

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2018] UKUT 394 (LC)
UTLC Case Number: LREG/54/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – Unilateral Notice - Contract for the sale of land – “completion to take place as soon as legal and banking formalities completed” – whether void for uncertainty – held – not void but subject to implied term that purchaser use its best endeavours to complete formalities as soon as reasonably practicable.

Contract for sale of land – delay –notice giving 7 days to complete not reasonable. Appeal allowed – Application to cancel unilateral notice refused.

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER
TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 16
May 2018

BETWEEN:

SK PROPERTIES (MIDLANDS) LIMITED

Appellant

and

PETER BYRNE

Respondent

Re: 11 Esme Road, Birmingham B11 4NH

Title No: WM105449

Before: His Honour John Behrens

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

on

1 November 2018

The Appellant appeared by its Director, Shakeel Afsar

The Respondent, Mr Byrne was represented by Ms Priya Tromans

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The following cases are referred to in this decision:

Blue v Ashley : [2017] EWHC 1928 (Comm)

Hillas & Co Ltd v Arcos Ltd: (1932) LI R 359

Johnson v Humphrey [1946] 1 AER 460

Behazdi v Shaftesbury Hotels [1992] Ch 1

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (“the Ft-T”) dated 16 May 2018 whereby Judge Taylor directed that a unilateral notice which had been registered by SK Properties (Midlands) Limited (“SKPM”) against 11 Esme Road, Birmingham B11 4NH (Title No WM105449) (“the Property”) be cancelled.
2. Mr Byrne is the registered proprietor of the Property. On 8th December 2015 Mr Byrne and SKPM signed a Sale Agreement whereby Mr Byrne agreed to sell the Property to SKPM for £145,000. It will be necessary to set out the Sale Agreement in full later in this decision. For the purpose of the introduction it is only necessary to refer to clause 1(c) which provides Purchaser shall complete the purchase as soon as their legal and banking formalities’ are completed.
3. On the same day SKPM paid Mr Byrne a deposit of £3,000.
4. On 14 March 2016 SKPM applied to the Land Registry to register a unilateral interest to protect his position under the Sale Agreement. On 8 April 2016 Mr Byrne applied to have the notice cancelled.
5. The dispute was referred to the Ft-T under s 73(7) of the Land Registration Act 2002 (“the 2002 Act”) and came before Judge Taylor sitting in Birmingham on 9th March 2018. Both parties appeared in person – SKPM appearing by its Director Shakeel Afsar. As already noted in his decision dated 16th May 2018 Judge Taylor acceded to Mr Byrne’s application and ordered cancellation of the notice. In his view clause 1(c) of the Sale Agreement rendered the whole agreement void for uncertainty.
6. On 25 June 2018 the Deputy President granted SKPM a stay of the decision of the Ft-T. On 24 July 2018 I granted SKPM permission to appeal. In my view it was arguable that Judge Taylor’s decision was wrong. On 21 August 2018 Mr Byrne filed a Respondent’s Notice.

Background

7. Mr Byrne purchased the Property from Birmingham City Council on 1st September 2014 pursuant to the right to buy legislation. The property had been valued by the Council in October 2013 at £143,000. Mr Byrne was entitled to the maximum discount of £75,000 with the result that the purchase price was £68,000.
8. Mr Byrne did not have £68,000. Accordingly he entered into discussions with a neighbour, Mr Mahmood about the possibility of Mr Mahmood or his extended family assisting with the funding of the purchase. Mr Byrne was aware that members of Mr Mahmood’s family owned a number of houses in the area. In the end, however, Mr Byrne was able to borrow money from his sister and thus the discussions came to nothing.

9. As already mentioned the Transfer of the Property took place on 1st September 2014. The Transfer contained a charge subsisting until 31 August 2019 relating to the repayment of the discount which Mr Byrne had received.

Negotiations

10. Some time in the late summer of 2015 Mr Byrne entered into further discussions with Mr Mahmood and other members of his family including Najib Afsar about the sale of the Property. By 8th September 2015 Mr Byrne had instructed solicitors (Carltons) in relation to a proposed sale. By 30 September 2015 the contract documentation had been sent to the purchaser's solicitors (Vicarage Court).

11. On 20 October 2015 Carltons wrote to Mr Byrne confirming that, on his instructions the contract documentation had been returned by Vicarage Court.

