Claim No: HC11CO01197

Neutral Citation Number: [2011] EWHC 3058 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL

Thursday, 28th July, 2011

BEFORE:

HIS HONOUR JUDGE PURLE QC
(Sitting as a Judge of the High Court)

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BETWEEN:

SAMARENKO

Claimant

- and -

DAWN HILL HOUSE LIMITED

Defendant

- - - - - -

MISS Z BHALOO QC (Instructed by Staal & Staal) appeared on behalf of the Claimant.

MR J SMALL QC (Instructed by Boardmans) appeared on behalf of the Defendant.

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Approved Judgment

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No of Folios: 51
No of Words: 3634

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J U D G M E N T

JUDGE PURLE QC:

1. This is a summary judgment application by the claimant, Alexi Samarenko, against the defendant, Dawn Hill House Limited, a company owned and controlled by Mr Mikhail Watford. The claimant is the freehold owner of property known as Dawn Hill House, Waverley Drive, Virginia Water in Surrey, which is registered under two title numbers at HM Land Registry. By a contract dated 18th June 2010 the claimant agreed to sell that property to the defendant. That contract was conditional upon the defendant obtaining satisfactory planning permission, as defined. A different planning permission from that envisaged in the contract was obtained, and the parties thereafter entered into a further contract on 22nd December 2010, which varied the first contract. The first contract, as I have said, was conditional, and the purchase price was £5 million. Under the variation, the contract became unconditional, and the defendant agreed to purchase the property for £4.5 million, to pay a deposit of £450,000 by 3rd March 2011 and to complete the purchase on 13th April 2011, when the balance of the purchase price of £4,050,000 fell due. The deposit was not paid on 3rd March 2011, and it is accepted that the defendant was thereby in breach of contract. By a letter dated 9th March 2011 the claimant demanded payment of the deposit by 5 p.m. on 16th March 2011, in relation to which deadline time was stated to be of the essence. The defendant did not pay the deposit by 5 p.m. on 16th March 2011, or at all. Accordingly, on 21st March 2011 the claimant notified the defendant that he accepted the defendant's repudiatory breach of contract and terminated the first contract, as varied by the second contract, with immediate effect. I take all those facts in summary form from the details of claim annexed to the claim form, all of which have been sufficiently proved. By the claim form, the claimant seeks a declaration that the contract, as varied, has been validly terminated, and an order requiring the vacation of notices at the Land Registry and other relief.

2. The issue is whether, by reason of the failure to pay the deposit, the defendant acted in repudiatory breach of the contract, entitling the claimant to terminate the same. An unusual feature of this case is that the deposit was not payable at the inception of the contract, but some weeks later. Nonetheless, the contract was still, in a sense, in a conventional form, in that it required both the payment of a deposit, which is an earnest for performance, and ultimate payment of the balance of the purchase price.

3. A great deal of evidence has been put in before me concerning the circumstances in which the contract came to be made. It appears that the claimant and the defendant (or, to be more accurate, the claimant and Mr Watford, the individual behind the defendant) have a long relationship going back over 20 years which, in the recent past, went through what can only be described as a very unhappy phase, when the claimant was discovered by the defendant, it is said, to have defrauded him of many millions of pounds. That led to proceedings in the Commercial Court, and a freezing injunction with a search order, the issue of a *writ ne exeat regno*

against the claimant (who it was thought would be likely to decamp to Russia), and the surrender of his passport or passports. Those proceedings were ultimately compromised on terms under which the claimant paid the defendant or his companies as much as he could. Despite that, there appeared to be a reconciliation just before Lent in 2009, and the parties came to discuss the sale of this property as a commercial venture in 2010.

4. The property is a domestic property, in which the claimant has at all material times lived. The proposal was for planning permission to be obtained for a fresh development, which was hoped to produce profits of many millions of pounds. The defendant did not have either the original £5 million provided for under the first contract, or the £4.5 million to which the purchase price was reduced. It was, therefore, understood, it is said on the defendant's side, that the claimant would be required to grant access to the defendant so that his funders could assess the proposal after exchange, as well as before. This is a summary judgment application, and I must take any genuinely disputed facts to be resoluble in favour of the defendant.

