Neutral Citation Number: [2022] EWHC 371 (QB)

Case No: BM10112A

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEALS CENTRE BIRMINGHAM
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT LEICESTER
CLAIM F6QZ7Z7F
BEFORE HIS HONOUR JUDGE MURDOCH

Birmingham High Court Appeals Centre
33 Bull Street, Birmingham B4 6DS

Date: 23/02/2022

Before:

MR JUSTICE COTTER

- -

Between :

SPS Groundworks & Building Limited	**Claimant/Respondent**
- and -	
Ms Satvinder Kaur Mahil	**Defendant/Appellant**

- -
- -

Mark Diggle, Counsel (instructed by Pattersons Commercial law) for the **Claimant/Respondent**
Steven Taylor, Counsel (instructed through direct access) for the **Defendant/Appellant**

Hearing dates: 31 January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE COTTER

Mr Justice Cotter:

1. This is an appeal against the order of His Honour Judge Murdoch made on 7th July following a three-day trial. The Judge ordered that there be judgment for the Claimant (the Respondent to this appeal) in the sum of £43,440 and dismissed the Appellant's counterclaim.

2. Permission to appeal was granted by Mr Justice Jacobs by his order of 4th November 2021.

Introduction

3. The case concerns the sale by auction held on 12th February 2019 of a plot of land situated to the east side of a house known as the White House, Gaulby Lane, in the village of Stoughton, Leicestershire ("the Land"). The Appellant was the highest bidder with the hammer falling for the sum of £130,000 plus VAT. She signed a memorandum of sale and paid a deposit of £13,000 with an agreed completion date of 12th March 2019. The Appellant did not complete. The Respondent sent a notice to complete but the Appellant refused to do so and the Respondent accepted her refusal as a repudiatory breach of contract. The property was later sold at a second auction and the Respondent brought these proceedings in respect of the shortfall between the price agreed by the Appellant and that subsequently obtained.

4. It was and is the Appellant's case that she was induced into entering into the contact by misrepresentation, that there was a failure to disclose a defect in the title to the land and that she validly rescinded the contact. She relies on the description of the land in the auction catalogue and also the absence from the sale documents of an overage covenant. She brought a counterclaim for the repayment of the deposit and the buyer's premium in the sum of £14,074.

Facts

5. The property register for the Land contained the following restriction:

> "No disposition of the registered estate by the proprietor…is to be registered without a certificate signed by Co-operative Group Limited… that the provision of clause 5.1 of a Deed of Covenant dated 21st December 2017 made between (1) Co-operative Group Limited and (2) [the Respondent] have been complied with."

The deed referred to within the restriction provided for payment to the Co-operative Limited of 50% of any increase in the Land's value attributable to obtaining planning permission ("the Overage Clause").

6. In August 2017 the Respondent purchased the land. Mr Smith, a director, was fully aware of the covenant before purchase as he had looked at the documents in the legal pack. The purchase price was £87,000 plus VAT. The Appellant was to argue that this was more than the land's true market value.

7. After the sale Mr Smith was approached by the owner of the adjacent property, the White House, who wanted to buy the land and had bid against Mr Smith. Indeed, he virtually demanded that he be able to do so.

8. The Respondent met with the planning officer to discuss development on the land. Mr Smith was told that the large majority of the land was classified as an important open space. He was also told that if he amended existing plans there was a better chance of planning being granted and that he should engage with the Parish Council. Mr Smith did contact the Council but members were not persuaded that the land should be built upon. Mr Smith eventually decided to sell the land because of cash flow issues

9. The property was put up for auction through SDL Auctions Limited ("SDL"). The description of the land in the catalogue was

> "Lot 17, land adj the Woodlands, Gaulby Lane, Stoughton, Leicestershire, Leicester, LE2 2FL. A small parcel of land set within the heart of the desirable village of Stoughton. Description: Stoughton is a highly sought after village on the south side of Leicester, situated close to Oadby and Evington. The village has a rural feel but there's plenty of amenities, schools and transport links close by. Benefitting from main road frontage and has residential properties on both sides and the rear. Approximately 0.5 acres. The site offers use for grazing or amenity space.
>
> There is also excellent scope for development, subject to any required planning permissions, making a superb investment opportunity. All planning enquiries should be made to Harborough District Council. We have been informed that VAT is chargeable on the lot. Tenure, freehold. Vacant possession upon completion. Viewing direct on site. Guide price, £75,000 plus fees."

Newspaper advertisements contained similar words.

10. Mr Smith then discovered a letter pinned to the Auction board on the land. It stated as follows

> "Dear Sirs, land adjacent to Woodlands, Gaulby Lane, Stoughton, LE2 2FL. Stoughton Parish Council is aware you are selling this plot by auction on 12 February 2019 at the King Power Stadium, Leicester. Our concern is that the land has previously been sold without full disclosure of certain important facts and we wish to prevent this happening again. Your own prospectus speaks of 'excellent scope for development.' For the sake openness and honesty we feel the following should be disclosed to potential bidders."
>
> Then it lists three things:
>
> "i) The paddock is registered with Harborough District Council as local green space as LGSSTO-2, and is therefore protected from development.
>
> ii) There exists an uplift covenant, 50% to the original pre 2017 owner.
>
> iii) A recent test case in Stoughton has stated that any further development within the village is unsustainable. This is robustly confirmed by the wording of the new Harborough local plan. All this makes the definition of 'excellent scope for development' somewhat far from the truth. Consequently, we wish you to warn potential purchasers of these facts. Yours faithfully, Miss Coco Smith, clerk to Stoughton Parish Council."