12. There were a number of text messages between Mr Byrne and Najib Afsar. [Najib Afsar is Shakeel Afsar's father and acts as his and SKPM's agent when necessary.] A transcript of these messages covering the period between 21 October 2015 and 5 March 2016 was before Judge Taylor at the hearing and he referred to some of them in the course of the hearing.

13. The text messages between 21 October 2015 and 26 October 2015 suggest the purchaser was ready to exchange at a price of £145k with a completion date to be agreed. Mr Byrne appears not to have been happy with this price in that on 28 October 2015 he is negotiating for a higher price. Nonetheless on 2 November 2015 he instructed Carltons to resend the contract papers to Vicarage Court.

14. There are no text messages between the end of October and 5 December 2015. There are a number between 5 and 8 December 2015. None of these text messages refer to the completion date. In one of the messages on 5 December 2015 Najib Afsar offered to draw up an agreement. In others there are discussions as to the amount of money to be paid by the purchaser on the signing of the agreement. Mr Byrne was seeking £3,500. Najib Afsar was offering £2,500. It is plain that Mr Byrne had not made any final decision by 7 December 2015. The parties did however agree to meet at 5.30 the following day.

The meeting on 8 December 2015

15. The meeting duly took place on 8 December 2015. It was attended by Shakeel Afsar (the director of SKPM), Najib Afsar and Mr Byrne.

16. It is not in dispute that the Sale Agreement was signed at the meeting. In the light of the text message on 5 December 2015 Judge Taylor found that it was drafted by Najib Afsar. It comprises a single sheet of paper which reads:

SALE AGREEMENT

17. THIS AGREEMENT is made on this day 8th December two thousand and 15 between **MR PETER BYRNE** of 11 Esme Road, Sparkhill, Birmingham B11 4NH as the vendor and **S K Properties (Midlands) Ltd**, with registered office at 250 Yardley Wood Road, Mosely Birmingham B13 9JN, Company Registration Number **9749781** as the purchaser.

1) Vendor agrees to sell the following property to the purchaser on the following conditions and consideration:

- a. Property: 11 Esme Road, Sparkhill, Birmingham, B11 4NH. Land Registry Title Number: WM105449.
- b. Purchase Price: £145,000 (one hundred and forty five thousand pounds) for FREEHOLD with vacates possession in the present condition.
- c. Purchaser shall complete the purchase as soon as their legal and banking formalities' are completed.
- d. Should purchaser fails to purchase the property, in such event the vendors will not return the deposit paid today towards the purchase price by the company for sum of £3000 cheque number 000002.
- e. Should vendor refuse to sell once purchaser legal and banking formalities are completed, in such case the vendor shall be responsible for loss and damages suffered.
- f. Purchaser shall have full right to sub sale this property within stipulated or alter the name, to purchaser and vendor shall have no objection.
- g. Vendor has no objection for purchaser to register caution against the property at land registry to protect their position

2) **Purchaser Solicitors:**

Mr Michael Elliott of Vicarage Court Solicitors, 5 Vicarage Road, Egbaston, Birmingham B15 3ES

3) **Vendor Solicitors**

Mr Raj Padhiar of Carltons Solicitors, 503 Coventry Road, Birmingham B10 0LL

Signed by Peter Byrne (Vendor)

Date 8/12/2015

Signed for and on behalf of

S K Properties (Midlands) Ltd (Purchaser)

Date 8/12/2015

Witnessed by Najib Afsar of JKLC.....

Date 8/12/15

46A Egbaston Road, Balsall Heath, Birmingham B12 9PB

18. There was a conflict of evidence as to what was said at the meeting about completion dates. Mr Byrne said he was assured that completion would take place within about 4 weeks. Shakeel Afsar did not accept this. He said that he told Mr Byrne that he needed 8 to 12 weeks before completion, but that Mr Byrne had replied that he could have as much time as he needed. As Judge Taylor pointed out neither of these accounts sits well with a text sent by Mr Byrne to Najib Afsar on 5 February 2016 in which he said:

Naj this is not exceptable (sic) we had an agreement which we shook hands on that this would be completed within six weeks and we are now nearing nine and no where near completion I want this matter completed in the next week or I will find someone else

19. In para 11 of his decision Judge Taylor looked at the matter in the round. He held that there were wide ranging discussions about the completion date and no concluded oral agreement as to a specific date when completion would take place. He regarded the dates mentioned as “aspirational targets”.