5. The contract also incorporated the Standard Conditions of Sale (4th Edition). Under Standard Condition 5 it was provided under 5.1.1:

> "The seller will transfer the property in the same physical state as it was at the date of the contract (except for fair wear and tear), which means that the seller retains the risk until completion."

Under 5.1.2 it was provided:

> "If at any time before completion the physical state of the property makes in unusable for its purpose at the date of the contract:
>
> (a) the buyer may rescind the contract,
>
> (b) the seller may rescind the contract where the property has become unusable for that purpose as a result of damage against which the seller could not reasonably have insured, or which it is not legally possible for the seller to make good."

Under Standard Condition 6.8 it was provided:

> "6.8.1 At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.
>
> 6.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.
>
> 6.8.3 On receipt of a notice to complete:

(a) if the buyer paid no deposit, he is forthwith to pay a deposit of 10 per cent,

(b) if the buyer paid a deposit of less then 10 per cent (no less than £500), he is forthwith to pay a further deposit equal to the balance of that 10 per cent deposit."

6. What needs to be noted at this stage is that, even when a notice to complete is served requiring completion within the relatively short period of ten days, the deposit, or the uplift to the deposit from less than 10% to 10%, becomes payable forthwith, thereby enabling the seller, in the event of continued default, to forfeit that deposit.

7. The effect of a failure to pay a deposit has been considered in a variety of cases. I was referred, firstly, to Myton v Schwab-Morris [1974] 1 WLR 331, a decision of Goulding J. That was a deposit payable on exchange. Goulding J held that the payment of a deposit was a condition precedent to the contract coming into existence, and, if he was wrong about that, went on to say that the requirement to pay a deposit was "a term of so radical a nature that the defendant's failure to comply with it would entitle the plaintiff to renounce further performance".

8. The first ground for that decision, namely that the payment of a deposit was a condition precedent, was not followed by Warner J in Millichamp v Jones [1982] 1 WLR 1422, but the second part, namely that the terms were so radical in nature that "failure to comply would entitle the plaintiff to renounce further performance" appeared to receive approval from that decision. That was an unusual case, in that the date for payment of the deposit had passed under an option, but nothing was said about it by either side. Then subsequently, at the seller's request, i.e. at the request of the person to whom the deposit was due, the parties entered into a written variation of the option agreement extending the date for completion of the exercise of the option. It must be plain from that that there had been at least a suspensory waiver of the requirement to pay a deposit timeously, which therefore required notice to be given before any breach was established (unlike the present case, where it is accepted that the defendant's failure to pay the deposit was a breach). In fact, there was in Millichamp v Jones a purported termination without notice. Warner J ruled that Goulding J's analysis on the first point in the Myton case was wrong, but went on to hold that the second point, namely the radical importance of the deposit term, was correct. However, he also held that, as the non-payment of the deposit was inadvertent, the failure to pay was not sufficiently serious to amount to a breach. I have real difficulties with that ground as a principle of general application, though I have no difficulty with it on the particular facts. However, what I am concerned with in this case is the first ground, because there is no inadvertence in this case or anything approaching it, and nothing which might even arguably amount to a suspensory waiver of the time provision.