11. As the learned Judge recorded

> "The Claimant says this letter was not on parish council letter-headed paper and was not signed or dated. He says that he formed the view the letter had been constructed by the owner of the White House as a tactic to undermine the sale of the property at the forthcoming auction. The Claimant says that he drove to the White House to speak to the owner but the owner was not in. He, that is Mr Smith, therefore ripped up the letter and posted it through the letterbox to demonstrate to the White House owner that he was not being taken in by that tactic. The Claimant says he then spoke to Coco Smith direct and she told him that she knew nothing about the letter."

12. On 9th January 2019 the clerk to Stoughton Parish Council contacted SDL to put them on notice that the land was registered with Harborough District Council as local green space and was therefore protected from development, that the overage covenant existed

and that there was a recent test case which established that any further development in the village would be unsustainable

13. SDL amended the description of the land adding that the planning enquiry should be directed to Harborough District Council, but did no more.

14. The legal pack prepared for bidders/potential purchasers contained the deed of covenant dated 21st December 2017, the Land Registry Office copy entries which include reference to that deed within a restriction in proprietorship register and a TP1 form which included a reference to the clause in favour of the Co-op.

15. The Judge set out that Mr Mahill, stated in evidence;

> "…his wife saw the advert in the Leicester Mercury for the sale of the land at an auction. They looked at the auction website and noticed there was a legal pack. He tried to download the legal pack but it would not download because it kept buffering. He says they went to the auction together. His wife asked for a copy of the legal pack when she was told to download it from the internet, but no hard copy was available and they were unable to download the pack from the internet."
>
> and
>
> "He says they looked at the land themselves prior to the auction, and that he understood that planning permission would be required to change the land from grazing land to residential. He said that he had wanted to look at the legal pack. He wanted to see for himself all the details contained within it. He knew there must be something of importance in the legal pack, and he wanted to make sure that everything was in order."

16. The Appellant visited the property. The Judge noted:

> "She said that prior to the auction her husband and she went to see the land. She says they were looking at the land for the purpose of building a family home for herself. She denied looking at it for the development potential of two or more houses. She accepted that she understood that planning permission would be needed. She accepted that the best people to speak to about such planning permission were Harborough District Council. She thought that because there were houses on either side of the land there would no problem in getting planning

> permission. She said she was relying on what she saw on the site, and this was reinforced by the fact:"
>
> "*There was a church opposite and other people or houses*."

17. She stated that she did not look at the SDL website. She gave evidence that she understood that the legal pack was to check all the information about a property and that it would reveal hidden problems.

18. The auction took place on 12th February 2019. There were 35 properties for sale. The Appellant picked up an auction catalogue but looked at the front part only. She did not read the Terms and Conditions.

19. The Terms and Conditions referred to common auction conditions (Edition 3 August 2009). As the Judge set out

> "54….The common auction conditions provide as follows, and I take this from G1.3 of the common auction conditions for sale. It says:
>
> "The lot is sold subject to all matters contained or referred to in the documents. The seller must discharge financial charges on or before completion."
>
> At 4.1, it says:
>
> "Unless condition G4.2 applies, the buyer accepts the title of the seller to the lot as at the contract date, and may raise no requisition or objection to any of the documents that is made available for the auction or any other matter except one that occurs after the contract date.""

And

> "the exclusion provision that provides in the common auction conditions as follows at A4:
>
> "We have taken reasonable care to prepare particulars that correctly describe each lot. The particulars are based on information supplied by or on behalf of the seller. You need to check the information of the particulars is correct. If we provide information or a copy of the document, we do so only on the basis that we are not responsible for the accuracy of the document or documents.""

20. On the website alongside each property there was a property description and a legal pack. At the auction there was a registration desk at which the auction catalogues can

be picked up. It was the Respondent's evidence that in the suite in which the auction takes place hard copy legal packs are provided. Also there was a sign, prominently displayed, encouraging people to read the legal packs and the auctioneer, on this occasion Mr Parker also mentioned the need to read the legal packs before bidding stating

> "It is your responsibility again to have read the legal pack, understood the content, including any charges contained within them"

21. The Appellant bid successfully for the land with the hammer falling for the sum of £130,000 plus VAT. It is not is dispute that a contract as formed and the fees due at the drop of the hammer. The Appellant then paid a deposit and fees due.

22. As the Appellant was leaving the auction she was approached by representatives of the Stoughton Parish Council who gave her a copy of a letter from the clerk to the Council to SDL and told the Appellant that it would not be possible to build on the land.

23. On 13th February the Appellant's sons and after them her husband downloaded the legal pack and discovered the Overage Clause.

24. The Appellant then refused to complete the purchase.

25. Eventually the Claimant instructed SDL to resell the land by auction; which took place on 21st May 2019. SDL made a late amendment to the property description by a "late announcement from" to include specific reference to the Overage Clause. The Auctioneer also read out the notice. The land was sold for £75,000 plus VAT.

