Neutral citation number: [2018] EWCA 2967 (Civ)

Case No: B2/2016/1190

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 18 April 2018

Before:

LORD JUSTICE LEGGATT

Between:

HOWELL

Applicant

- and -

HAYWARD & ANR

Respondents

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The **Applicant** appeared in person
MR EDWARD BENNION-PEDLEY (instructed by DPA) appeared on behalf of the **Respondent**

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Judgment

(Approved)

LORD JUSTICE LEGGATT:

1. This is a renewed application for permission to appeal against an order made in the Central London County Court dismissing the greater part of a claim which relates to certain properties at Penarth in Wales. The judgment giving reasons for the order is dated 25 February 2016 and it has regrettably taken a long time for the application to come to this renewed oral hearing.

2. Permission to appeal was initially refused after consideration of the papers by Christopher Clarke LJ on 22 December 2016. The claimant, Mr Howell, as was his right, renewed that application orally at a hearing before McCombe LJ on 26 July 2017. McCombe LJ was inclined, after reading the documents, to take the same view as Christopher Clarke LJ that an appeal would have no real prospect of success, but he considered that there had not been properly explored a criticism made at the forefront of the grounds of appeal that there had been serious procedural irregularity because of the way in which the judge had conducted the trial – which is alleged to have been unfair in numerous ways. For example, at paragraph 1.1 of the grounds of appeal complaint is made that "the judge cut off the claimant repeatedly when giving oral evidence, allowing him to answer only very shortly. He did so bad-temperedly. This never happened to the defendant, who was encouraged to answer at length, usually not answering the question but a different one, but the judge of course accused the claimant rather than the defendant of not answering the questions even though the truth was the exact reverse."

3. Because he considered that that ground of appeal needed to be investigated, McCombe LJ directed that there be transcripts obtained of the evidence, or the most important

parts of the evidence, and that there be a further oral hearing. Those transcripts took some time to obtain, but they have been obtained and that further oral hearing has taken place this morning.

4. Having read through all the transcripts myself, I consider that there is some justice in some of the criticisms made by Mr Howell. In particular, the judge does appear to have cut off Mr Howell on a few occasions in a way which may be described, to use a word that Mr Howell himself used, as "tetchy" and perhaps in some places as rude. I also understand Mr Howell's feeling of grievance that his counsel was given a difficult reception by the judge when he was seeking to save time by putting questions in perhaps a wrapped-up way which did not find favour with the judge. It is also right to say, on the other hand, that the judge showed some impatience on occasion with Mr Bennion-Pedley, who was counsel for the defendant.

5. However, whilst I have gained the impression that some aspects of the judge's handling of the trial were far from ideal, the transcripts do not begin to provide a basis for an argument that there was a serious procedural irregularity in the conduct of the case. To provide a valid ground of appeal, it would need to be shown that the judge interfered in a way which denied the claimant a proper chance to give evidence or to make points which he wished to make. There really is nothing that begins to support a criticism of that serious nature. To be fair to Mr Howell, I did not understand him this morning to press that ground of his appeal, perhaps partly for the reason that it would, at the very best, result in an order for a retrial and not in a reversal of the judge's decision.

6. In any event, as I say, an appeal on that basis would, I am satisfied, have no realistic prospect of success because, whilst the judge showed an impatience that may be thought regrettable, reading the transcripts also shows that there was a fair opportunity overall to ask questions and give evidence. For example, where Mr Bennion-Pedley did not pursue questions about funding in cross-examination, the claimant's counsel had the opportunity and took the opportunity in re-examination to elicit evidence from Mr Howell about that part of the case. So I do not consider that the complaint which led McCombe LJ to adjourn the case in July for the purpose of further investigation turns out to be well-founded.

7. Mr Howell is, nevertheless, entitled to argue and seek to persuade the court, as he has sought to do this morning, that there is a realistic prospect of a successful appeal on the merits of the case and that there are grounds on which the Court of Appeal could conclude that the judge was wrong to reach the factual conclusions that he did.

8. There is no dispute about the law, as there was not at the trial. The primary claim made by Mr Howell was put on the basis of a proprietary estoppel. Accepting that there had not been a concluded written contract for the purchase of the relevant properties, he argued at the trial that the parties had reached what he has described today as a settled understanding or agreement in the course of their discussions, on the faith of which he says that he proceeded to act to his detriment by incurring expenditure, and which it was unconscionable for the defendant then not to recognise.