9. Mr Small QC, who appeared for the defendant in this case, criticised the language

of Warner J in that case, who said, in terms, that a term requiring a payment of the deposit was a fundamental term of the agreement. He pointed out that that was, on the face of it, inconsistent with the failure to pay the deposit not amounting to a sufficient breach, because, if the deposit requirement was, in truth, a fundamental term, then time must be of the essence, and any failure to perform should be regarded as sufficient to entitle the other party to terminate the contract. I agree with him that there is that tension in the case, but, in my judgment, that ignores the special facts under consideration by Warner J. Moreover, the tension was resolved by the decision of the Court of Appeal in Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 WLR 435. That case concerned the sale of a ship, which required the payment of a deposit. In fact, no deposit was paid 4½ weeks after the contract was found to have been made. The Court of Appeal confirmed, in line with the decision of Warner J, that provision for the payment of a deposit was not a condition precedent for the formation of a contract, but that it was a fundamental term of the contract concluded on 8th July 1977 and, no deposit having been paid, the contract could be terminated. That was in fact a case (like the present) where a notice was served on 5th August requiring payment by 12th August. That also was a case of a 10% deposit.

10. In the present case, a notice was served requiring payment within five days. The defendant had the money, which would have enabled it to pay the deposit, but chose not to do so. It chose not to do so because the claimant was refusing inspection facilities to the defendant's valuer. What was required was a 10-minute inspection so that the valuer, it is said, could report to the bank. The contemporaneous correspondence on the defendant's side asserted that, by refusing an inspection, the claimant was making it impossible for the defendant to pay the deposit, because the claimant was deliberately frustrating the defendant's efforts to raise finance for that purpose. This assertion, made no doubt in good faith by solicitors on instructions, turned out to be untrue. The deposit was available to the defendant and five days was more than ample time to transfer the funds to the claimant.

11. Accordingly, it seems to me, subject to other arguments to which I shall come, that, treating the requirement to pay a deposit as a fundamental term (as it has been put by the Court of Appeal), failure to pay that deposit, even without a notice, would have entitled the claimant to treat the contract as terminated. The effect of serving a notice was merely to extend one essential date by five days, time remaining, or at least becoming, of the essence, because the notice said so.

12. It is said on the defendant's side that I should not reach that conclusion, at least at a summary judgment stage, because the facts need to be looked into with care and, if one looks at all the facts with sufficient care, it is possible that it may emerge at trial that the defendant's conduct was not such as could be characterised as a renunciation of the contract. It is also pointed out that time is not, in general, of the essence of a contract, and that the time for payment of the deposit (with or without a notice) cannot be regarded as an essential term, or condition. However, the authorities are strongly in support of the proposition that the requirement of a deposit, as an earnest for performance, is of such a fundamental nature that it is to be regarded as a condition, or an essential term, or a term the breach of which goes

to the root of the contract.

13. Accordingly, on those authorities, it does not seem to me that it is open to the defendant, by putting forward excuses for non payment (which I shall assume he honestly held at the time, although the correspondence, as I have said, is notably misleading) to assert a willingness to pay after the passing of an essential date. In this case, had the original or varied contract expressly made 3rd March an essential date, and had said in terms that time was of the essence, then it was accepted by Mr Small QC that the defendant would be stuck with that contract. In my judgment, that was the effect of the clause in this case, given the nature of a deposit. It makes no difference, in my judgment, that the deposit was payable several weeks after the entry into the contract. On the contrary, it might be said to make it all the more important that the deposit should be paid timeously, because otherwise the defendant could decline to pay the deposit, and the claimant might be left without effective remedy, but with a property that could not be marketed because of the outstanding contract.

14. It is said on the defendant's side that the claimant engineered a breach because he had another purchaser in the wings and was marketing the property. That may well be so factually. It does seem, on the face of it, somewhat unreasonable to decline a 10-minute inspection of the property, but that inspection was not needed for payment of the deposit. It is a moot point whether or not the claimant might have been required to give inspection before completion, but that is to confuse completion with payment of the deposit.

15. In this case, two implied terms are pleaded on the defendant's side which it is said afford the defendant an excuse for non-performance. They are pleaded as follows:

> "(4) It was an implied term of the contract that the Claimant would afford the Defendant (to include its prospective funders) all reasonable facilities (prior to completion) for carrying out any reasonable inspections of the property for the purposes of ascertaining its physical state, appraising the intended development and appraising the value of the property and the intended development.
>
> (5) Further, on the true construction of the contract/by necessary implication into the terms of the contract, completion of the contract by the Defendant was dependent upon the Claimant complying with the said implied term."