Pleaded cases

26. The particulars of claim pleaded the following in respect of the formation and terms of the contract at paragraph 9:

> "The Memorandum of Sale incorporated, and was subject to:
>
> a. The Common Auction Conditions, 3rd Edition,
>
> b. The SDL Auctions: Auction Conditions, a copy of which is attached hereto and marked 'Appendix C'.
>
> c. The terms and conditions as set out within the Memorandum of Sale.
>
> Together, the successful bid at the Auction, the Memorandum of Sale and incorporated terms and conditions, as above, formed a contract for the sale of the Land ("the Contract") and the

> Claimant relies upon the terms and conditions of the Contract of their full effect."

27. The defence pleaded:

> 6. Except as admitted in the following sub-paragraphs, paragraph 9 is denied.
>
> 6.1 The Contract was made when the Auctioneer indicated that the Defendant's final bid was the winning bid.
>
> 6.2 It is admitted that the Sales Memorandum included the following words:
>
> *"This Agreement is subject to the sale conditions as defined in the glossary to the Common Auction Conditions (3rd Edition) so far as they apply to this lot."*

The reply stated

> 8. The Claimant is embarrassed by paragraph 6 of the Amended Defence & Counterclaim insofar as the Defendant's case is unclear as to whether she admits the Contract was subject to those matters contained in paragraph 9 of the Particulars of Claim or not, on what basis that denial is advanced.

28. At the outset of the hearing it was clear that the Respondent's case was that the contract incorporated terms set out in the auction catalogue and was formed at the drop of the hammer. Mr Taylor submitted that this had not been pleaded; rather that the pleaded case was that the contract was formed by signing the memorandum of sale; which he submitted was clearly wrong (as he had pleaded). I have no transcript of the exchanges on the issue and Mr Taylor states the Judge did not give a judgment as to the adequacy of the pleading at the outset of the case. If this is so it is unfortunate as Mr Taylor has argued on appeal that had he known that the Judge's view was that the Respondent's case was that the brochure terms were incorporated into the contract at the time the hammer fell he would have conducted the case differently. By way of example he would have requested the video of the auction to ascertain what was said by the auctioneer.

29. The Learned Judge dealt with the issue in his Judgment as follows:

> "41. What do I draw from the evidence and the submissions? I am going to deal with those in turn. If I turn first to what I am going to call the pleading point. Counsel for the Defendant submits that the Claimant pleads that the memorandum of sale

> incorporated the common auction conditions found in the auction brochure, SDL's auction conditions, and the terms and conditions set out in the memorandum of sale. The Defendant submits that this cannot be right because the contract was formed at the fall of the hammer and the memorandum of sale was only produced thereafter.
>
> 42. The Claimant submits that it is common ground that the contract is formed at the fall of the hammer. The Claimant puts it that the Claimant's case has been obviously set out in the particulars of claim, that the terms and conditions are incorporated into the contract within the auctioneer's brochure, that the notice to complete was served in accordance with the terms and conditions, that the Defence adequately deals with the notice to complete without raising the issue that there was no contractual ability to file and serve a notice to complete, and that the Claimant's case has been obviously set out. The Defendant submits that the whole tenor of the Defendant's evidence would have been different if the claim had been pleaded differently. In my judgment the particulars of claim adequately set out the Claimant's case."

30. It is the fourth ground of appeal that alleges the Judge fell into error in his approach to the pleadings and I will return to the issue.

31. Mr Taylor produced written submissions before the hearing. He set out the issues that required determination which included whether the failure to refer to the Overage Clause in the Land's description in the auction catalogue was an actionable misrepresentation by omission. Under the rubric of "law" he set out that

> ".. in a contract for sale of land, every material defect in the Vendor's title must be disclosed, because the vendor is under a duty to disclose defects in title. If a material defect is not disclosed, the purchaser may rescind the contract. Chitty 7-175"

Chitty (33rd Edition) at paragraph 7-175 (34th Edition 9-184) sets out that;

> "Contracts for the sale of land are not uberrimae fidei in the sense that the vendor has to make to the purchaser a full disclosure of all material facts. In the absence of actual misrepresentation the general rule is caveat emptor. But certain qualifications must be made because the vendor is under a duty to disclose defects relating to title. Every material defect in the vendor's title must be disclosed, because if the title is in fact defective the vendor will be unable to perform his contract in the absence of a condition that the purchaser should accept a defective title. In consequence, if any such defect is not disclosed the purchaser

> may rescind the contract or resist a suit for specific performance."

And

> "A purchaser may, of course, contract to accept a defective title, but even an express agreement to this effect will not (it seems) save the vendor where he fails to disclose defects known to him"

32. Mr Taylor's submissions also argued that the Claimant's failure to refer to the Overage clause was an actionable misrepresentation by omission "*as it concealed a material fact: it hid the existence of the defect in the Land's title*". Further that

> 25. It is submitted that the Overage Clause was a fact about the Land which amounted to a defect in title (see paragraph 9 above). It was a fact, which, when uncovered after contracts had been exchanged, prevented the Defendant from obtaining such title to the Land as she had expected.
>
> 26. That being so, the Claimant was under a duty to disclose the defect in title before the contract (*i.e.* before the hammer fell).

