Neutral Citation Number: [2020] EWHC 3432 (QB)

Case No: QB-2019-03240

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2020

Before :

CHARLES MORRISON
Sitting as a Deputy Judge of the High Court)

- -

Between :

BRETT JOHN BUTCHER **DARREN TRUEMAN**	**Claimant/ Applicants**
- and -	
(1) RICHARD PIKE **(2) ADRIAN ARKELL** **(3) KARL CARTER**	**Defendant/ Respondents**

- -
- -

Daniel Goodkin (instructed by **Flinty Bishop LLP**) for the **Claimant**
Kyle Lawson (instructed by **Eversheds Sutherland (International) LLP)**) for the **Defendants**

Hearing dates: 26 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE MORRISON

Covid-19 protocol: This judgment was handed down remotely by circulation to the parties@ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 7th December 2020.

Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. The Claimants (**Cs**) in this matter have brought before me an application for Summary Judgment. The application is made in respect of two issues only. Before I turn to those issues I will give a short account of the background facts in this dispute.

2. These proceedings arise out of a contract dated 20 February 2017 (the **SPA**), pursuant to which the Defendants (**Ds**) agreed to purchase, and the Cs agreed to sell, the entire issued share capital of a company called BPG (UK) Limited (the **Company**). The Company is a commercial lettings agency which was marketed by the Cs as being in the business of providing various services to residential landlords, primarily through its website.

3. The services provided by the Company include a facility which enables private landlords to advertise their properties for rent on various well-known online property platforms such as 'Rightmove' and 'Zoopla'. The Company is able to provide this service because it holds a *"Residential Lettings Membership"* with Rightmove and Zoopla (I will refer to these businesses together as the **Platforms**) for which it pays membership fees.

4. The dispute before the court turns on the simple fact that the Ds say that the Platforms do not allow their members, such as the Company, to advertise lettings on behalf of other commercial operators. This might be described in the vernacular of the commercial world as the Company acting as a "sleeve" through which other commercial landlords would gain access to the advertising profile of the Platforms without the inconvenience of paying their annual membership fees: I will refer to this prohibition as the **Restriction**.

5. The principal (though not the only) reason for the Ds' complaint is that whilst they accept that they were informed of the existence of the Restriction by the Claimants during the course of due diligence, they were not told that the Company was operating its business *in breach* of the Restriction; nor were they informed of the extent of that breach. This is the dispute that gives rise to the issues before me. They also say that the Platforms are now strictly enforcing their rights in respect of the Restriction and that this is having a material impact on the financial health of the business that they have bought. In short they say that had they been told the true position in respect of non-compliance with the Restriction, they would not have entered into the SPA. Moreover, they say that they have the benefit of a Warranty from the Cs in the following terms:

> "8.3 *The Company has not defaulted under any agreement or arrangement to which it is a party and to the best of the Vendors' knowledge, there are no circumstances likely to give rise to such a default.*"

6. This warranty the Ds say is untrue. Thus the Ds are resisting the Cs' suit for the unpaid deferred consideration due under the terms of the SPA and they have counterclaimed for damages for breach of warranty and/or misrepresentation.

7. This matter has some procedural history but for the purposes of this judgment, little of it is relevant. I need only record that the issues now before me were recently placed before Master Brown on an application to direct the hearing of preliminary issues. The Master declined to make such an order however in expressing some sympathy as to the case made to him foresaw that the very application that has now been ventilated before me might in due course be made.

The Two Issues

8. The application before me is for Summary Judgment by way of a Declaration that the Ds have no real prospect of establishing at trial that:

   a) when the parties entered into the Contract, the Company was prohibited from placing adverts on behalf of other commercial lettings agents on Rightmove or Zoopla under the terms and conditions of its contracts with either of those platforms ("Issue 1"); or that

   b) when considering whether there has been *"fraud or negligent non-disclosure"* within the meaning of Clause 6.2 of the SPA, the assessment of what disclosure has been given is assessed based on what was disclosed in the *"Disclosure Letter"* ("Issue 2").

9. The approach to be adopted by the court in respect of a CPR 24.2 summary judgment application of this type, is set out in the 2020 White Book at [24.2.3]. Reference is made to the principles formulated by Lewison J (as he then was) in *Easyair Ltd (Trading As Openair)v Opal Telecom Ltd [2009] EWHC 339 (Ch)* at [15] which were approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301* at 24. The matter with which Lewison J was concerned involved an application for summary judgment by a defendant. A number of the principles which he set out are relevant to the matter before me. It is certainly the case that in seeking to arrive at a conclusion I must not attempt to conduct a "mini-trial" (see *Swain v Hillman [2001] 1 All E.R. 91*); and in seeking to reach a conclusion I must take into account not only the evidence actually placed before me on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial (see *Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550*).

10. Of perhaps particular relevance to the instant matter is the uneasy conflict that emerges from the related principles which on the one hand allow that whilst a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment, and on the other, that it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

11. It is plain that the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where

reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case (see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3), but the second formulation that I have outlined above is grounded in the sensible approach that is in the interests of everyone (including other court users) that the sooner the matter is determined the better. At all events it seems to me that the simple principle is that if the court is satisfied that it is in a position to decide the matter and do justice to the parties, then it should do so; if there is good reason for saying that it cannot fairly and properly conclude upon the controversy (because for example, further relevant evidence or documents are likely to emerge), the matter should be left for trial.