9. The difficulty that he faces in advancing that argument is to show that the parties reached a point in their discussions where they had what they mutually understood (or

what at least Mr Howell would reasonably have understood) to be a binding agreement, albeit not one which had yet complied with the formalities necessary to create an enforceable contract for the sale of land.

10. In the case of Cobbe v Yeoman's Row Management Limited [2008] 1 WLR 1752, which is the leading case on the doctrine of proprietary estoppel, the claimant, who was an experienced property developer, orally agreed with the defendant to purchase a number of flats for £12 million, acting, it was said, in the belief that the property would be sold to him. The claimant then spent the next 18 months engaging architects and other professionals and in applying for planning permission. Immediately after planning permission was granted, the defendant withdrew from the transaction. Despite the fact that in that case the defendant was found by the court to have acted unconscionably, the claim based on proprietary estoppel ultimately failed in the House of Lords on the basis of what Lord Walker described as the fundamental point that both parties knew that there was no legally binding contract and that either was free to discontinue the negotiations without liability in equity or at law. Similarly, Lord Scott concluded that the interest in the property that the claimant was expecting to acquire was an interest pursuant to a formal written agreement which never came into existence and that in those circumstances, despite the unconscionability of the defendant's behaviour in withdrawing from the inchoate agreement immediately after planning permission had been obtained, it could not be said that the claimant had an agreement or what he could reasonably have understood to be a binding agreement, albeit not yet committed to writing, on the strength of which he had been proceeding.

11. It seems to me that in the present case the judge was plainly entitled to reach the conclusion based on the correspondence that I have been shown that the position was similar to that in the Cobbe case to which I have just referred.

12. Mr Howell, who has made his submissions courteously and moderately this morning, criticised a number of findings made by the judge, including a finding that he, Mr Howell, was impecunious throughout the course of the discussions and not in a position to complete any contract. I am prepared for today's purposes to accept that there is a reasonable prospect of showing that the judge was wrong on that point, and that he reached factual conclusions which are capable of being criticised on several other points in the case. But I cannot see that there is any realistic prospect of satisfying the Court of Appeal that the judge could not reasonably and properly come to the conclusion that, during the long course of discussions between the parties, the point was never reached where they had what Mr Howell could reasonably have understood to be a binding agreement or commitment on the part of the defendant to consummate the transaction.

13. The email correspondence which I have been taken through plainly shows that at all times what was being contemplated was that there would be a contract made between the parties at which point they would be bound, but that, unless and until that point was reached, what was taking place was the formulation of and discussion of a proposal which Mr Howell could not reasonably have understood to create any form of binding obligation on the part of Mr Hayward. This is apparent from the outset of the critical part of the discussions, when an email was sent by Mr Howell to Mr Hayward on 12 September 2010 which expressly stated that it contained a proposal for a contract and

then indicated what the main provisions of the proposed contract would be. That proposal was reiterated in an email dated 20 December 2010.

14. It is apparent from the emails sent by Mr Hayward in response that nothing was said by him at that stage which could have entitled Mr Howell to believe that the parties had reached any form of binding agreement. Mr Hayward made it clear that before he would agree anything he would need to see a funding offer from Lloyds Bank. It was said by Mr Howell at the trial that a meeting took place between them towards the end of December at which a schedule of expenditure was discussed and agreed between them. The judge did not accept that assertion and I find it impossible to see that the Court of Appeal could find that he was plainly wrong to reach that conclusion in circumstances where there is no written evidence of, or even reference in any document to, the alleged meeting.

15. But even assuming in Mr Howell's favour that such a meeting did take place and that there was a discussion along the lines that he alleged, he cannot reasonably have thought, following that discussion, that the parties had reached a concluded agreement, even orally. That is plain, for example, from an email sent by Mr Hayward on 7 January 2011 stating:

> "When you have a letter of offer you can show me, I will consider the position. I feel I cannot do anything until I have a formal offer letter, otherwise it may result in you and I incurring wasted legal fees."

The reference there to a formal offer letter was to a formal offer letter from Lloyds Bank indicating that they would provide finance for the transaction. A letter from Lloyds Bank was produced by Mr Howell in April and he criticises the findings made

by the judge that that letter was inadequate and did not amount to fulfilment of what had been discussed in December 2010.