20. Mr Byrne suggested in evidence that he believed that that all he was signing was a receipt for the £3,000 deposit. Judge Taylor rejected that evidence for a variety of reasons (set out in para 12). Apart from all other considerations it was plainly inconsistent with the text he sent on 5 February 2016. Furthermore, as Judge Taylor pointed out, it was not suggested that either Shakeel Afsar or Najib Afsar had misrepresented the position or that this was a case of “non est factum”.

Subsequent events

21. In para 15 of the judgment Judge Taylor summarised the text messages between the date of the Sale Agreement and 5 March 2016. In summary:

1. On 16 December 2015 Najib Afsar texted that things were moving in the right direction.
2. On 11 January 2016 Najib Afsar stated that the Bank had started their process again. Once their side was sorted they would send instructions to solicitors. In further texts that day Mr Byrne asked Najib Afsar to do it asap and Najib Afsar replied that the person dealing with it had not come back from holiday until 4 January 2016.
3. On 18 and 26 January 2016 Mr Byrne asked Najib Afsar if he had come up with a completion date yet. Najib Afsar replied on 27 January 2016 that he was pushing to have the matter completed as soon as possible.
4. On 2 February 2016 Mr Byrne made a further request for a completion date. On 4 February 2016 he repeated the request pointing out that he had been asking for a date since 4 January 2016.
5. On 5 February 2016 Najib Afsar replied that he had been informed by the Bank that their formalities should be complete by 19 February 2016. Mr Byrne replied with the text I have set out above giving the ultimatum there set out.
6. On 25 February 2016 Najib Afsar said that the bank had informed him that completion can take place soon.

7. On 3 March 2016 Najib Afsar said that he hoped to complete the purchase next Friday and that the bank would instruct solicitors on Monday. He asked Mr Byrne to confirm that this was OK.
8. On 4 March 2016 Najib Afsar asked Mr Byrne to confirm the completion date.
9. In the absence of a reply from Mr Byrne Najib Afsar informed him on 5 March 2016 that he had applied for registration of the Sale Agreement at the land registry.

Certainty of Terms

The law on certainty

22. Before turning to the details of this case and as SKPM is not legally represented may be helpful to summarise the law relating to certainty of terms.

23. In the recent case of *Blue v Ashley* : [2017] EWHC 1928 (Comm) Leggatt J summarised the law in the following way at para 61

Vagueness in what is said or omission of important terms may be a ground for concluding that no agreement has been reached at all or for concluding that, although an agreement has been reached, it is not intended to be legally binding. But certainty and completeness of terms is also an independent requirement of a contract. Thus, even where it is apparent that the parties have made an agreement which is intended to be legally binding, the court may conclude that the agreement is too uncertain or incomplete to be enforceable – for example, because it lacks an essential term which the court cannot supply for the parties. The courts are, however, reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in *Durham Tees Valley Airport v bmibaby* [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep 68, at para 88:

“Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content.” (citing *Scammell v Dicker* [2005] EWCA Civ 405, para 30, Rix LJ).”

24. This passage appears in Chitty on Contracts 33rd Ed at para 2-169:

The courts do not expect commercial documents to be drafted with strict legal precision. The cases provide many examples of judicial awareness of the danger that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force. The courts are reluctant to reach such a conclusion, particularly where the parties have acted on the agreement. As Lord Wright said in *Hillas & Co Ltd v Arcos Ltd*: (1932) 43 LL 359

“Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the

duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.”

Implied terms

25. This is not the place for a detailed discussion on the law relating to implied terms. For present purposes it is sufficient to set out the summary in *Chitty* at para 14-006:

The requirements which must be satisfied before a term will be implied into a contract as a matter of fact have been stated in various ways over the years. At a high level of principle it may be said that the implication of a term as a matter of fact depends upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. The court will not make a contract for the parties but will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in question. Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. Both are predicated to depend on the presumed common intention of the parties. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the time of contracting. As so formulated, these criteria were traditionally regarded as “tests” which had to be satisfied if a term was to be implied.