The Principles of Construction

12. In order to decide the issues in this application, I am asked to construe contracts: for the purposes of the first issue the contracts are those of the relevant Platforms; in respect of the second issue, it is the SPA. In order to guide me in this task, my attention has been invited by counsel to two of the well-known authorities in this area. The first case is *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 W.L.R. 896, where at 912 Lord Hoffman said:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

13. The more recent decision pointed to by counsel is *Arnold v Britton* [2015] Ac 1619 at [15], where Lord Neuberger said:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions […]".

14. In Volume one of the current (33RD) edition of *Chitty on Contracts*, the following view is expressed by the learned authors at [13.070] in regard to inconsistent terms of a contract:

> "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. However, matters are otherwise in the case where there is a term in the contract dealing with the possibility of inconsistency. The parties may do this by including in their contract an order of precedence term which will determine how any conflict between the terms of the contract is to be resolved.
>
> In other cases the court should approach the interpretation of the contract without any pre-conceived assumptions and should neither strive to avoid nor to find an inconsistency but rather should approach the documents in a "cool and objective spirit to see whether there is inconsistency or not". To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. A term may also be rejected if it is repugnant to the remainder of the contract. However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void. But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the contract as disclosed by the instrument as a whole."

15. Further on at [13.083], this passage is to be found:

> "However, in *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann cautioned that "it clearly requires a strong case to persuade the court that something must have gone wrong with the language" in order to justify a meaning which departs from the words actually used. Not only must it be clear that "something has gone wrong with the language", it must also be "clear what a reasonable person would have understood the parties to have meant": in other words, both the "problem" and the "solution" must be clear if the court is to give to the words a

> meaning other than that which they ordinarily bear. It is thus "only in exceptional cases" that commercial common sense can "drive the court to depart from the natural meaning of contractual provisions". It is no part of the court's function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that "something has gone wrong with the language" in order to save himself from the consequences of his own poor or inadequate drafting. But in the case where from the language of the contract the court can discern that an event has occurred which was plainly not intended or contemplated by the parties and it is clear what the parties would have intended in the circumstances which have occurred, the court may give effect to that intention even if that intention is not consistent with the primary meaning of the words of the contract. It is, however, important to note the limits on the latter principle. The event must "plainly" not have been contemplated by the parties and it must also be "clear" what the parties would have intended in the circumstances which have occurred. The principle does not "extend to re-formulating or altering the parties' bargain"."

16. In the course of argument before me, no little effort was expended by counsel for both parties in pointing to the commercial impact of one construction or another of the clauses of the agreements with the Platforms that require interpretation. Although the rules of interpretation are no different when it comes to the world of commerce I understand it to be settled law that, wherever practicable, there must be ascribed to the words used a meaning that would make good commercial sense. In respect of this point the learned authors of *Chitty* have this to say at [13.084]:

> "The third situation is one in which the natural and ordinary meaning of the words used by the parties leads to a conclusion which is said by one of the parties to be a conclusion which is not commercially sensible and which cannot therefore have been intended by the parties. There is a significant body of authority in which the courts have attached substantial weight to the importance of giving to commercial documents a meaning which is commercially sensible. Thus it has been stated that commercial documents "must be construed in a business fashion" and "there must be ascribed to the words a meaning that would make good commercial sense". Indeed, in *The Antaios* Lord Diplock said that:
>
> > "… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense."
>
> Lord Diplock's dictum has been referred to many times. **It does not, however, mean that the court can rewrite the language used by the parties, where it is clear and unambiguous, in order to produce a more balanced, fair or "business like" result. There is no overriding criterion of construction to the effect that an interpretation that makes more business common sense is to be preferred**. But if alternative interpretations are available, it will be necessary to consider the implications of each interpretation and which interpretation is most likely to give effect to the commercial

purpose of the agreement"

17. And at [13.088]:

> "A court should be "very slow" to reject the ordinary and natural meaning of a contract term "simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight". It is not an unknown phenomenon for a contracting party to enter into an agreement which it can see, retrospectively, to have been "ill-advised" but it is: "… not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice." **It is therefore not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties ought to have agreed, or what the court may think would have been a reasonable contract for the parties to make**."

18. By way of reinforcement of the propositions above to which I have added emphasis, regard may be had to the decision in *Sinochem International Oil (London) Co Limited v Mobil Sales and Supply Corp (No 1)* [2000]1 Lloyd's Rep. 339, where faced with an appeal arising out of a summary judgment application Mance LJ expressed the clear view [29] that:

> "The court cannot either re-write contracts or impose on parties to them what the court may think would have been a reasonable contract."

Issue 1 - Evidence in respect of the Platforms' contracts

19. Evidence was put before the court by way of witness statements from Mr Butcher (for the Cs) and Mr Pike (for the Ds). Mr Pike explains at paragraph 54 of his statement, that:

> "a) H the Ds were not parties to the terms of the original contracts between the Company and the Platforms, which he says appear to have been entered into in or around 2010, at a time when the Company was still under the control of the Cs; and
>
> b) that it was also the Cs who prepared the original applications for membership of the platforms."