It will be noted that both those implied terms relate and relate only to completion. The words "prior to completion" appear in (4), and there is an express reference to "completion" being dependent upon compliance with the implied term as to inspection in (5). Payment of the deposit was not said to be so dependent. That is not just a pleading point, because, as I have said, the evidence is that the defendant did in fact have the funds available to pay the deposit, but chose not to do so.

16. Even if those implied terms could be made good (and I have doubts about that, for reasons I will come to), it seems to me that they do not, so far as payment of the deposit is concerned, avail the defendant at all. As I have said, the terms themselves revolve around completion and not payment of the deposit.

17. It may be that one can envisage extreme circumstances (on the hypothesis that such a term can be implied) when a repeated refusal by the claimant to afford reasonable inspection facilities would amount to renunciation on the claimant's part. But that renunciation would be of no impact or significance unless accepted as a repudiatory breach. Moreover, on the authorities cited to me and, in particular, the decision of the Court of Appeal in Eminence Property Developments Limited v Heaney [2010] EWCA Civ 1168, starting at paragraph 61 onwards, it is not clear that the claimant's conduct, even if in breach, would be regarded as repudiatory, so long as the claimant genuinely thought that, in declining such inspection facilities, he was acting in accordance with his rights under the contract. It would, at least at the stage with which I am concerned, i.e. 12th March, be at most an anticipatory breach, which could still be resiled from.

18. As it happens, the defendant did not treat the failure to grant inspection facilities as a repudiatory breach on the claimant's part, and so the contract, even if, which I very much doubt, it could otherwise have been terminated by the defendant, remained in force for the benefit of both parties, and the requirement to pay the deposit remained unaffected by any perceived or alleged breach of the claimant.

19. I should also say that, were it necessary to decide the matter, I would not be persuaded that a breach of any implied term was sufficiently arguable to justify the matter going to trial. It is said that the claimant knew that the defendant would need both an appraisal by the bank and an inspection, but there is nothing in the agreement which enables it to be construed as requiring a general right of inspection, or from which such a term might be implied. The only relevant clause is Standard Condition 5.1 which, as I have already read, entitles the buyer in certain circumstances to rescind the contract if the property deteriorates so as to become unusable. That clause would be, it is said, unworkable unless an inspection for that purpose were allowed. In this case, the inspection that was sought was not for the purpose of ascertaining whether the property was unusable, but for the purpose of enabling a valuation to be made for the defendant's bank, which would, no doubt, take into account, amongst other considerations, the state of the property, though perhaps less so in the case of a development project. It is said that the claimant's conduct was calculated to goad the defendant into non-completion and, in particular, non-payment of the deposit. If, however, the claimant was entitled to decline inspection, then however unreasonable that may appear, that does not give rise to any legitimate complaint on the part of the defendant. In my judgment, there is no ground for implying a term which entitled the defendant to inspect for anything other than (possibly) the limited purpose of checking up on the continued usability of the property at completion, compared with its state at the date of the contract. This, it must be remembered, was a domestic dwelling in which the claimant was living. Rights of access, which might include, as was asserted in this case, ancillary rights to carry out tests with bore holes, need to be clearly spelt out before the inevitable intrusion of privacy

consequential upon recognising such rights is to be taken as having been granted.

20. In my judgment, therefore, there would be nothing in the implied term point even if it were otherwise relevant.

21. It is finally said that the five days that was given for payment of the deposit was insufficient. I have already ruled to the effect that the five days was enough. The notice was therefore in my judgment sufficient to make time of the essence, even if that was not hitherto the case. There is, in my judgment, nothing in this point either.

22. Accordingly, the claimant is, in my judgment, entitled to succeed, and I will now hear counsel on the precise form of relief.

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