

[2019] UKFTT 0022 (PC)

**PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION**

REF NO 2017/1064

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002**

B E T W E E N:

NOLTON LIMITED

Applicant

And

**(1) AHMAD BASHIR
(2) KIGHAT BASHIR Property address: 94 Broad Street, Birmingham B15 1AU**

Title number: WM422297

**Before: Judge David Taylor
Birmingham Family & Civil Justice Centre - 30th October 2018**

Representation: The Applicant (which acts in person through its director Mr Binning) did not attend the hearing. The Respondents were represented by Mr Trevor Berryman of Counsel. Their solicitors were Hadgkiss Hughes & Beale.

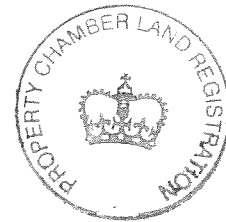
ORDER

THE TRIBUNAL ORDERS as follows:-

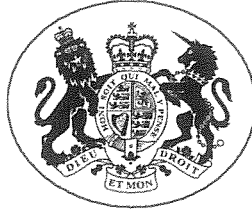
1. The Chief Land Registrar shall give effect to the Respondents' application dated 1st August 2017 as if the Applicant's objection had not been made.
2. For the purposes of paragraph 1 of this Order, the Respondents' application dated 1st August 2017 shall be treated as if it had included an application to cancel the substituted unilateral notice which was described in HM Land Registry's letter to the First Tier Tribunal dated 12th March 2018.

BY ORDER OF THE TRIBUNAL

David Taylor



DATED 9th November 2018



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DECISION

1. The Respondents are the registered proprietors of the freehold estate in 94 Broad Street, Birmingham, B15 1AU ('the Property'). On the 15th August 2014 they granted in favour

of the Applicant a lease of the property for a term of 5 years, commencing on the 11th July 2014. On the same date the parties entered into a Pre-Emption Agreement ('the Agreement'). By the Agreement, the Applicant was given '*the right to purchase [the Property] if [the Respondents] shall desire to sell or otherwise dispose of their interest in [the Property] within the Pre-emption Period*'. The Pre-emption Period was defined to mean the period of 5 years commencing on the 11th July 2014.

2. The machinery within the Agreement provided, in a case in which the Respondents wished to sell the Property, for service of a 'Vendor's Notice' upon the Applicant. If the Applicant wished to exercise the right of pre-emption conferred by the agreement, it was required to serve a 'Purchaser's Notice' in response to that Vendor's Notice. That Purchaser's Notice was required, by clause 4.1 of the Agreement, to be served '*at any time within two weeks from receipt of the Vendor's Notice.*'

3. It was provided by clause 4.3 of the Agreement that:

'If the Purchaser does not service [sic] a notice confirming that it wishes to exercise the Right of Pre-Emption within the time specified in clause 4.1 then the Right of Pre-Emption shall lapse and the Owner shall be at liberty to sell [the Property] on the open market subject to the Lease.'

4. On the 11th May 2017 the Respondents, through their solicitors (Hadgkiss Hughes & Beale), sent to the Applicant a letter with which they enclosed a copy of the Agreement, and in which they wrote:

'Pursuant to clause 3 of the Pre-Emption Agreement we hereby give you notice that our clients wish to sell their freehold interest in the Property at the Purchase Price of £500,000

You now have the Right of Pre-Emption pursuant to the terms of the Pre-Emption Agreement and thus must inform our clients (in the first instance please reply in writing to us) within 2 weeks whether you wish to purchase our clients' freehold interest in the property....'

5. It is the Applicant's case that, on the 19th May 2017, it sent a letter to the Respondents, within which it wrote:

'I am replying to the letter you sent me on the 11th May 2017 regarding Mr Bashir expressing he wants to sell the property. As stated in the pre-emption agreement he must

offer me first refusal if he wishes to sell the property. I hereby agree to buy the property, I will instruct a chartered surveyor to confirm Mr Bashir's market value of £500,000 which I believe to be an exaggerated figure but never the less agree to buy the property at market value once an independent chartered surveyor does a valuation of the property's true market value as of the 11th May 2017 as stated in the pre-emption agreement.'