20. The Ds go onto say, and there does not seem to be any dispute about this based on the evidence from Mr Butcher at paragraph 27 *et seq*, of his first witness statement, that given the documents that they have seen, the Company's contracts with the Platforms were governed by the following:

> "a) the membership application form dated 16 March 2010 which was completed by the Cs as part of the Company's initial application for membership of Rightmove (the MAF);

> b) the Terms & Conditions that were appended to the Rightmove Application Form (the 2009 Terms);
>
> c) the version of the Rightmove terms and conditions which the Cs claim were in force at the SPA completion date and the associated "Technical Guidelines" (the 2017 Terms);
>
> d) the version of the Zoopla terms and conditions (the Zoopla Terms) which the Cs claim were in force at the SPA completion date."

21. I will deal with what is contained in each these documents in addressing the competing submissions made upon them. It is plainly an important facet of the case as to whether the Platforms are in fact complaining about how the Company is conducting its business but that is not a matter that concerns me in this application. I am only asked to declare that when the parties entered into the SPA, the Company was precluded under the terms and conditions of its contracts with those Platforms, from placing adverts on behalf of other commercial lettings agents.

The Cs' Case

22. The Cs say that that there is no contractually effective Restriction. They rely on a number of points which turn on provisions in the documents which the Ds accept govern the Company's contracts with the Platforms. As to Rightmove it will be recalled that there are three relevant documents: the MAF, the 2009 Terms, and the 2017 Terms.

23. In his principal argument, Mr Goodkin for the Cs invited my attention to the Section A definitions contained in the 2009 Terms, which provided:

> "*1. Agent means any person, firm or corporate entity in the business of selling or letting residential or commercial properties or land on behalf of a third party.*
>
> *3. Landlord means any person, firm or corporate entity marketing and/or managing property they own for let.*
>
> *5. We, Us, Our and Rightmove means Rightmove Group Limited, Grafton Court, Snowdon Drive, Winterhill, Milton Keynes, MK6 1AJ. Registered in England no. 03997679 or any entity which is from time to time its holding company, a subsidiary or a subsidiary of any such holding company (within the meaning of section 736 of the Companies Act 1985 as amended at the date of this Agreement) or any successor in business to Rightmove Group Limited.*
>
> *6. You and Your refers to the person, firm or corporate entity who has applied for membership of Our Website.*
>
> *7. Your Client means an Agent, Developer or Landlord who has instructed You to market property, land or developments on their behalf.*

> *11. Your Data means all information and any part thereof provided to Us by You either directly or indirectly, including Data supplied by way of a link to a document or similar of any kind, or information provided or displayed by a third party.*
>
> *12. Locations means the places that You nominated on Your membership application form and/or added by Us from which you operate, promote or manage Your activities, that are displaying Your Data on Our Website and the contact details You provide to Us where We will direct enquiries about Your Data.*
>
> *13. If your application is accepted by Us, Your Membership means membership of and access to the Rightmove services You select and use ONLY for Your Locations.*
>
> *14. Our Users means visitors to Our website.*"

24. Mr Goodkin also pointed to Section B, which set out Rightmove's obligations.

> "W*e*"*:*
>
> "*1. Will provide an internet property listing service for displaying Your Data to visitors to Our Website and may also offer you other relevant additional features and services to help manage your advertising and promote your membership;*"

25. And to Section C, for the obligations placed upon a Rightmove member. It stated that

> "*You*"*:*
>
> "*1. Warrant that You or Your Client operate as an Agent, Developer or Landlord and are providing the services normally associated with those operations;*
>
> *2. Warrant that unless you are a Landlord, neither You nor Your Client are dealing as a consumer for the purposes of the Unfair Contract Terms Act 1977, Section 12, as amended;*
>
> *3. Warrant that Your Data will only include information on property or land appropriate to Your Membership;*
>
> *3.1. where You or Your Client received the original instruction from a third party at one of Your Locations to sell or let such property or land OR*
>
> *3.2. where You or Your Client have developed or are developing such property or land at one of Your Locations;*
>
> *For the avoidance of doubt Your Data must not include details of property or land if the original instruction was received or is managed or is controlled from somewhere other than one of Your Locations.*
>
> *6. Will comply and You will procure that Your Client complies with all UK legislation and other regulatory and compliance standards that*

are applicable to a business of the same or a similar nature to Yours or Your Client's business within the UK (such as, without limitation, the Estate Agents Act 1979, The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 and The Home Information pack Regulations 2007) and if You or Your Client or both (as appropriate) operate outside the UK, within that jurisdiction as well;

9. Will ensure that Your Data complies with all UK legislation (such as, without limitation, the Property Misdescriptions Act 1991, The Housing Act 2004 and The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007) that applies to the marketing of property or land and any other regulatory and compliance standards that may from time to time apply in respect of Your Data, regardless of whether such legislation directly applies to You;

10. Warrant that You have good title to Your Data and that Your Data; is accurate and complete; is of a professional and inoffensive nature; is to the best of Your knowledge free from known viruses, disabling programs and devices; is not in breach of any obligations of confidentiality or privacy; is not being displayed against the wishes of whom You or Your Client acquired it; does not include details of Your commission, fees, specific comparisons with third parties who We perceive to be competitors of You or Your Client, any links or references to any website or any other information that is specifically excluded by these Conditions or that We deem to be inappropriate to Your Membership;

16. Will make all payments due to Us pursuant to Our charging structure, as notified from time to time, promptly in accordance with Section E below;

19. You warrant that you will not without our written permission sell on the services and features of Your Membership or provide access to the services and features of Your Membership to third parties."