And

> 29. It is submitted that the Claimant's failure openly to disclose (before or at the First Auction) the Overage Clause (*i.e.* the defect in title), amounted to a misrepresentation by conduct. It was conduct not so much intended to convey information, as to conceal it from the potential buyer (see paragraph 8 above).
>
> 30. The fact that, at the Second Auction, a late announcement was made, alerting potential bidders to the Overage Clause, is some evidence that the Claimant recognised its omission at the First Auction, and sought to put it right.

33. As Mr Diggle points out Mr Taylor did not expressly state in his submissions before the hearing that references of whatever nature to the overage clause in the legal pack would not be sufficient, without more, to disclose the defect in title. He also did not refer the Judge to the authorities of **Farqui-v-English Real Estates** [1979] 1 WLR 963 and **Rignal Developments -v-Halil** [1988] 1Ch at 190 upon which he now relies (although the latter was set out in a footnote to the sections of Chitty placed before the Judge).

34. In my view the submissions did not set out the Appellant's case as clearly as they might have, but the issue of the failure to disclose a defect was clearly before the Court at the outset of the hearing and the applicable legal principles set out within the relevant section of Chitty which was before the Judge.

35. The Judge heard from Mr Smith, Mrs Mitchell and Mr Finch on behalf of the Respondent, and the Appellant and her husband, Mr Mahill. There was also a joint expert report from Mr Skipworth who gave the opinion that the Respondent paid too

much for the land in 2017 and that the potential for development was overplayed at the two subsequent auctions

36. Mr Taylor explained during his submissions to me that he made the point in closing (he read from his closing notes for his submissions to the Judge) that the reference to the Overage Clause in the legal pack was not enough give the duty to disclose the defect in title. He only discovered the case of **Rignall** the day after receiving the reserved judgment as he was surprised by the Judge's findings on the issue.

Judgment

37. As for facts the Judge found that the Appellant had some experience as a property developer and had also previously attended an auction with SDL as the auctioneer. He also noted that she knew that the land required a change of use. He clearly had some reservations about the reliability of her evidence

38. The Judge noted that both the Appellant and her husband accepted that the descriptions of the land as having

> *"excellent scope for development*

and

> *"being a superb investment opportunity"*

were opinions. Both were also qualified by the words *"subject to planning permission".*

39. He found that the overage clause was a defect in title. This finding is not challenged.

40. In relation to notice of the defect he stated at paragraphs 62 and 63:

> "62. So I find that the terms and conditions are clear, that they put a bidder on notice that they buy the lot as set out in the legal pack, and that the legal pack is a vital document. That evidence, in my judgment, is supported by the evidence of Mrs Mitchell who was the licensing conveyancer who described precisely what the purpose of the legal pack was.
>
> 63. Simply this Defendant should have studied the legal pack before bidding. The overage clause was in the legal pack. It was her failure to do what a prudent purchaser should have done that has resulted in her being unaware of it until she is handed the letter by someone allegedly from the parish council. The Claimant did reveal the overage clause. It is in the legal pack. It was there to be seen. I did not deal with, but in relation to sales of land, the opening sentence in Chitty is that the starting point

> is caveat emptor. Buyer beware. It is for the Defendant to have, in my judgment, looked at the title and satisfied herself. She did not. That, I am afraid, is the root of the difficulties for the Defendant in this case."

41. The Judge also found that the Appellant knew that the auction brochure contained terms and conditions. He was of the view that she was far more experienced in these matters that she wished him to believe. He stated that the fact that she did not read them was irrelevant to the issue of incorporation and that a reasonable person would expect there to be terms and condition in the brochure. Further SDL did what was reasonably sufficient to give her notice of the conditions.

42. It is a well established principle as the Judge set out at paragraph 60 of his judgment that terms must be brought fairly and reasonably to the other persons' attention. The Judge considered whether the terms were unduly onerous or unusual. He observed that the terms merely state that the bidder is bound by the legal documents which make up the legal title. That is why the legal pack was produced and sale was not subject to contract. He found that the conditions were not unduly onerous and did not need, to quote Lord Denning in **Olley-v-Malborough Court** [1948] CA 532, a red hand pointing at them.

43. He then dealt with the Appellants submissions in respect of Misrepresentation. The Judge describe the Appellant's submissions as follows

> "64…The Defendant submits that by the time of the auction of this land Mr Smith was aware there was an overage clause, and as such that would affect the investment opportunity and the scope for development or the scope for development and the investment opportunity. This was withheld from the first auction, but at the subsequent auction of land the overage clause was viewed as a late amendment. The fact the overage clause was in the legal pack is not enough. The failure to disclose the overage clause within the auction brochure was a material non-disclosure.
>
> 65. Secondly, that Mr Smith was aware that the development potential was severely restricted by the fact that four fifths of the land was deemed as important open land, and that in respect of the remaining fifth he was aware, following an onsite planning meeting, he was unlikely to get planning permission. The planning officer had recommended that the Claimant tried to get the parish council on board, but the Claimant had not been able to persuade them. He was aware that all the land was nominated to become local green space and thus planning permission would be almost impossible, save some very limited exceptions which I have already set out.
>
> 66. The Defendant submits that the letter the Claimant obtained from Coco Smith was clearly considered by the Claimant to be

> from the parish council, and that in itself clearly sets out the limited scope for development and investment opportunity. That being so, it is submitted that an honest person with all that knowledge would not have given the opinions so given, and therefore although on the face of it made the opinion that has been given, that opinion should be treated as fact."

