Neutral Citation Number: [2019] EWCA Civ 1118

Case No: C1/2018/1143

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mrs Justice Lang DBE
CO/3929/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd July 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE PETER JACKSON

- -

Between :

THE QUEEN **(on the application of)** **DANIEL CHARLESWORTH**	**Appellant**
- and -	
CROSSRAIL LIMITED	**Respondent**
- and -	
BERKELEY FIFTY-FIVE LIMITED	**Interested Party**

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- -

MR TIMOTHY STRAKER QC & MS KARISHMA VORA (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
MR TIMOTHY MOULD QC (instructed by **Winckworth Sherwood LLP**) for the **Respondent**

Hearing date : 27th June 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. It is common ground that Mr Charlesworth had a Qualifying Interest in certain land which was acquired by Crossrail for the purpose of building a subterranean station and running tunnels at Woolwich to serve the Elizabeth line. Crossrail is a subsidiary of Transport for London ("TfL"). The issue on the appeal is whether Berkeley Fifty-Five Ltd ("B55") had one too. If it did, then Crossrail was entitled to sell the land on the open market under its C10 Land Disposal Policy. If it did not, then the land ought to have been offered back to Mr Charlesworth at market value. Lang J held that B55 had a Qualifying Interest. Her judgment is at [2018] EWHC 915 (Admin). With the permission of Longmore LJ, Mr Charlesworth appeals.

2. Policy C10 supplements the Crichel Down rules which, in general terms, apply to land acquired compulsorily for a particular purpose which then turns out to be surplus to requirements. Although they are commonly referred to as "rules", they are in fact no more than policy without the force of law. The judge set out a number of the rules, together with parts of Policy C10. Paragraph 5.1 of the Policy defines a Qualifying Interest. The definition includes both a freehold and a lease which, but for the acquisition by Crossrail, would have had an unexpired term of more than 21 years at the date of the disposal. Paragraphs 5.2 and 5.3 provide:

> "5.2 Where only one expression of interest from a former owner or long leaseholder with a Qualifying Interest is made to acquire a site, that person will be given the opportunity to acquire the site at market value within the timescales set."
>
> 5.3 If there are competing bids for a site from former owners, it will be disposed of on the open market."

3. The central focus of the appeal is rule 7 of the Crichel Down rules themselves, which provides:

> "The Rules apply to all land if it was acquired by or under threat of compulsion. A threat of compulsion will be assumed in the case of a voluntary sale if power to acquire the land compulsorily existed at the time unless the land was publicly or privately offered for sale immediately before the negotiations for acquisition."

4. Bingham LJ explained the policy underlying the Crichel Down rules in *R* (*Tomkins) v Commission for the New Towns* (1989) 58 P & CR 57:

> "The public interest underlying this policy is obvious also. When land is compulsorily purchased the coercive power of the state is used to deprive a citizen of his property against his will. He is obliged to take its assessed value whether he wants to or

> not. This exercise is justified by the public intention to develop the land in the wider interests of the community of which the citizen is part. If, however, that intention is not for any reason fulfilled, and the land becomes available for disposal, common fairness demands that the former owner should have a preferential claim to buy back the land which he had been compelled to sell, provided he is able and willing to pay the full market price at the time of repurchase, that price reflecting the development potential of the land."

The facts

5. The Crossrail Bill gained Royal Assent on 22 July 2008. It contained wide powers of compulsory acquisition of land; including the land in issue on this appeal. The acquiring authority was formally the Secretary of State; but in practice TfL. Part of that land was held by Mr Charlesworth under a long lease. It is common ground that the underlease amounts to a Qualifying Interest. During the passage of the Bill through Parliament, there were extensive discussions and negotiations between B55's parent company (Berkeley Homes plc), the London Development Agency (the "LDA"), TfL the Secretary of State and others. The purpose of the negotiations was two-fold: to facilitate the construction of a subterranean station at Woolwich; and the redevelopment and regeneration of the surrounding area.