26. Section D set out general terms of the 2009 Terms. It provided that:

"*1. Your Membership is subject to these Conditions to the exclusion of all other terms and conditions express or implied and any variation to the conditions of your Membership (other than as described in D2) shall have no effect unless expressly agreed in writing and signed by an authorised senior representative of Us.*

11. If when compared with the majority of Our other members, Your Locations market or Your Data includes, high volumes of property or land and/or Your properties or land are spread over a wide geographical area or We believe Your Data includes details of property or land not from one of Your Locations, then in accordance with any guidelines that we may set and communicate to You from time to time, we reserve the right to charge You for additional locations or in a manner we deem equivalent to Your volume or to charge You on a per property basis.

> *19. These Conditions and Your completed membership form when accepted by Us contain the whole agreement between You and Us relating to Your Membership and supersedes all prior agreements, arrangements and understandings between You and Us relating to Your Membership.*
>
> *25. If You or Your Client are advertising multiple properties similar in price or type, we reserve the right to group them into one advertisement.*"

27. Section E of the 2009 Terms, provided for the payment terms:

> "*1. If Your Membership is accepted, for the duration of the Term and thereafter You will pay Our membership charges for the Rightmove services You select and use. After expiry of the Term, Our charges may be varied from time to time subject to Us providing 1 month's prior notice to You of the date the change will take effect. Further, without prejudice to any of Our other rights in these Conditions, where Your Data does not comply with Condition C3 or does not in Our opinion originate from one of Your Locations, You will also pay Us for the equivalent Rightmove services you are using and for any additional locations We deem appropriate at Our then prevailing prices.*
>
> *3. If You or Your Client are a Developer, We will raise invoices monthly in arrears for the number of developments that You have displayed on Our Website during the previous month. For all other customers, We will raise invoices in advance.*"

28. It is not in dispute that the 2017 Terms were broadly similar to the 2009 Terms. The Cs point to the following 2017 provisions:

The Definitions at Clause 1, which included:

> *"Agent" means any person primarily in the business of selling or letting residential or commercial properties or land on behalf of multiple unrelated third parties.*
>
> *"Landlord" means any person marketing and/or managing property they own for let.*
>
> *"Locations" means the physical locations identified on Your Membership Application Form which may be varied in accordance with clause 3.3.*
>
> *"Membership" means Your entitlement to the Services subject to these Conditions.*

The Services at Clause 3, which provided:

> "*3.1 Rightmove shall supply the Services to You in accordance with these Conditions. You will only be entitled to those Services as specified in Your Membership Application Form.*
>
> *3.2 Rightmove shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety*

requirement or which do not materially affect the nature or quality of the Services. Rightmove shall notify You in any such event.

3.3 You may request the provision of further Services at any time in writing and Rightmove may recommend further Services to You at any time in writing. You may also request that additional Locations be added to Your Membership. If both parties agree to the provision of further Services or the addition of further Locations (subject to agreement regarding a variation in the Charges to reflect the additional Services or Locations) then those Services and/or Locations shall be deemed to be added to the Membership Application Form. Rightmove shall keep an up to date list of the Services provided to You and all of Your Locations and shall provide the same to You upon request.

Clause 4, which provided that the member shall:

4.1.1 ensure that the terms of the Membership Application Form, Your Data and any other information that You provide to Rightmove are complete, accurate and not misleading;

Clause 4.2.1, by which the member warranted:

"You (and, where applicable, Your Client) carry on business as an Agent, Developer or Landlord and that You have not misrepresented the nature of Your business to Us"

Clause 5 titled Charges and Payment provided:

"5.1 If Your Membership is accepted, for the duration of the Term and thereafter You will pay our Membership Charges for the Rightmove services You select and use.

5.2 After expiry of the Term, Rightmove may vary the Charges from time to time. You will be given 30 days' notice of any increase in the Charges and Rightmove will send to You an amended Price Schedule.

5.3 If when compared with the majority of Our other members, Your locations market or Your Data includes high volumes of property or land and/or Your properties or land are spread over a wide geographical area or We believe Your Data includes details of property or land not from one of Your Locations, then in accordance with any guidelines that We may set and communicate to You from time to time, We reserve the right to charge You for additional locations or in a manner We deem equivalent to Your volume or to charge You on a per property basis.

5.4 If Your Data does not comply with the requirements in the Technical Guidelines or (in Rightmove's opinion) does not originate from one of Your Locations then You will pay Rightmove's additional charges at the prevailing rate for providing these additional Services."