44. In my judgment, it is clear that the Judge well understood that it was the Appellant's case that references to the Overage Clause in the legal pack were not enough to disclose the defect and that what was needed were further steps such as were taken at the time of the second auction.

45. The Judge found as a fact that Mr Smith had reason to believe that the owner of the White House had posted the first letter on the Board. It was not on official paper, signed or dated. However, he did not accept his evidence that the clerk to the parish council had told him that she had not written it. The Judge set out that:

> "In respect of these prospects of getting planning permission, he accepted that it would not be easy. He accepts that the meeting took place and that the parish council would not be persuaded to agree to allow development of the land, but he says he never believed there was no prospect of getting planning permission. It was a good possibility of getting planning permission on this site eventually, he said. He said that his planning man gave him advice there was still scope for development. Those, I think, were his words. He accepts the local green space limitations set out at, I think, it's page 310 of my bundle."

46. The Judge then considered what a reasonable honest man would have understood the position to be as regards planning opportunities. Four fifths of the land was designated as important open space. However the Planning officer had suggested a revision to a plan which had a bungalow and a garage (but not the drive) on the one fifth which was not designated. The Parish Council would not "come on board" but the Judge formed the view that a reasonable man would consider there was

> "still opportunity for this land to be developed".

He noted that Mr Smith had not sold up which played into and supported the finding that the statement as to development potential was an opinion.

47. As regards reliance on the description of the property the Judge found that the Appellant took the decision to buy based on her own judgment as to its potential. She was determined to bid. He stated:

> "In this case, and I accept the proposition obviously set out in Chitty, that if the statement was made it is a fair inference to me of fact that the person was influenced by that statement, and I accept that as the starting point. However in this case the Defendant went to the site to look at it. She convinced herself that planning was achievable because there were houses on all sides around, and there was a church and other houses or people opposite. She understood that a change of use was required. She understood that planning permission was required. The reality is that she was determined to buy this piece of land. She had had difficulties developing the current family home. She saw this land as the opportunity to get that family home that she had dreamed of.
>
> In my judgment she was so determined by what she had seen in her own analysis of this piece of land that she was prepared to bid on this land, and did so, and did so without studying the legal pack. It feeds in, in my judgment, to that analysis, that she was so determined to buy it that she put in the highest bid simply based upon her own assessment of this piece of land and its development potential. In my judgment it simply is not right to say that the description that I read out in full persuaded her to buy this land. It was her own decision based upon her viewing the land."

48. As regards the clause at A4 the Judge found it to not be unduly onerous as a standard industry wide term

> "it merely says that it is for the buyer to satisfy themselves that the particulars are accurate"

49. In the alternative he found them to be reasonable

Grounds of Appeal

50. The six grounds of appeal in respect of which permission was granted are as follows

i. The Judge was wrong in law to conclude that the Respondent had fulfilled its duty to disclose the defect in title by including it in the legal pack; see **Rignal Developments -v-Halil** [1988] 1Ch at 190.

ii. On the facts of the case the Judge was wrong in law to conclude that a reasonable man with the knowledge of Mr Smith (the director of the Respondent) could honestly have believed that the representations made were true.

iii. On the facts of the case the Judge was wrong in law to conclude that the Appellant had not relied on the Appellant's misrepresentations

iv. The Judge was wrong to exercise his discretion to allow the Respondent to argue (the matter not having been pleaded) that the common auction conditions were incorporated into the contract of sale

v. There being no evidence of any reference to SDL Auction conditions the Judge was wrong in law to have found that these conditions were incorporated into the contract

vi. The Judge was wrong to ignore (without explanation the jointly instructed expert's view that
   a. the respondent had greatly overpaid for the land
   b. in relation to the representation being misleading

51. By a Respondents notice it is argued that

(a) it was open to the Judge to have found clause 1.10 of the auction conditions precluded the Appellant from arguing that she had relied on the representation;

(b) it was open to the Judge to have found clause 1.9 of the auction conditions meant that the Appellant was purchasing the land with full knowledge of the documents.

Analysis

52. I turn to the first ground.

53. It is not in dispute that the Overage Clause constituted a defect in title and also that neither the property description in the brochure nor the auctioneer made any express reference to it. The legal pack did give information about the clause (as it contained the deed of covenant and also the draft contract containing the requirement for the purchaser to enter into the covenant).

54. Mr Taylor submitted that every material defect in property title must be disclosed. The vendor was duty bound to take the steps, such as were subsequently taken at the second auction when there was a written addendum and oral statement by the auctioneer, to disclose the defect. The information within the legal pack was not enough. He argued that equity requires the vendor to disclose all known defects, and the disclosure must be put in the purchaser's mind. Also the vendor cannot rely on a contractual term which deems the buyer to have had knowledge of the defect. He relied upon the same extract from Chitty (7-175) which had been put before the Judge.

55. In response Mr Diggle did not argue against the general principle that a defect must be disclosed but argued that in this case the vendor had taken sufficient steps to disclose the existing of the Overage Clause and a fair opportunity had been given for the Appellant to see what restrictions the property was subject to.