6. The negotiations culminated in a position by which the new station was to be built, various parcels of land were to be transferred so as to enable that to happen; and B55 would be in a position to construct a major residential development scheme above and around some parts of the railway.

7. B55 acquired the freehold of the land in issue as part of a larger parcel of land from the LDA under a transfer made on 11 February 2011. The consideration for the transfer was £3 million. A few days later, on 15 February 2011, B55 transferred the land in issue to TfL for £1. The detailed terms of that transfer contain many references to TfL's compulsory powers of acquisition.

8. The judge explained why the consideration was only £1. She said at [59]:

> "There were a number of reasons for this. (1) The B55 Land was a very small part of the LDA Land that had been acquired by B55. (2) The part of the freehold title of the B55 land comprising the Land in Issue was subject to two 999 years' leases. (3) The B55 Land included an estate road of little or no value. (4) The transfer was subject to the terms of the B55 Transfer Agreement which provided for the grant of the lease for 150 years back to Berkeley Homes in respect of that part of the Station Box Land to the west of Arsenal Way upon satisfaction of the condition precedent, also for consideration of £1. The obligation to grant the lease thus stripped out a significant proportion of the value of the freehold interest in the B55 Land."

9. It is clear that the transfer of the land in issue by B55 to TfL was voluntary, in the sense that no notice to treat had been given either to B55 or to its predecessor in title, the LDA. There had previously been a general vesting declaration; but the interest in the land belonging to the LDA had been excluded from its scope.

The issue

10. The argument for Mr Charlesworth is that the sale by B55 to TfL was not a sale made under threat of compulsory acquisition. The judge dealt with this issue as follows:

> "[71] The B55 Transfer Agreement was negotiated on the basis that there were compulsory purchase powers in existence which would be exercised if the B55 Transfer did not take effect. The fact that land is acquired voluntarily, in the sense that an agreement is reached between the acquiring authority and the landowner, does not mean that the land is not acquired under the threat of compulsory purchase powers. Indeed paragraph 7 of the Crichel Down Rules 2004 expressly provides that, in the case of a voluntary sale where compulsory powers exist, the sale will be assumed to have taken place under a threat of compulsion.
>
> [72] I accept the Defendant's submission that the exception in Rule 7 , where land was offered for sale before the negotiations for acquisition, is intended to cover the situation where the landowner has already placed his property on the market for sale before compulsory acquisition negotiations commenced, and so should not be allowed fortuitously to benefit from the Crichel Down Rules. That exception plainly does not apply here on the facts, where compulsory acquisition was imminent by 15 February 2011, when B55 sold the freehold to TfL.
>
> [73] In my view, neither Rule 7 of the Crichel Down Rules, nor paragraph 3.1 of the C10 Policy, excludes from the scope of those schemes a person who has recently purchased a freehold interest in land, which was already under threat of compulsory acquisition, with a view to selling it to the acquiring authority. Nor do I consider that such a purchase and re-sale is contrary to the underlying purpose of the two schemes."

11. Mr Straker QC, on behalf of Mr Charlesworth, stresses the facts that:

    i) B55 had a wider interest in developing the land of which the land in issue was only a small part.

    ii) Its parent company had positively lobbied for the construction of the station which, initially at least, Crossrail did not wish to construct.

    iii) The very short span of time between B55's acquisition of the development site and the subsequent sale of the land in issue to TfL (two working days) leads to the inference that the developers and TfL acted in concert with a view to

defeating what would otherwise have been Mr Charlesworth's entitlement to the right of first refusal. Moreover, the very short time span leads to the further inference that there must have been an offer to sell the land in issue to TfL before it itself acquired it.

iv) Although rule 7 of the Crichel Down rules says that it will be "assumed" that a voluntary sale was made under threat of compulsion where compulsory powers exist, an assumption of this kind can be displaced by contrary evidence.

v) The judge was wrong to equate a backcloth of compulsion and a sale made under threat of compulsion. The true reason for B55's acquisition and (almost) immediate sale to TfL was to protect B55 and to enhance the prospects of its successful redevelopment of Woolwich.