Judge Taylor’s decision

26. Judge Taylor realised that if a contract fixes no date for completion, the law implies that completion is to take place within a reasonable time. [See, for example *Johnson v Humphrey* [1946] 1 AER 460]. In his decision Judge Taylor distinguished that case on the basis that clause 1(c) was an express provision of the contract relating to completion and there was no room for an implied term.

27. It will be remembered that clause 1(c) provides:

28. “Purchaser shall complete the purchase as soon as their legal and banking formalities’ are completed.”

29. In para 19 of his decision Judge Taylor identified two areas of potential uncertainty. First, the clause does not define the legal and banking formalities – second, the clause does not attempt to impose any time limit for the completion of these formalities.

30. In Judge Taylor’s view the first of these potential uncertainties was not fatal to the validity of the agreement. In the context of a contract for the sale of land he interpreted the phrase as a reference to the steps that needed be taken (a) to put in place finance to fund the purchase and (b) to undertake the normal conveyancing process.

31. However, he had more difficulty with the second possible uncertainty. He pointed out that the clause did not impose on SKPM any duty to pursue completion of the formalities whether diligently, within a reasonable period of time or otherwise. In his view it was not possible to imply a term that the formalities would be completed within a reasonable period of time. He put it in this way:

But on the evidence which I have heard, there is no material from which I can be satisfied that the parties must have intended that the purchaser should be under any form of absolute obligation to complete its legal and banking formalities (whether within a reasonable time or not). It is entirely possible that the parties contemplated the possibility that [SKPM] might be unable to raise funding and thus unable to complete its banking formalities and the parties may have intended that in that eventuality [SKPM] should not be obliged to complete at all. It is even possible that the agreement might have operated as a conditional contract conferring on [SKPM] an entitlement to call for the completion if its legal and banking formalities were completed but placing no obligation on [SKPM] to pursue those matters.

32. In the absence of evidence on those points Judge Taylor held that this uncertainty was fatal to the validity of the contract.

Submissions in this Tribunal

33. Shakeel Afsar is not a lawyer and was not able to make any submissions on any of the legal points that arose. He was content to leave the law to me. He therefore concentrated his submissions on the facts. As I explained to him this is an appellate jurisdiction and thus I would not be going behind the facts as found by Judge Taylor.

34. Ms Tromans produced a helpful skeleton argument for which I am grateful. Perhaps unsurprisingly she sought to rely on the reasons given by Judge Taylor. In particular she emphasised that there is no requirement for the formalities to be completed within a particular period of time, no requirement on the Respondent to pursue the completion of the formalities and no requirement for the Appellant to complete the formalities at all. Whilst she accepted that this was a case where the court would be reluctant to hold a contract void she pointed out that the court could not rewrite the contract or imply a term inconsistent with the actual terms expressed by the parties. She submitted that the wording of clause 1(c) was inconsistent with any implied term.

35. Ms Tromans submitted by way of alternative that the Agreement had been validly terminated as a result of “lack of performance” by SKPM. In particular she contended that the failure by SKPM to comply with the ultimatum set in the text of 5 February 2016 had the effect of discharging Mr Byrne from further performance.

36. In her skeleton argument Ms Tromans also submitted that the Sale Agreement constituted an unconscionable bargain. However as this was not raised before Judge Taylor, and as there is a valuation of the Property at the material time in the sum of £145,000 the submission had no realistic chance of success and she did not pursue it.

Discussion

37. I am quite satisfied that the parties intended the Sale Agreement to be a legally binding agreement. This can be inferred from the document itself. It is drafted as an Agreement in relatively formal terms. It was signed by the parties and witnessed. Its execution was accompanied by the payment of the deposit of £3,000. The subjective intentions of the parties (which are not, of course, relevant to the construction of the contract) appear clearly from the text messages including the text message from Najib Afsar on 5 December 2015 and the text message from Mr Byrne on 5 February 2016. In so far as Mr Byrne suggested that he thought that the Sale Agreement was merely a receipt his evidence was rejected by Judge Taylor on cogent grounds.

38. It follows that this is one of those cases where the court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content.

39. I agree with Judge Taylor's construction of the phrase "legal and banking formalities". I note that Ms Tromans did not challenge it either in her skeleton argument or her oral argument. In my view that phrase is not uncertain. As Judge Taylor pointed out in the context of a contract for the sale of land it is to be interpreted as "the steps that needed be taken (a) to put in place finance to fund the purchase and (b) to undertake the normal conveyancing process".