29. These provisions are relied upon by the Cs to support the submission that the 2009 Rightmove Terms expressly permitted the Company to place adverts on behalf of other commercial lettings agents. They say this because clause C1 expressly provided for clients of the Company to be Agents, Agents being defined as "*any person, firm or corporate entity in the business of selling or letting residential or commercial properties or land on behalf of a third party*". Thus they say, the Company expressly warranted that its clients did operate as commercial lettings agents, as well as "*Developers*" or "*Landlords*".

30. This submission is supported they say by Clause C6, which makes clear that "*Your Client*" includes "businesses", in light of the Company's warranty to procure that its client will comply with all UK legislation "*that are applicable to a business of the same or a similar nature to Yours or Your Client's business within the UK*".

31. Further support is to be found in Clause C10, which they say envisages "*Your Client*" acquiring data *from third parties*, since the Company warrants that "*Your Data* […] *is not being displayed against the wishes of [the person from] whom You or Your Client acquired it*". If only residential landlords/homeowners could list properties, then they would not be acquiring data from anyone.

32. The Cs also say that the effect of Clause D25 is that when it provides for "*You or Your Client […] advertising multiple properties similar in price or type*", such a provision is consistent with "Your Client" being commercial lettings agents.

33. Taking all of these express terms into account, the Cs go onto make a submission based upon what the 2009 Terms did not contain, and that they say is an express and clearly drafted prohibition on placing adverts on behalf of other commercial lettings agents. If that had been the intention, it would have been straightforward for Rightmove to have included such wording.

34. Insofar as it is for the Cs to offer an explanation as to the commerciality of the 2009 Terms, they say that it is to be assumed that Rightmove will simply levy a higher membership charge upon the Company if its throughput of listings increases (because it is taking on adverts for other commercial lettings agents); and in addition, Rightmove has quite clearly and for a purpose, reserved to itself the right to charge on "per property" basis if the throughput is inconsistent with the membership charge paid or results from a listing placed by a branch in circumstances where the original instructions did not originate from that branch.

35. As to the 2017 Terms, the Cs say that same analysis applies. This is on the basis that Clause 4.2.1 expressly envisages that "***You (and, where applicable, Your Client)****" may "carry on business as an* ***Agent****, Developer or Landlord"*, where *"Agent" means any person primarily in the business of selling or letting residential or commercial properties or land on behalf of multiple unrelated third parties*." Thus it is clear they submit, that the 2017 Terms expressly envisage clients of the Company operating as commercial agents.

36. Turning again to the supposed commerciality of the arrangement, the Cs point to Clause 5 of the 2017 Terms which allow Rightmove to vary its prices as required if a member lists an excessive number of properties or if "*We believe Your Data includes details of property or land not from one of Your Locations*"; and Clause 5.4 they say, makes clear

that Rightmove's exclusive remedy for a member listing a property that does not originate from one of "*Your Locations*" is that Rightmove may charge an additional fee for it. This provision the Cs suggests, demonstrates that even in the extreme case of a member listing a property on Rightmove where the instructions originated from a physical branch not included on its membership form, would not be a breach of the 2017 Terms, it would simply constitute an additional service for which the member had to pay.

37. Again, it is submitted that the 2017 Terms do not expressly (or otherwise) prohibit the Company from placing adverts on behalf of other commercial lettings agents: at most, they require the Company to pay for placing such adverts.

The Ds' response

38. The Ds' case is that it would be an extraordinary outcome if commercial agents throughout the country were able to gain access to the market access offered by the Platforms not by signing up to their terms and paying their fees but simply by paying a (doubtless much lower) fee to the Company. Surely they say, the Platforms cannot have expected their terms and conditions to operate in such a way and, on a proper construction, they do not.

39. Counsel for the Ds asks me to have in mind the MAF, which at the end of Section 2 states that *"Properties can only be displayed if they are from a paying branch that received the original instruction"*; and further on at the bottom of the form) that *"As a Director/Proprietor/Partner of the above company, you confirm that you had read and agree to the Terms and Conditions and have selected the appropriate payment and membership options. You confirm that all properties to be listed have been secured by the branch(es)/office(s) named in your application"*.

40. I would just add here that the MAF in fact goes to provide, as a final sentence, just above the signature block, that "*Any other properties listed under this agreement will be charged for on an individual property basis*".

41. This Section 2 provision (absent the provision I have recited) is the principal underpinning of the Ds' analysis. The Company plainly cannot be permitted to upload an advert onto the Rightmove site if the instructions were originally taken on by a commercial agent at their branch and not the Company's branch. To do so would be at odds with the confirmation given. This analysis is buttressed by the reliance which the Ds place on clause C3 of the 2009 Terms in which this provisions is to be found: *"For the avoidance of doubt Your Data must not include details of property or land if the original instruction was received or is managed or controlled from somewhere other than one of Your Locations"*, *"Your Data"* being defined as meaning *"all information and any part thereof"* provided to Rightmove by the member; and *"Your Locations"* meaning *"the places that You nominated on Your membership application form and/or added by Us from which you operate, promote or manage your activities ..."*.

42. Moreover, the Ds assert, how could the Company possibly upload property adverts on behalf of other commercial operators when Clause C19 of the 2009 Terms provided that *"You warrant that you will not without our written permission sell on the services and features of Your Membership or provide access to the services and features of Your Membership to third parties"*, *"Your Membership"* being defined as meaning *"...*

membership of and access to the Rightmove services You select and use ONLY for Your Locations". Similar "third party" restrictions are contained in the 2017 Terms.