12. Mr Straker did not pursue the argument raised in his skeleton argument that there was a distinction between a deeming provision and an assumption. He was right not to have done so. Parliament uses a variety of different formulations to prescribe what might be a hypothetical state of affairs. One common formula is that one set of facts should be "treated as if" they were a different set of facts. That was the form of words considered by the Supreme Court in *DCC Holdings (UK) v HMRC* [2010] UKSC 58, [2011] 1 WLR 44 which Lord Walker considered generically under the heading "deeming provisions". Another formula is that certain assumptions are to be made (as in section 9 of the Leasehold Reform Act 1967, which lays down a basis of valuation for the purchase of a freehold; or the assumption of "no scarcity" for the purposes of a fair rent considered by the House of Lords in *Western Heritable Investment Co Ltd v Husband* [1983] 2 AC 849). As Bennion on Statutory Interpretation points out at 17.8:

> "The language used to set up a statutory hypothesis varies. The traditional form of words "shall be deemed" has generally given way to expressions such as "treated as", "regarded as" or "taken to be". Whatever form is used the effect is the same."

13. The fact that rule 7 of the Crichel Down rules is expressed as an assumption, rather than using one of these forms of words, does not, in my judgment, alter its effect. Mr Straker stressed, however, that a provision that creates an assumed state of affairs must be interpreted in the light of the purpose for which that assumed state of affairs has been created. I agree. It is important to pay attention to the underlying policy, as described by Bingham LJ. But as Neuberger J said in *Jenks v Dickinson* [1997] STC 853 (approved in *DCC Holdings*) that is not to say that somehow normal principles of interpretation cease to apply.

14. There is no doubt, in my mind, that the literal terms of rule 7 are satisfied. The acquiring authority had compulsory powers which, if exercised, would have entitled it to acquire compulsorily the land required to build the subterranean station and its associated works. In those circumstances, the assumption contained in that rule comes into play, unless the land was offered for sale before the negotiations for acquisition. I agree with Mr Mould QC that the offer referred to is an offer made by the landowner who has been directly or indirectly expropriated. The policy is not concerned to trawl back through the history of the land. The LDA did offer the land for sale before the negotiations for acquisition by TfL. But B55 did not. In those circumstances the

exception to the assumption does not apply to B55; although it would probably have applied to the LDA.

15. Mr Straker stressed the fact that "fairness" underpinned the rules; and argued that the application of the policy was unfair to Mr Charlesworth. But for B55's ownership of the freehold, Mr Charlesworth would have had a monopoly on the right of first refusal. B55's acquisition had excluded him from that favoured position. The assumption in rule 7 should therefore be disapplied; or should be interpreted as not applying to an "extraordinary" case. There are, in my judgment, a number of answers to this point. First, the policy is clear, and is intended to be all-embracing. It does not exclude Mr Charlesworth. It includes him, together with B55 (and others). Second, the consistent application of a published policy is itself an aspect of fairness. This is part of the general administrative desirability of applying known rules if a policy is to be workable, predictable, consistent and fair. Third, what is fair from Mr Charlesworth's perspective might be entirely unfair from that of B55. Fourth, for TfL to disapply the assumption in vague and unspecified circumstances would not be conducive to good administration. Fifth, the circumstances in which policy C10 applies are not the same as in the classic case of Crichel Down rules. Those rules do not apply where the land has been materially altered; and cannot be offered back to its former owner in much the same state. That is not this case. This difference between the current policy and the classic circumstances in which the Crichel Down rules apply was pointed out by McCombe LJ in *R (Pritchett) v Crossrail Ltd* [2017] EWCA Civ 317 at [35]:

> "The CD Rules apply to cases where the land in question has not materially changed in character. This Policy is designed to include sites which have so changed. It is not necessarily apparent that the policy considerations in the two cases will be identical. The interested parties here were the appellant, who had owned an individual flat, and other parties who had had interests in other individual parts of the site. None would be stepping back into a property of the character that he or it had previously owned. They would be getting the opportunity of commercial benefit from a potential new development of the whole site of an entirely different character. This is hardly the situation faced by the former owners of Crichel Down, whose erstwhile property gave rise to the principles now expressed in the CD Rules."

