. The original concession was based on an incorrect view of the law and, since a correct legal analysis was critical for the resolution of the case, the Court had no hesitation in allowing D to withdraw it.

C2 sought to argue that a valid contract of sale (whether of land or goods) could *never* come into existence between A as vendor and B as purchaser, in circumstances where it was intended at the time of signing the contract that C would also be the purchaser, and C did not in fact subsequently sign the contract. That, it was argued, was irrespective of the fact that the putative contract provided that the obligations of B and C should be joint and several. Gloster LJ rejected that submission [at 65]. There was no such universal rule. Whether or not a valid contract came into force as between A and B, both of whom had signed the contract, notwithstanding that C has not signed the contract, would depend on the common intention of the parties as objectively ascertained from the circumstances surrounding the transaction. Put another way, the issue was whether, objectively, B's agreement to execute and his execution of the contract was, expressly or impliedly, conditional upon C likewise signing the agreement.

As to that, Gloster LJ said [at 68] that if one considered all the circumstances of the case, including the standard procedure for the signing and exchange of contracts at the sales fair and the putative contract itself, there was nothing to support an *objective* analysis that C2 signed the contract on the understanding or condition that he would only be liable if C3 had authorised him to sign on her behalf, was contractually bound or subsequently ratified it. Still less was there any support for

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an analysis that D was only contracting on the basis that C3 was a joint purchaser. The joint and several provisions of the contract made it clear that C2 and C3 were not being regarded as a "composite" purchaser. In contrast to the position where property was owned jointly by X and Y as legal joint tenants and trustees (the position in ***Suleman***), where the obvious inference (in the absence of express wording) was that both had to be contractually bound to sell the property in order for a purchaser to be able to enforce the contract for sale, there was nothing in the objective factual matrix relating to the purchase of the unit from which a similar requirement could be inferred. It was irrelevant that C2's *subjective* evidence was that he did not intend to proceed with the purchase without his wife.

Compliance with S.2 of the 1989 Act

It followed from Gloster LJ's analysis of the joint and several nature of the contractual liability that, if there were no obligation on D to sue both C2 and C3 together or under the joint contract, s.2 would not be infringed in relation to the several contract entered into between D and C2 [at 53].

The issue under s.2 of the 1989 Act was (a) whether the contract and particulars sheet signed by C2 "for and behalf of the purchaser" (and the corresponding particulars sheet signed on behalf of D) incorporated "all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each" and (b) was signed "by or on behalf of each party to the contract" in the absence of any authority having been given by C3 to C2 to sign on her behalf. The answer to both of those questions was affirmative. The contract clearly contained all the terms of the several contract between C2 and D and it was irrelevant that C2 did not expressly sign the particulars identifying the precise capacity in which, in the circumstances, he was doing so, i.e. as principal obligor under his several contract [at 71].

Gloster LJ concluded [at 72] that there was nothing in the authorities to require that s.2 had to be construed in an artificial way to enable C2 to escape from his liabilities under the several contract. When Peter Gibson LJ said in ***Firstpost Homes Ltd v Johnson*** [1995] 1 WLR 1567 at p.1571 that

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"all contracts must be signed by or on behalf of all the parties", he was contrasting that requirement of s.2 with the previous requirement under s.40 of the Law of Property Act 1925 that only the party to be charged had to sign. It was quite plain that, in context, he did not have in mind a situation where a purchaser proposed that another join him as co-purchaser and purported to sign on her behalf, but did not in fact have authority to do so.

She considered [at 76] that under the terms of C2's several contract, he was entitled on completion to call for the grant of the lease to himself and his wife jointly, but in relation to that several contract it was not necessary for C3 as the proposed co-tenant to be a party to that several contract for the purpose of s.2 of the 1989 Act. Nor [at 77] did the fact that "the purchaser" was defined in the particulars as comprising both C2 and C3 persuade her that the contract was somehow non-compliant with s.2 on the grounds that the document did not accurately set out the terms of the contract. That definition was an apt description given the provisions of clause 24 and the fact that the contract actually consisted of three separate contracts, viz. the several contracts made by each of C2 and C3 respectively with D, and the joint contract made by both of them with the latter. S.2(3) of the 1989 Act distinguished between "the document" and "the contract". All there needed to be was a document (or two documents given the requirement for exchange) incorporating all the terms of the several contract, signed by C2 on the one hand and by D on the other. She concluded [at 78]

> "For the above reasons, in my judgment, the requirements of s.2 were satisfied in this case. It would make a mockery of the policy of the section if [C2] could rely on technical arguments, such as those presented to the court on this appeal, to escape from his several contractual obligations, in circumstances where the failure to obtain his wife's authority to sign the contract was entirely his."

Such authorities as there were (and none was directly on point) supported that interpretation of s.2. Thus, in a case where a contract for sale had been signed by a firm of solicitors " as solicitors and agents" for a then unincorporated company named as the vendor, it was held that the contract complied in effect with s.2 on the basis of the solicitor's personal liability (***Braymist Ltd v. Wide Finance Co Ltd*** [2002] Ch 273). The purchaser had sought to argue that the contract was void on

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the basis that the contract did not state that the solicitor who were liable under s.36C of the Companies Act 1985 were the vendors because they has signed as agents, but the argument was rejected. Etherton J held that by virtue of s.36C they were deemed to be the vendors, even though they had signed as agents. Otherwise, s.36C would be useless in the case of all contracts for the sale or other disposition of land. The statutory purpose of s.2 of the 1989 Act would not be served by the purchaser's construction of the section. Accordingly, the provisions of s.2(1) and (3) of the 1989 Act were satisfied. The Court of Appeal supported the judge's conclusion. Indeed, the instant case was stronger than ***Braymist*** because in that case the party held liable only signed as agents, whereas C2 did not solely sign in his capacity as agent, but for himself as principal.