56. I turn to the relevant principle and its consideration before the Courts.

57. A vendor is under an obligation to disclose all defects in title and encumbrances of which he/she is aware. In **Re Marsh and Earl Granville** (1883) 24 Ch.D. 11 Mr Justice Fry stated:

> "The principles applicable to the decision of the question appear to me to be not in dispute. According to the view which I take, a vendor who desires to limit the rights of a purchaser must do so by explicit and plain conditions, and he must tell the truth, and all the truth, which is relevant to the matter in hand."

58. In **Nottingham Patent Brick & Tile Co. v. Butler** (1885) 15 Q.B.D. 261, at first instance, Mr Justice Wills considered a contractual provision negating the principle and held;

> "The fourth condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of a third person of which he is unaware... It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value ... In honesty and in law alike he was bound to give the purchaser full and fair information what it was that he had for sale, and was inviting him to buy, and, having failed to do so, he cannot insist upon the bargain procured by the suppression of material matters affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct, but in the preparation of the particulars of sale he unfortunately relied upon his solicitor, who, as I cannot help believing, was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession, and open to his perusal."

59. In **Farqui-v-English Real Estate** [1978] WLR 963 the plaintiff agreed to purchase a property at an auction from the defendant company. The contract incorporated the National Conditions of Sale (19th ed.) and there were general and special conditions set out in the auction particulars which provided, inter alia, that a block of the property was registered with absolute leasehold title and other blocks with absolute freehold title and also that: "*The property will be sold subject to … (b) the entries on the registers of title.*". A contractual term provided as follows:

> "Where by the special conditions of sale any property is sold subject to any lease, covenant, restriction or other matter a copy of the said lease covenant restriction or other matter may unless otherwise provided in the said special conditions be inspected at the said offices of the solicitors for the vendor at any time during normal office hours and the purchaser shall be deemed to purchase with full notice and knowledge of such matters whether or not he shall have availed himself of the opportunity of such inspection and shall raise no objection or inquiry or requisition thereon."

When the plaintiff's solicitors eventually saw the copy entries post auction it became apparent that the freehold property was subject to various matters set out on the charges register.

60. Mr Justice Walton found that as a matter of strict construction, the contract provided in express terms that the plaintiff was to take the property subject to the entries on the register.

61. The Defendant's counsel argued that it was always open to the purchaser, if he wished to find out what he was buying the property subject to, to go along to the solicitors named in the special condition of sale and inspect the entries on the register at their offices in accordance with that condition. As a result the vendors had given the purchaser a fair and proper opportunity of seeing what he was buying, of seeing the documents subject to which he was buying the property, and certainly of inspecting the entries on title. Therefore, the purchaser has had a fair opportunity of knowing what he was letting himself in for and, therefore, there is no conceivable reason why equity should interfere. This argument found no favour with Walton J who stated;

> "It seems to me that that is an argument to which I cannot in any circumstances pay any regard whatsoever. It has for a long time been the view of equity that if there is a defect in the title and the vendor knows that there is a defect — and in the present case there can be no question but that the vendor knew there was a defect — then it is the duty of the vendor to disclose the same fully and frankly in the particulars or in the conditions, or at any rate in some place where the purchaser's attention will be drawn to it. I need cite only three very short passages from the authorities."

And

> "Of course there may well be circumstances where it is difficult to frame a suitable condition for sale in such a way that an ordinary purchaser — because that, as we have seen from Lord Romilly, is the test — would understand what the difficulty is. Under those circumstances, there can of course be no objection to a condition somewhat along these lines: "The property is subject to the contents of a deed dated so-and-so which

> materially affects it, but it is impossible to summarise the contents of this deed, which can be inspected at," and a suitable place for inspection given. If something along those lines is put into the conditions, if the purchaser then goes on and purchases the property he cannot be heard to say that his attention has not been called to the difficulty and he has been given a fair opportunity of seeing to what the property is subject. But in the present case there is no attempt whatsoever, either in the special conditions or in the general conditions, at saying that there is a particular difficulty and snag with the title here, namely, that the whole of the property is subject to something that cannot even be hinted at. That being so, it appears to me quite clear that this title is not such a one as equity would ever force upon an unwilling purchaser."

And

> "Any purchaser reading these general and special conditions of sale would be entitled, I think, to assume that of course there were entries on the register but that those entries were only of what I may call the usual sort, which do not in any way affect the value of the property adversely. He would be most surprised to learn, as I am certain that the purchaser here was most surprised to learn, that he was literally buying a pig in a poke because he was taking the property subject to the contents of a deed which could not even be produced."

62. Mr Taylor submitted that the judgment of Walton J supported the existence of an equitable rule/principle that it was incumbent on the vendor to make specific reference to a defect in title; otherwise the purchaser could proceed on the basis that the charges on a register would contain nothing particularly unusual. He submitted that in the present case references to the legal pack, made in the context of all the 35 properties to be sold at the auction, was insufficient to disclose the existence of a defect. Mr Diggle submitted that what Walton J set out was only a requirement that the purchaser be given a fair opportunity of seeing to what the property is subject. The references made in the brochure and by the auctioneer to the need to read the legal pack (including the reference to charges), taken with the information in the legal pack, were sufficient.