16. So here. What is potentially on offer is either the prospect of participating with TfL in a joint venture development, or the grant of a 250 year lease. There is no prospect of Mr Charlesworth regaining the property interest he had before the acquisition. That in itself has a substantial impact on fairness.

17. The reason for the assumption in rule 7 is, to my mind, clear. It avoids the necessity of investigating the internal state of mind of an individual landowner. The investigation of the subjective state of mind of an individual landowner is likely to be partly speculative, since it postulates a hypothetical state of affairs in which the threat of compulsory acquisition is airbrushed out of history. It is also speculative in the sense that it is likely to be based in inferences. Such an investigation is also likely to be burdensome for an acquiring authority to undertake; particularly if the scheme in

question affects a large number of landowners. If such a landowner overtly manifests a willingness to divest himself of the land irrespective of the existence of the scheme that is one thing. But absent any such overt indication of intention, the assumption provides a clear and workable rule for determining who is entitled to the right of first refusal. Mr Straker's argument that the assumption could be defeated by a factual investigation of the evidence would, in my judgment, subvert the purpose of the assumption.

18. The reason underlying the exception is also clear. If a landowner wishes to divest himself of the land in question, irrespective of a scheme backed by compulsory purchase powers, he should not be entitled to be in the privileged position of having a right of first refusal over the self-same land, if it turns out to be surplus to the requirements of the scheme. But on the other hand, if a landowner has given up his land for the sake of the scheme, the reverse is true. Fairness requires that if the land turns out to be surplus to requirements, he should have a right of first refusal over it.

19. On the facts of this case it cannot be said that for B55 disposal of the land was the end which it wished to achieve independently of the existence of statutory powers. On the contrary, the scheme for the construction of the subterranean station at Woolwich under statutory powers was the very justification of the sale. The terms of the transfer under which it sold the land to TfL are closely tied to the existence of compulsory powers. Mr Straker attempted to distinguish between an offer to sell "immediately before" the negotiations, and earlier negotiations. I regret to say that I did not understand the argument; or how he proposed to disaggregate the overall negotiations that in fact took place.

20. Moreover, again in agreement with Mr Mould, it seems to me to be implicit in rule 7 that the phrase "land was publicly or privately offered for sale immediately before the negotiations for acquisition" means that the land was offered for sale to someone other than the acquiring authority. The expression "the negotiations" can only mean negotiations with the acquiring authority. Negotiations will typically begin with an offer. It follows that an offer for sale before *those* negotiations begin must be an offer to someone else. In short, it is a logical impossibility for negotiations between a landowner or prospective landowner and the acquiring authority to take place before the negotiations referred to in rule 7.

21. My conclusion in this respect is consistent with that of Lord Hamilton, sitting in the Outer House in *J D P Investments Ltd v Strathclyde Regional Council* 1997 SLT 408. He said:

> "The purpose of the proviso is, in my view, to exclude from the assumption of a threat of compulsion situations in which the landowner has, immediately prior to negotiations between him and the authority, taken active steps to dispose of his land. *Disposal of the land is the end which he, independently of the existence or use of statutory powers, wishes to achieve.* …The proviso envisages activity in relation to the land *prior to the negotiations for acquisition between the owner and the authority*, that activity being the land having been offered for sale immediately before those negotiations. Where, as here, the owner immediately prior to any relevant approach by the

> authority caused the land to be advertised for sale by auction, the proviso, in my view, applies and a threat of compulsion is not to be assumed." (Emphasis added)

22. In those circumstances I consider that the natural meaning of the rule, and the policy underlying it, both militate against the interpretation for which Mr Straker contends.

23. I would dismiss the appeal.

Lord Justice Peter Jackson:

24. I agree.

Lord Justice Patten:

25. I also agree.