The Court also rejected the argument that, under the terms of the contract, the lease of the unit was to be granted to C2 and C3 on completion so that s.2 required C3 to sign the contract as well. But the mere fact that she was to be *granted* the lease jointly with her husband was not determinative, as the decision of Neuberger J in ***RG Kensington Mgt Co v. Hutchinson IDH Ltd*** [2003] 2 P & CR 13 demonstrated. What s.2(3) of the 1989 Act requires is that the document "must be signed by or on behalf of each party *to the contract*"; that does not mean that the *ultimate disponee or transferee* has to be a signatory. In that case the defendant contended that an agreement to sell the freehold of a leasehold block of flats was void under s.2 because, although it was signed by the two parties to the contract (the freehold owner and a leaseholder of one flat), it was a contract by the defendant to transfer the freehold to a third party, Kensington, which had not signed it. Neuberger J held [at 57]

> "The closing words of s.2(3) require the contract, or the parts of the contract to be signed by 'each party to the contract', not by 'each party to the prospective conveyance or transfer'. In this case that means that the freehold agreement must be signed by the parties to it, the defendant and Mr Caan. Kensington is not a party to the freehold agreement and, as it is not a party to that contract, it seems there is no reason to require it to sign it. I see no reason to give an artificial meaning to s.2(3) as the defendant's argument involves, nor do I consider it permissible to do so. Mr Dowding, in his concise submissions on this issue, said that it would be consistent with the spirit of s.2 if a contract such as the freehold agreement could only be enforced in Kensington's favour if it could be enforced against

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> Kensington. I accept, that the freehold agreement could not be enforced against Kensington unless Kensington had signed it. Accordingly, I see the force of the point, but there is nothing to suggest that the legislature had that sort of consideration in mind when enacting s.2. To give s.2 the meaning and effect that the defendant contends for, would involve an impermissible re-writing and extension or extension of s.2(3). It would also involve giving s.2 a greater degree of interference with common law rights and freedom to contract than it naturally bears."

Comment

The distinction between ***Suleman*** and ***Rabiu*** is therefore that in the former case the Shahsavaris were the owners and vendors of the property and there was no question of either of the joint vendors being in a position to convey the property individually; furthermore, there was no provision in the contract, such as that in ***Rabiu***, imposing several (as well as joint) liability on each of the signatories. In contrast, in ***Rabiu*** there was no reason why C2 as one of the proposed two "purchasers" of a unit (and given the express provisions of the contract), should not be contractually liable on his separate and several obligation to purchase the unit, given that he had certainly signed the particulars and authorised exchange on his own behalf. So far as the form of the contract was concerned, it would have made a mockery of the policy of s.2 if C2 could rely on technical arguments to escape from his several contractual obligations, in circumstances where the failure to obtain his wife's authority to sign the contract was entirely his own. Whatever problem there was between C2 and C3, that was no concern of D; he had put his head on the block and was liable accordingly.

So similarly, a party cannot escape liability in respect of his own share when he purports to charge a jointly owned property on his own account and that of his co-owner when the co-owner knows nothing of the charge, for example where a husband forges his wife's signature on a deed of charge. An attempt by a joint tenant to deal unilaterally with the entire joint held estate will be ineffective at law, but will operate in equity to sever his own aliquot share and to confer on the mortgagee rights in relation to that share, see ***First National Securities Ltd v. Hegerty*** [1985] QB 850 at pp.854B, 862G-H and ***Ahmed v. Kendrick*** (1988) 56 P & CR 120 at p.126. The addition of the forged signature does not render the deed of charge void in toto; the addition of a forged signature

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which is not relied on by the mortgagee should make no difference and would allow the forger to repudiate his own deed because of the addition of a superfluous forged signature: ***Bowers v. Bowers*** (unreported, Hoffmann J, 3rd February 1987) at p.7

But what of mutuality and what if the boot had been on the other foot? If C2 alone had wanted to enforce the contract and take the lease, could D (who might not have wanted to proceed with only one party) object? D had surely bargained for the comfort of the covenants of both husband and wife. Would D then have been entitled to resist a claim by C2 acting alone? And if so, why should C2 be forced to comply with a contract which he could not himself enforce? And if D had been told at the time of the execution of the contract that C3 knew nothing about it, would it have said that it was obvious that it was bound to sell to C2 alone, or would it (as is more likely) have told C2 through his solicitors to sort things out with his wife before going any further?

What counterparties need to ensure, however, when contracting to sell property to joint parties (particularly husband and wife or cohabitees) is that both sign the contract, or that *specific* confirmation is obtained from the non-signing party (or his or her representative) that the signatory has authority to bind them both. In the absence of such confirmation, the counterparty may find that its recourse is only against the party who signed the contract, not against the pair of putative purchasers. In addition, the counterparty needs to ensure that the contract provides that liability under it is joint and several and does not provide merely for joint liability, lest it find that neither party is liable (although even then it may still have recourse against the purchasers' agent for breach of warranty of authority).

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