6. According to the Applicants' Statement of Case, this letter was sent to the Respondents at their home address (2 Greet Hurst Drive, Moseley, Birmingham B13 9GL) by ordinary first class post.
7. The Respondents say that they did not receive that letter, and nor did they receive any other purported Purchaser's Notice within the 2 week period permitted by clause 4.1 of the Agreement. Accordingly, they say, the right of pre-emption has lapsed.
8. The Applicant's right of pre-emption under the Agreement was protected by entry of an unilateral notice against the Respondents' registered title. On the 1st August 2017, the Respondents applied to cancel that unilateral notice on the ground that the right of pre-emption had lapsed. The Applicant opposed that application, saying that the right of pre-emption had been validly exercised. The resulting dispute has been referred to this Tribunal for determination by HM Land Registry.

The Trial; Non-Attendance by the Applicant

9. The trial of the dispute was listed to take place at Birmingham Civil Justice Centre at 10:30am on the 30th October 2018. The Respondents were represented at the hearing by Counsel. The Applicant, which had been expected to attend through its director Mr Binning, did not attend.
10. Having considered the file relating to the case, I have satisfied myself that the Applicant was notified of the hearing. On the 22nd June 2018 a letter was sent to Maya & Co Solicitors (who were then acting for the Applicant) informing them that the hearing was due to take place at Birmingham Employment Tribunal on the 30th October 2018, at 10:30am. By a subsequent letter of the 9th August 2018, Maya & Co were notified of a change of venue to Birmingham Civil & Family Justice Centre. The letter made clear that the date and time of the hearing would remain the same. The address to which those letters were sent is the same as the address which appears on Maya & Co's headed paper, and it

is clear from subsequent correspondence between Maya & Co and the Tribunal that the Tribunal's correspondence was being received by Maya & Co at that address.

11. On the 3rd October 2018, Maya & Co wrote to the Tribunal to inform it that '*our Client has left us without instructions and as such we have now ceased acting on this particular matter.*'.
12. On the morning of the hearing, Mr Berryman showed me correspondence which had been sent by Hadgkiss Hughes & Beale to the Applicant enclosing the hearing bundle. That correspondence had been sent both to Winston Churchill House, Ethel Street, Birmingham B2 4BG (that being the Applicant's address as stated in the lease and in the Agreement), and to 6 Kirkham Way, Tipton, West Midlands (which I was told was Mr Binning's home address). The hearing bundle, which was sent under cover of both letters, was clearly marked on the front '*Bundle of Documents for Hearing on 30th October 2018 at 10:30am At the Birmingham Civil & Family Justice Centre, 33 Bull Street, Birmingham, B4 6DS.*'
13. Mr Bashir was, additionally, able to provide my clerk with a mobile phone number for Mr Binning. Attempts were made to contact him using that number, but the 'phone was not answered.
14. Finally, I was informed by Mr Berryman that his client had spoken with Mr Binning on an unconnected matter on the day prior to the hearing. Mr Bashir had formed the impression, from that conversation, that Mr Binning was overseas.
15. In all of these circumstances I am satisfied that the Applicant has been notified of the hearing, alternatively that reasonable steps have been taken to notify the Applicant of the hearing. I am also satisfied that it is in the interests of justice to proceed with the hearing. This dispute has been before the Tribunal for more than a year, and it is in the interests of all parties that it should be resolved sooner rather than later. The Respondents have incurred costs in attending the hearing; the Applicant appears (from Maya & Co's letter of 3rd October 2018) to have failed to engage or to prepare for the hearing for some time. I have been given no explanation for that failure, or for the Applicant's non-attendance at the hearing.

Issues

16. The following issues arise for determination from the parties' Statements of Case:
 - a. whether the letter which was sent by Hadgkiss Hughes & Beale to the Applicant on the 11th May 2017 was a valid Vendor's Notice for the purposes of the Agreement;
 - b. if so, whether the Applicant's letter of the 19th May 2017 was served, or deemed served, in the manner required by the Agreement.