43. To permit other commercial lettings agents to use the Company as a "sleeve", through which to place adverts on Rightmove on behalf of their own clients, would be tantamount to *"selling on*" the services and features of the Company's membership to third parties, who ought properly themselves to subscribe for their own membership with Rightmove.

44. The Ds also pointed to elements of the Rightmove Membership Classification Guidelines as supporting their interpretation that any adverts could not be placed on behalf of commercial operators who were selling on behalf of others, as the Company's category of membership confirmed that when it acted on behalf of multi-property landlords, those landlords were required to be themselves owners of the properties being advertised. Why would this restriction be stipulated, asks Mr Lawson who appeared for the Ds, if members were in any case permitted to advertise on behalf of non-owners whenever they chose?

Discussion

45. The difficulty that Mr Lawson faced throughout the argument before me, was the somewhat inconvenient truth that for a provision having such an important commercial effect as was contended for by him, he was unable to point to any clear statement of it in any of the contractual provisions binding the Company. He was bound to accept that it would have taken little effort on the part of Rightmove to put the point beyond peradventure.

46. Taken together, I can see that the requirement to list properties only where the original instruction was taken on at that branch, leaving to one side for the moment the virtual nature of the Company's website-based business, and the warranty binding the Company not to sell on the features of membership to third parties, could be construed as giving rise to the Restriction as argued for by the Ds but it nonetheless remains a curiosity that the matter was not rendered clear cut by straightforward and plain drafting.

47. Mr Lawson's difficulty was compounded by the drafting surrounding the definition of the clients of the Company which included Agents. This drafting *was* straightforward and plain. It admits of no doubt that the Company was entitled to take on the business of clients who were agents, and that agents included firms or corporate entities in the business of selling or letting residential or commercial properties or land on behalf of a third party. This language was described by counsel for the Ds as "overly broad"; to my mind its meaning is crystal clear. I can well understand why it was volunteered by counsel that a new set of terms are to be expected from Rightmove soon.

48. The Ds' response to this case made by the Cs was to assert that the definition of clients and agents only goes so far and is not by any means the end of the construction analysis. The argument advanced is that what the Company is entitled to do with its clients, whoever they are, is only what the 2009 Terms and the 2017 Terms permit. That is the point at which the original branch instructions restriction and the proscription in relation to selling on services to third parties, bite.

49. This in my judgment cannot be right. Viewed objectively, whoever was behind the drafting of the 2009 Terms and 2017 Terms, cannot have intended to have opened the door so wide by virtue of the definition of the Clients/Agents mechanic, only to have then sought to have it closed again by means of a careful scrutiny of several provisions which need to be read together and afforded a particular and helpful meaning in order to amount to a padlock on the door. That is not a proposition that I find at all likely or attractive. It would also involve the court choosing to ignore the plain meaning of the words the parties decided to use to set out their bargain and to place upon the agreement a construction simply because it is said to be the more commercially sensible for Rightmove. In my judgment I must approach this taking account of what was said by Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd*, and also having regard to the judgment of Rimer LJ in *Prohphet v Hugget* [2014] EWCA Civ 1013, both of which decisions encouraged the authors of Chitty to comment: "*It is thus "only in exceptional cases" that commercial common sense can "drive the court to depart from the natural meaning of contractual provisions". It is no part of the court's function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that "something has gone wrong with the language" in order to save himself from the consequences of his own poor or inadequate drafting*."

50. I am in any case, as Mr Goodkin correctly in my judgment submitted, in no position to say what was is in the best commercial interests of Rightmove or what their business model is in regard to advertising on behalf of agents. What I am able to do is to express a view on the meaning of words where the language used is plain and clear.

51. It may or may not be the case that Rightmove are happy to charge their members for properties advertised otherwise than in circumstances where the original instruction came into the member's branch that placed the advert. That would certainly seem to be the position from the sentence above the signature block on the membership application form to which I made reference earlier in this judgment, despite the obvious conflict with the warranty upon which the Ds rely. This inherent conflict gives me further encouragement to stay away from any attempt to divine the Rightmove business model from a reading of only the 2009 Terms or the 2017 Terms. Such an understanding is in any event not necessary in order for me to decide the construction issue that is before the court.

The Zoopla Terms

52. I will now turn to the construction of the Zoopla Terms, which the Ds described as being on broadly similar terms to the terms and conditions governing the relationship with Rightmove. Again, the Ds assert that there was a Restriction contained in the Zoopla Terms. The Restriction is, as with the argument in regard to Rightmove, founded upon the requirement, in clause 3.1.10 of the Zoopla Terms, that each of the company's branch offices should only upload details of properties they received instructions for specifically at each of their branch locations and that no branch would upload details of properties originating from any other branch location.