40. Thus the issue is whether the failure to place any time limit on SKPM in relation to those steps is fatal to the contract. There are a number of points that can be made about Judge Taylor's analysis.

41. It is plain that Judge Taylor was concerned about the lack of material from which to infer the parties' intentions. This point appears at the beginning of the passage I have set out and immediately before his ultimate conclusion. With great respect to Judge Taylor he has, in my view, applied the wrong test. In so far as he was interpreting the contract his task was to determine the objective intentions of the parties. It was to determine the meaning the contract would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation they were in at the time of the contract. In those circumstances the subjective intentions of the parties are irrelevant.

42. A similar point can be made about implied terms. As is clear from the passage in Chitty I have quoted above the Court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in question. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the

time of contracting. In my view, therefore, Judge Taylor was wrong to be concerned about lack of material.

43. I am equally not impressed with Judge Taylor's suggestion that the agreement might have operated as a conditional contract conferring on [SKPM] an entitlement to call for the completion if its legal and banking formalities were completed but placing no obligation on [SKPM] to pursue those matters. To my mind this is not a meaning the contract would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation they were in at the time of the contract.

44. I agree with Judge Taylor that the express terms of the contract do not make provision for the time within which SKPM is to complete banking and legal formalities. However I think that this is a clear case for the court to imply a term that SKPM was under an obligation to use its best endeavours to complete the legal and banking formalities as soon as reasonably practicable. Such a term is not inconsistent with the express terms of the contract. It is necessary to give business efficacy to the contract and to my mind represents the obvious but unexpressed common intention of the parties. If the officious bystander had been asked about SKPM's obligations he would have said "Of course, SKPM must use its best endeavours to get the banking and legal formalities completed as soon as reasonably practicable."

45. To my mind this is also supported by the expression "as soon as" in clause 1(c). It is not strictly accurate to say the purchaser shall complete as soon as legal and banking facilities are completed. Completion is part of the legal formalities. Thus the expression "as soon as" in the clause connotes to my mind a sense of urgency into the process to be adopted by SKPM.

46. In my view the Sale Agreement is not void for uncertainty.

Performance

47. In the light of his views on uncertainty Judge Taylor did not deal with this issue in his decision. However the question of delay was plainly an issue that was before him. It was a major part of Mr Byrne's case that the delay entitled him to cancel the contract. It is referred to in Mr Byrne's counternotice.

48. In those circumstances I can either remit the matter to the Ft-T for a further determination or decide the matter myself. As I have formed a clear view I have decided to deal with it myself.

Time of the Essence

49. The normal position is that time is not of the essence in contracts for the sale of land. That means that if a party fails to comply with obligations as to time in the contract the innocent party is not entitled to treat the contract as at an end. However (in the absence of an express contractual term) the innocent party can serve on the other a notice (usually called a "Notice to Complete")

specifying a time for completion. However, the time allowed must be a reasonable time after the notice is served. [See, for example, Emmet on Title para 8.031 and *Behazdi v Shaftesbury Hotels* [1992] Ch 1].

Application

50. It is a question of a fact whether SKPM used its best endeavours to complete the banking formalities as soon as reasonably practicable. If it was necessary to decide the point it would be necessary to remit the matter to the Ft-T for a decision. I am, however, prepared to assume without deciding that SKPM were in breach of the implied obligation by 5 February 2016.

51. There is also a question whether it is possible to construe the ultimatum in Mr Byrne's email of 5 February 2016 as a notice to complete the contract "by the end of next week". There are significant legal arguments that can be raised against such a construction but, again, I am prepared to assume without deciding that it was such a notice.

52. I am quite satisfied that the period specified in the notice was not "a reasonable time" having regard to what was known by Mr Byrne at the time. 5 February 2016 was a Friday. Thus the notice gave 7 days to complete. Mr Byrne knew that the Bank formalities would not be complete until 19 February 2016.

53. It follows in my view that the "notice to complete" was not valid and that the Sale Agreement has not been rescinded.

Conclusion

54. In my view SKPM has a subsisting interest in the Property by virtue of the Sale Agreement. It follows that I would refuse to direct the Chief Land Registrar to discharge the unilateral notice. I would allow the appeal.

John Behrens

Judge John Behrens

12 November 2018