The Vendor's Notice

17. The issue concerning the validity of the Vendor's Notice arises in this way. Under the Agreement, the Vendor's Notice is required to give notice to the Purchaser of the Respondents' desire to sell or otherwise dispose of the Property '*at the Purchase Price*'. The Agreement defined the '*Purchase Price*' as '*the market value of the Property as at the date of the Purchaser's Notice*'. The notice in the present case gave notice of the Respondents' desire to sell the Property '*at the Purchase Price of £500,000.*' By its Statement of Case the Applicant takes the point that this notice '*may have been invalid or defective by virtue of its attempt to fix the Purchase Price at £500,000 ...*'
18. I reject this argument, for three reasons.
19. First, it is not obvious to me that clause 3 of the Agreement should be construed in such a way as to make it a requirement of a valid Vendor's Notice that the notice must specify the figure which represents the Purchase Price. I note that there is nothing in the express words of clause 3 which requires any figure to be specified in the Vendor's Notice. If clause 3 does not require a Purchase Price to be specified, then it is difficult to see why specification of an incorrect Purchase Price within the Vendor's Notice (ie. a figure which does not represent the market value of the property on the date of the Vendor's Notice) should invalidate the notice.
20. Second, even if clause 3 of the Agreement, properly construed, does require the Owner to specify a figure within the Vendor's Notice, it seems to me that that figure can only possibly be the figure which the Vendor *contends* is the Purchase Price. Given the enormous scope for disagreement between the parties (and indeed between valuers) about what the actual market value of the Property is, it seems to me to be an unlikely construction of clause 3 that it requires the Owner to specify the particular figure which

a court would conclude represented market value after a contested hearing. In the present case, the letter which Hadgkiss Hughes & Beale sent to the Applicant on the 11th May 2017 specified a Purchase Price of £500,000, and I interpret that letter as descriptive of the figure which the Respondents contended represented market value of the Property on the date of the Vendor's Notice. Accordingly, if clause 3 of the Agreement required the Vendors to state the sum which they contended was the Purchase Price, that requirement was satisfied by the letter of the 11th May 2017.

21. Third, even if (which I think very unlikely) clause 3 of the Agreement did require the Owner to specify the actual market value of the Property (rather than the figure which the Owner contended represented market value), the Applicant has adduced no valuation evidence from which I can conclude that the £500,000 figure which was stated in the Vendor's Notice was not the market value. In fact, the only evidence that was adduced before me on the question of value took the form of the assertion within the Applicant's Statement of Case (which contained a transcript of the contents of a letter written by the Respondents' solicitors to the Applicant or its representative on the 20th June 2017) that an 'interested party' had offered to buy the Property for £500,000 prior to the date of the Vendor's Notice. On the basis of that evidence, and in light of the Applicant's failure to adduce any evidence of value, I conclude that £500,000 was the market value of the Property on the date upon which the Vendor's Notice was served. Therefore, if clause 3 did require the market value to be specified, that requirement was met.

The Purchaser's Notice

22. Clause 4.1 of the Agreement provides that '*[t]he Right of Pre-emption shall be exercisable by notice in writing by the Purchaser to the Owner at any time within two weeks from receipt of the Vendor's Notice.*'
23. The Purchaser's Notice in the present case was contained in a letter written by the Applicant's Mr Binning on the 19th May 2017. It appears from the face of the letter that the letter was intended to be sent to 'Mr & Mrs Bashir % Hadgkiss Hughes & Beale'. I note, however, that the Applicant contends in its Statement of Case that the letter was sent to the Respondents' home address.

24. There is no indication on the face of the letter of the means by which the letter was intended to be sent, but in its Statement of Case the Applicant asserts that the letter was sent by ordinary first class post.
25. The Respondents deny receipt of the letter. They accept, however, that their solicitors received a duplicate of the letter when it was sent to them under cover of a letter sent by the Applicant to the Respondents' solicitors, and dated 8th June 2017. That letter was, of course, sent well outside the 2 week period within which the right of pre-emption could be exercised under the Agreement. So, in order to establish that the right of pre-emption was validly exercised, the Applicant must prove valid service of the notice contained in the letter dated 19th May 2017.
26. It follows that I need to resolve three issues:
 - a. to what address was the Purchaser's Notice sent?
 - b. was the Purchaser's Notice received by the Respondents (at their own address, or *via* their solicitors) on or about the 19th May 2017 (or at any event before expiry of the 2 week deadline specified in clause 4.1)?
 - c. even if it was not received, was the Purchaser's Notice nevertheless validly given for the purposes of the Agreement?
27. So far as the first issue is concerned, I reject the Applicant's assertion in its Statement of Case that the letter was posted to the Respondents' home address. There is nothing on the face of the letter that indicates that it was intended to be sent to that address. On the contrary, the letter indicates on its face that it was to be sent '*To Mr & Mrs Bashir % Hadgkiss Hughes & Beale*'.
28. I also note that, within the Vendor's Notice, Hadgkiss Hughes & Beale had invited any response by the Respondents to be sent to them ('*in the first instance please reply in writing to us*'), and that the Applicant's subsequent letter of the 8th June 2017, which was also marked '*To Mr & Mrs Bashir % Hadgkiss Hughes & Beale*' is admitted to have been received by the Respondents' solicitors at their office address. On the balance of probability, therefore, I find that the Purchaser's Notice of the 19th May 2017 was sent to Hadgkiss Hughes & Beale, and not to the Respondents' home address.
29. So far as the second issue is concerned, Mr Bashir was quite clear that he did not receive a copy of the letter of the 19th May 2017. His account is supported by contemporaneous