63. **Rignall Developments Limited -v-Halil [1987] Ch 190** also concerned the purchase by the Plaintiff company of a house at an auction. Subsequently the plaintiff, who had not made a search of the property register before the auction, discovered that the property was subject to a local land charge in respect of repayment of a local authority improvement grant. It was argued on behalf of the Plaintiff that the defendant vendor had been under an obligation to disclose all defects in title and any condition of the contract had been accepted on the basis that the vendor had complied with the equitable obligation of disclosure.

64. The Defendant argued that there were two relevant conditions of sale; general condition 11:

> "The purchaser shall be deemed to have made local searches and inquiries and to have knowledge of all matters that would be disclosed thereby and shall purchase subject to such matters."

And Special condition 5 which provided:

> "The property is also sold subject to any matters which might be disclosed by a search and/or inquiries of the relevant local authority either at the date of sale or at the date of completion and (whether or not he has carried out any such search and/or inquiries) the purchaser shall be deemed to buy with full notice and knowledge of all such matters and shall not raise any objection thereon or requisition relating thereto."

65. Counsel for the Defendant also relied upon the effect of section 198 of the Law of Property Act 1925, as explained by Eve J in **Re Forsey and Hollebone's Contract** [1927] 2 Ch 379, which was that the purchaser was deemed to have known of the existence of entries under the Land Charges Act 1925. He also argued that a prudent purchaser would have been alerted and would have made a search. It would be inequitable to put an imprudent bidder in a better position than a prudent bidder who has made a search, by allowing the former to bid unrestrictedly and then rescind the contract if he does not like what he finds on the register, whilst the latter has regulated his bidding in accordance with what he knows to be on the register.

66. Millet J (as he then was) stated

> "It is, however, a well-established rule of equity that, if there is a defect in title or encumbrance of which the vendor is aware, the vendor cannot rely upon conditions such as those in the present case unless full and frank disclosure is made of its existence."

and

> "To entitle her (the vendor) to rely on the relevant conditions of the contract in these circumstances, it was incumbent on her to disclose the existence and nature of the entries to the plaintiff before contract. Had the information disclosed in the answers to requisitions been included in the particulars of sale, there could have been no objection to conditions precluding all further inquiry and making the sale subject to the entries in question. In the absence of such disclosure the conditions cannot be relied on. It is hardly necessary to add that the equitable principle cannot be circumvented by the inclusion in the contract of a condition deeming the purchaser to have searched the register and to know

> of its contents. The purchaser's acceptance of such a condition is on the basis that the vendor has made the disclosure required of him."

67. The following principles can be distilled from these authorities

(a) It is a well-established rule of equity that a vendor of property has a duty of disclosure in respect of defects to title. Specifically, the vendor is bound to give the purchaser full, frank and fair information, or a fair and proper opportunity to gain such information, about any defect.

(b) A purchaser's imprudence in not making enquiries will not relieve the vendor of the duty of disclosure

(c) In the absence of specific reference to a defect a purchaser may assume that entries on a property register or within other relevant documentation would be the usual sort of entries which would not significantly affect the value of the property

(d) In the absence of proper disclosure contractual conditions cannot be relied on to save the vendor. The equitable principle of disclosure cannot be circumvented by the inclusion in the contract of a condition deeming the purchaser to have knowledge of the defect.

68. Turning to the facts of this case it is my judgment that the Judge did fail to properly apply the equitable principle of disclosure and wrongly took into account the maxim caveat emptor which does not apply to defects in title. The references in the brochure, and by the auctioneer, to the need to read the legal pack were not enough to comply with the duty of disclosure. The references were made in respect of all 35 properties for sale and the Appellant was not put on any notice of any unusual feature of the title in respect of this particular lot and could not have been put on notice by inspection of the property. She was entitled to assume the duty of disclosure had been complied with and that as a result there would be no unusual defects revealed in the legal pack. As a result the reference to the need to read the legal packs did not provide a fair and proper opportunity to become aware of the defect as Mr Diggle contends. Full and frank disclosure required the Overage Clause to be specifically brought to a potential purchaser's attention by description in the particulars, addendum notice of the type produced at the second auction, or specific reference by the auctioneer.

69. The Appellant's acceptance of terms and conditions must be taken as on the condition that the duty of disclosure had been complied with so do not save the Respondent. To hold otherwise would substantially if not wholly undermine the equitable principle.

70. The Learned Judge fell into error and ground one is successful. Notwithstanding that the appeal succeeds on this ground it is necessary to consider the other grounds

71. It is an obvious requirement of misrepresentation that the statement relied upon be false. The second ground argues that on the facts of the case the Judge was wrong in law to conclude that a reasonable man with the knowledge of Mr Smith (the director of the Respondent) could honestly have believed that the representations made about the property were true

72. A statement of opinion may be regarded as a statement of fact if it is false. Thus if it can be shown that the person who expressed the opinion did not hold it or could not, as a reasonable man having knowledge of the facts have honestly held it the statement can be regarded as a statement of fact.

73. Mr Taylor submits that the Learned Judge erred in finding that a reasonable person with the same knowledge as the Respondent could honestly have believed that the land had

"excellent scope for development"

and therefore provided

"a superb investment opportunity"

The reality was that the land had only limited scope for development, as four fifths of it could not be built on and provided only a speculative investment opportunity. No reasonable Tribunal properly directing itself could have concluded otherwise.