16. There seems to me on the face of it to be some force in that criticism made by Mr Howell, since I take the point which he makes that no objection subsequently seems to have been made in the correspondence (at least that I have been shown) by the defendant along the lines that there was still a need for further proof that funding was available from Lloyds. But nevertheless it cannot be said that in April 2011, or at any time thereafter, anything was stated by the defendant, in the documents that I have been shown, which could reasonably have induced Mr Howell to believe that the two parties had reached an agreement which was binding.

17. I have been referred to an email from Mr Howell dated 27 July 2011 which begins with the words: "The offer remains as I sent to Richard [the defendant] on 12 September last year." The email goes on then to go through proposed terms and in fact to make certain adjustments to the terms that had previously been discussed.

18. Criticism is again made by Mr Howell of the judge for making too much of the differences between what was being put forward at that stage and what had previously been put forward. He says that the judge was wrong to describe this as a completely new offer. For today's purposes again I am prepared to accept that that criticism is a valid criticism and that the judge went too far in that respect. But the fundamental point remains that this was on the very face of the email described as an “offer” on the part of Mr Howell, and it is plain that he could not reasonably have thought and did not

think at that point that he had made an offer which had already been accepted and on the strength of which he was conducting himself and incurring expenditure.

19. Moving on to 21 November 2011, Mr Howell sent a further email which again made alterations or adjustments to the terms that were being proposed. Again, I am prepared to accept that those were not major changes, but the email in terms states: "I suggest a contract under the heads of terms set out below." It is once again apparent that what was happening at this stage was negotiation and discussion which was understood by Mr Howell to be aiming at a contract but was not a situation in which he could have understood or did understand that the parties had reached an agreement which was binding on them and on which he was entitled to act and rely.

20. Mr Howell set store this morning by an email from Mr Hayward dated 1 December 2011 in which Mr Hayward referred to "chasing the council". That was in the context that one matter which both parties were seeking was to obtain confirmation from the council that it would not seek repayment of grants which had been given for the restoration of the property if the transaction went ahead. In that email Mr Hayward said: "I have asked Chris [that is somebody who worked for him] to chase the council this week but heard nothing further. It seems unlikely that we can progress this sale."

21. Mr Howell puts great emphasis on the word "sale", but it is abundantly clear to me reading the correspondence as a whole that that could not have been understood to be a reference to a sale agreement that had already been concluded, but referred rather to discussions that were seeking to achieve such an agreement.

22. Perhaps the most conclusive document that I have been shown is the final document to which Mr Bennion-Pedley referred me. This is an email from Mr Howell to Mr Hayward dated 1 August 2012, sent after Mr Hayward had reneged on what Mr Howell now maintains was their settled understanding and agreement. In that email Mr Howell stated:

> "The contract you and I have been aiming to enter into since at least May 2010 can now be concluded."

It seems to me plain from that statement and from the rest of the email that Mr Howell himself understood at the time that the situation was one in which the parties were carrying on discussions in which there may have been a great deal of common ground but which were "aiming towards" the conclusion of a legally binding contract and not proceeding on the basis that a binding agreement had already been made between them on the faith of which Mr Howell was entitled to rely.

23. As I reminded Mr Howell in the course of the oral argument, and as I think he understands as a result of the great deal of study that he has obviously made in pursuing this appeal, the task of any party who seeks to bring an appeal to this court against findings of fact made by a judge following a trial is a difficult one. To succeed it would be necessary to persuade the Court of Appeal that the conclusion reached by the trial judge who heard the whole of the evidence over several days was one which was plainly wrong and was a conclusion which no reasonable judge could have reached.

24. I do not consider that there is any real prospect of satisfying that test in this case. It seems to me that, although criticisms can validly be made of some of the factual findings made by the judge, there is, far from being a real prospect of showing that he

was plainly wrong, no reasonable basis that I have seen for challenging his fundamental conclusion that the parties in this case in the course of their discussions never reached a position in which Mr Howell was justified in believing that he had acquired an interest in the property on the faith of which he then relied to his detriment.

25. Accordingly, having given the fullest consideration that I can in the time available to all the points which Mr Howell has sought to make, I am not persuaded that there is any legal merit in them and his application must therefore be dismissed.

Order: Application dismissed with costs in the sum of £1,750 plus VAT.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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