53. Of course, the Company did not have any physical branches. The position of a member whose trading operation was online only, was to some extent anticipated by the Zoopla Terms. Those terms contained the following definitions:

> ""*Agent" means an estate agent, lettings agent (and in Scotland, solicitor agents) and/or commercial property agent;*
>
> *"Member" means the Agent or the Developer;*
>
> *"Online Agent" means an estate agent, lettings agent (and in Scotland, solicitor agents) and/or commercial property agent that operates primarily via a website (rather than a physical branch) and/or does not operate through a local office network;*
>
> *"Services" means the services to be provided by Zoopla (or its Group Companies) as set out in the Order Form and which may include any, or a combination, of the following:*
>
> - *A process facilitating the upload by the Member of property details (including images) to the Website(s);*
> - *Displaying the Member's properties on the Website(s);*
> - *Providing the Member with a listing within the agent directory on the Website(s);*
> - *The provision of Leads to the Member;*
> - *The provision of advertising services to the Member;*
> - *The provision of reports and access to reporting tools to the Member; and*
> - *Any other services provided by Zoopla from time to time."*

54. If a property was advertised by a member otherwise than in compliance with the clause 3 restriction, Clause 3.3.3 provided that Zoopla "*reserves the right to charge the Member for additional fees or in a manner it deems appropriate or on a per property basis if Zoopla has reason to believe that Content uploaded by any of the Member's branch offices is in breach of clause 3.1.10 above.*"

55. In respect of the ability to increase charges to a member whose throughput of adverts is inconsistent with its membership fee, Clause 3.4.8 allows that "*from time to time Zoopla shall be entitled to increase the fees payable by the Member in the event that following an assessment by Zoopla. it is determined by Zoopla that the number of properties displayed on the Website on behalf of the Member has increased such that the number of properties exceeds the average for Members of a similar type. In assessing the number of properties and the applicable average for these purposes:*

> "*an Agent's properties (and those of other Agents) shall be assessed on a per-branch basis by reference to an appropriate geographical area:*
>
> *a Developer's properties (and those of other Developers) shall be assessed on a per-Development basis:*
>
> *an Online Agent's properties (and those of other Online Agents) shall be assessed by reference to appropriate geographical areas:*

> *and in any event an assessment will be made by reference to any relevant guidelines issued by Zoopla from time to time. Any increase in fees will be calculated on either a per-property or per-Development basis so as to fairly reflect the increase in the volume of the Member's displayed properties.*"

56. As with the Rightmove 2009 Terms and the 2017 Terms, the Zoopla Terms do not contain any clearly expressed prohibition against placing adverts on behalf of other commercial lettings agents.

57. The Cs submit that Clause 3 does not prohibit the Company from placing adverts on behalf of other commercial lettings agents because the Company does not have any "*branch offices*". It was a web-based business, the existence of which being expressly acknowledged in the definition of "*Online Agent*", which was defined as being a business not operating through a physical branch and/or local office network. Therefore, strictly construed, Clause 3.1.10 does not apply to it.

58. Further the Cs say, clause 3 does not specify from whom the instruction must have been received. There is no reason to suppose that the Zoopla member cannot receive instructions from another commercial lettings agent. The only prohibition is against uploading "*details of properties originating from any other branch office location"*.

59. The task before Mr Lawson for the Ds was once again to somehow demonstrate that the Zoopla Terms contained a prohibition against the Company advertising properties where its clients were themselves commercial operators, in circumstances where there was no express wording to that effect upon which he could rely Once again he was put to trying to construct such a restriction out of a reading of a combination of provisions which taken together established the prohibition.

60. In this instance Zoopla went to the trouble of defining an online business. What they did not do was provide for how any fetter on the ability of the member to upload properties would operate. It is clear that they may have sought to do so (though this is disputed by the Cs) in respect of members possessed of physical branches but crucially, in my judgment at any rate, in neither case did Zoopla take the opportunity to express the Restriction in plain and straightforward language: they easily could have done.

61. At this juncture I remind myself of the position adopted by Mance LJ in *Sinochem*: it is not for the court to re-write contracts or impose on parties to them what the court may think would have been a reasonable contract. It might be that Zoopla would wish to prevent its members from placing adverts on behalf of other commercial agents as the Ds submit, and it might be that such a course would have been sensible from a commercial standpoint, but I am a long way from knowing that to be the case and it is not for me to impose such a contract on the parties, certainly not because I arrive at the view that it would be more reasonable a construction and not when such a state of affairs is self-evidently not provided for in circumstances where it easily could have been.

Issue 2 - Disclosure

62. The second issue is concerned with the SPA. The Ds want to bring breach of warranty claims against the Cs but clause 6 of the SPA required them to do so within a period which they accept expired before they took the necessary steps to instigate their claims. The matter that the Ds say was not disclosed was in essence the Restriction and the

Platforms' enforcement of it. In light of my finding on Issue 1, the complaint at the heart of Issue 2 might well have become moot, but I have been asked to reach a decision on the second issue and as there might well be something more to it than presently on my appreciation of the argument appears to be the case, I will go on and deal with it.

63. The exclusion provision in clause 6 contains a potential "escape hatch" for the Ds inasmuch as the proviso at clause 6.2 (the **Proviso**) provides that the time bar does not apply to warranty claims "where there has been fraud or negligent non-disclosure…."