evidence. Upon receipt of the Applicant's letter of the 8th June 2017, the Respondents' solicitors replied '*[w]e refer to your letter of 8th June and acknowledge receipt. However we had not received your original letter of 19th May. We have forwarded copies of both of your letters to our clients and await their instructions.*' (The reference to 'both of your letters' appears to have been a reference to the letter of the 8th June 2017, and the duplicate of the letter of the 19th May 2017 which had been enclosed with it). I find, therefore, that the Purchaser's Notice was not received by Mr & Mrs Bashir, or by the Respondents' solicitors, until the duplicate was sent under copy of the Applicant's letter of the 8th June 2017.

30. The third and final question is whether, having regard to my factual findings, the Purchaser's Notice was nevertheless validly served. So far as this question is concerned, although I was quite properly referred by Mr Berryman to the deemed service provisions of s.196(4) of the Law of Property Act 1925, it seems to me that those provisions cannot assist the Applicant for two reasons. First, given my factual findings, Mr Binning's letter of the 19th May 2017 was not sent to the last known place of abode or business of the Respondents. Second, there no evidence that the Purchaser's Notice was sent as a registered letter or by recorded delivery post, as required by the sub-section. On the contrary, the Applicant's own case is that the letter was sent by ordinary first class post.
31. In these circumstances I find that there was no valid service of the Purchaser's Notice within the 2 week period required by clause 4.1 of the Agreement. The consequence of that conclusion is that the right of pre-emption has now lapsed by operation of Clause 4.3

Procedural Matters

32. At an early stage of these proceedings, the Tribunal made an order striking out the proceedings, and directing the Chief Land Registrar to give effect to the Respondents' application dated 1st August 2017 for cancellation of the Unilateral Notice entered on 10 September 2014 as if the Applicant's objection had not been made.
33. That order, which was made on the 15th February 2018, was set aside by a subsequent order of the Tribunal dated 2 March 2018.
34. Before the order of 15th February 2018 was set aside, HM Land Registry had acted upon it by cancelling the unilateral notice. Upon receiving the order of 2nd March 2018, HM Land Registry wrote to the Tribunal on the 12th March 2018, explaining that:

“On receipt of the Tribunal Order of 15 February 2018 (the First Order) the disputed application was completed and the unilateral notice was cancelled from this title & notice of this was provided to all parties.

Further to the Tribunal Order of 2 March 2018 (the Second Order) we note the First Order has been set aside. We have therefore entered a new Unilateral Notice on the title in the same form as the previously cancelled notice and captured an application to preserve this dispute’s position on the day list.’

35. Although the matter which was referred to this Tribunal for determination under section 73(7) of the Land Registration Act 2002 concerned an application to cancel an unilateral notice dated 10th September 2014, nevertheless the substantive issues which I have been required to decide impact equally upon the substituted unilateral notice to which HM Land Registry referred in its letter of 12th March 2018.
36. I will therefore direct the Chief Land Registrar to give effect to the Respondents’ application as if the application had been made in respect of the substituted unilateral notice, and as if the Applicant’s objection had not been made.

Costs

37. The normal consequence of the outcome which I have directed is that the Applicant, as the unsuccessful party, would be ordered to pay the costs of the Respondent. I have been provided with the Respondent’s summary schedule of costs which indicates a claim for costs in the total sum of £6,141.60 including VAT. I am told that a copy of that costs schedule was sent to the Respondent under cover of a letter dated 26th October 2018.
38. I will provide the Applicant with an opportunity to make written representations about:
 - a. whether there is any reason why I should depart from the normal rule that the Applicant, as the unsuccessful party, should be ordered to pay the Respondents’ cost of this reference, and;
 - b. assuming that costs should be awarded in the Respondents’ favour, what level of award should be made.
39. Any written representations on these issues should be filed and served by 4pm on 23rd November 2018. I will then decide costs issues on paper.

BY ORDER OF THE TRIBUNAL

David Taylor

Dated this 9th November 2018