64. Because the warranties are expressed to be subject only to any matter fully and fairly disclosed in the Disclosure Letter (the **DL**), the Ds say that if there was to be any disclosure which would prevent the provisions of the Proviso engaging, it would have to be contained in the DL. They believe that they are in a position where nothing relevant to the claims they want to bring (outside the time bar) was revealed in the DL.

65. The Cs say that all of this is for trial, save that the Ds should be told now that they will not be able to rely upon the argument that any disclosure for the purposes of the Proviso must have been contained in the DL.

The relevant provisions of the SPA

66. It is necessary for me to set out the relevant clauses. As to Clause 6:

> "*6.1 The Warrantors' liability under the Warranties shall be limited as follows:*
>
> *6.1.1 no claim for breach of any Warranty shall be made by the Purchasers until the aggregate liability for all claims under this Agreement (including all previous claims whether or not satisfied and including costs) shall equal or exceed £1,000 in which case the whole amount shall be capable of being claimed and not merely the excess;*
>
> *6.1.2 the Warrantors' maximum aggregate liability in respect of all the Warranties (excluding interest, costs, fines, penalties and surcharges) is limited to the Purchase Price;*
>
> *6.1.3 no claim for breach of the Warranties:*
>
> *6.1.3.1 otherwise than in relation to Taxation shall be made unless the claim has been notified in writing to the Warrantors within 6 months of the Completion Date; and*
>
> *6.2 None of the limitations contained in clause 6.1 apply to any claim under the Warranties where there has been fraud or negligent non-disclosure, or, in relation to the Warranties on Taxation, where any Taxation Authority alleges fraud, default, negligent conduct or conduct involving dishonesty on the part of the Company or any person acting on its behalf in relation to the matter giving rise to the claim.*"

67. The DL is defined to mean "the letter (together with all the documents attached to or referred to in it) in the agreed form from the Vendors to the Purchasers executed and delivered to the Purchasers immediately prior to the execution of this Agreement".

68. Clause 5 provides:

> "*5.1 The Warrantors warrant and represent to the Purchasers that (subject to clause 5.2) each Warranty is true, complete and accurate and not misleading at the date of this Agreement.*
>
> *5.2 The Warranties are subject only to:*
>
> *5.2.1 any matter which is fully, fairly and specifically disclosed in the Disclosure Letter; and*
>
> *5.2.2 the provisions of clause 6.*
>
> *5.3 The Warrantors acknowledge that the Purchasers have been induced to enter into this Agreement by, and are entering into this Agreement in reliance upon, the Warranties which have also been given as representations with the intention of inducing the Purchasers to enter into this Agreement*"

Discussion

69. It is my construction of the SPA that the purpose of the DL is to carry into effect an agreement between the parties that in respect of any warranty given, no claims can be made in respect of it by the purchaser on the basis that it is untrue, to the extent of the facts and matters fully, fairly and specifically disclosed in the DL. In essence the seller is showing that the warranty is not true and the purchaser is agreeing that it knows this to be the case.

70. As to the Proviso, in my judgment what the parties were trying to say was that the purchaser would not be prevented from bringing a late claim if the reason it was brought late was the concealment by the sellers of facts and matters essential to the decision or knowledge necessary to be able to bring such a claim; or to put it another way, because those facts and matters ought properly to have been, but were not disclosed to them. But if the purchasers did in fact know, because the sellers did disclose information about the matter, then the bar would still apply. Whether enough had been disclosed would be a matter for argument.

71. There was no disagreement before me that whatever might be the position with fraud (which is not in any case relied upon) it is not possible to point to any duty (as might be relevant to an assertion of negligence) on any party to disclose anything: all that can be said that if a Warranty claim is to be avoided, facts and matters must be disclosed in the DL to the requisite standard. The operation of the Proviso is a different matter altogether.

72. What it seems to me cannot be argued is that if the purchasers did know perfectly well of a matter, albeit that it was not in the DL, that in regard to the Proviso, the matters had not been disclosed to them. In reaching this view, I rely upon the fact that when in

the Proviso the concept of disclosure is raised, no reference is made to any standard of disclosure; nor is reference made to the DL.

73. Whatever is the true construction of clause 6 will be for the trial judge, but I am grasping the nettle today in respect of the Proviso so that the parties can have some understanding of the position that they are in as they progress to trial. I am satisfied that non-disclosure as it is used in clause 6 did not mean only the facts and matters disclosed in the DL. In my judgment the Ds have no reasonable prospect of establishing otherwise.

Contra proferentum

74. The Ds urge me to exercise any doubt in their favour on the basis of the principle of construction that a deed or instrument is to be construed more strongly against the grantor or maker thereof. The rule is applied to remove doubt or ambiguity, where and as a last resort, the court cannot arrive at an answer to the issue applying ordinary construction principles.

75. I am not persuaded that I need to resort to the application of this aid to construction as I am not in sufficient doubt upon the issue as to require its assistance.

Conclusions

76. For the reasons that I have given above, I am prepared to make both the declarations sought by the Cs, by way of summary judgment. In my judgment the Ds have no real prospect of succeeding on the issues that they have raised. Nor can I see any compelling reason why either issue should be left for disposal at trial.

77. I will hear counsel on the question of costs unless the parties are able to remit an agreed version of the draft order, with which I am otherwise content.