74. Mr Diggle submitted that this ground turns upon the Learned Judge's assessment of Mr Smith. He found that Mr Smith reasonably held these opinions. He had been told that it was possible to develop on part of the land (albeit there would be difficulty with the driveway) and had commissioned an altered plan. He had not put the land up for sale immediately after the meeting with the District Council.

75. Any challenges to findings of fact made by a Judge have to pass a high threshold test. This has been set out in a number of appellate cases including the court of appeal in **Grizzly Business Ltd v Stena Drilling Ltd** [2017] EWCA Civ 94 and most recently the Supreme Court in **Perrys-v-Raleys** [2020] UKSC. An appellate court may only reverse a decision if any significant finding of fact was unsupported by the evidence and/or was one that no reasonable judge could have reached. There are obvious reasons why appellate courts are warned not to interfere with findings of fact unless compelled to do so as enumerated by Lewison LJ in **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5:-

> "i) In making his/ her decisions the trial judge will have regard to the whole of the sea of evidence presented to him/her, whereas an appellate court will only be island hopping.
>
> ii) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> iii) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

76. With these matters in mind I turn to the relevant factual findings.

77. The Judge recorded that Mr Smith was adamant that:

> "he believed at some point the land would be viable as a building plot …. in respect of planning permission he accepted that it would not be easy."

Mr Smith accepted that the Parish Council would not be persuaded but never believed that there was no prospect of permission rather

> "It was a good possibility of getting planning permission on this site eventually... there was still scope for development."

The Judge concluded

> "a reasonable man would consider there was still opportunity for this land to be developed."

And

> "a reasonable person would hold the views that Mr Smith did"

78. In my judgment there can be no challenge to these findings of fact. The Judge heard Mr Smith, who was cross-examined by Mr Taylor on this issue, and was entitled to find as he did.

79. Mr Taylor found more traction with his submission that these views could not, in the eyes of any reasonable tribunal provide adequate support for reasonable man to have honestly held the view that given all the issues there was "excellent scope for development" providing a superb investment opportunity. Rather the highest a reasonable man could honestly have believed is what the Judge found Mr Smith actually did believe i.e. that there was still "some" scope for development. As such it had investment potential; but could not possibly be a "superb" investment.

80. In my view the Judge failed to grapple with the difference between what he found Mr Smith believed and the opinion stated. At no point did he find as a fact that Mr Smith actually believed that the land had "excellent scope" for development.

81. Mr Diggle argued that the only objectionable elements to the descriptions were the superlatives "excellent" and "superb" and that these opinions, which were qualified by the words " subject to planning permission" were substantially correct and the difference would not have induced a reasonable person to enter into the contract (see Rix J in **Avon Insurance -v-Swire** [2000] 1 All ER (comm) 573).

82. In my judgment the Learned Judge also fell into error in his analysis of these opinions. He was obviously entitled to find that Mr Smith held the view that he did , however no

reasonable person could have honestly equated that view to "excellent scope", even pointing to the need for planning permission (which often accompanies development) and the Judge could not properly hold otherwise. I also do not accept Mr Diggle's submission that the difference between what could honestly have been said and what was said would not have induced a reasonable person to enter into the contract. It was the very purpose of the statement i.e. specifically designed to induce a reasonable person to purchase this property, as opposed to others in the auction which just provided a scope for development and investment. However, the fact that a statement was false is insufficient if it was not relied upon which brings into play the third ground of appeal

83. The third ground was that on the facts of the case the Judge was wrong in law to conclude that the Appellant had not relied on the Appellant's misrepresentations.

84. Mr Taylor submitted that the Appellant's viewing of the land could not have revealed that it was nominated as local green space and that four fifths of it could not be built upon. When she went to the site she saw things as consistent with the representations that there was excellent scope for development thus providing a superb investment opportunity. Her viewing could not have negated inducement. Further the representations did not need to be the sole inducement

85. Mr Diggle submits that this is a finding of fact and one that the Judge was entitled to make. Put bluntly the Judge rejected the Appellant's evidence that she had relied on the representations. He did not form an entirely positive view of the Appellant. His findings, as set out above, are clear.

86. The difficulty with the Judge's analysis is that he stated that it was not right that description "*full persuaded her to buy this land*". There is no requirement for the representations to have been the sole inducement.

87. As the Judge observed once it is proved that a false statement was made which was material in the sense that it was likely to induce the contract and the representee enters the contract it is a fair inference of fact that he/she was influenced by the statement. Taking this starting point the Judge should not then have set the high hurdle as whether the representations where the sole cause or *"full persuaded her",* rather the lower hurdle of whether they were one of the inducing causes. What the Appellant required to prove is that she would not have entered the contract but for the misrepresentation.

88. Mr Diggle is correct in that the judge did not from an overly favourable view of the Appellant. He concluded that she was very keen to buy and that the decision to purchase was "*her own decision based upon her viewing the land".* In my judgment the Judge's finding of fact amount to a view that the Appellant did not act as a reasonable purchaser would, i.e. taking the representations into account and be to a degree induced by them, rather she ignored the representations (she wanted a home rather than a simple investment) and relied solely on her own judgment having viewed the land. The keenness to purchase may also in part explains the failure to view the legal pack.

89. I confess to being troubled by the Judge's finding but have ultimately reached the view that it was not unsupported by the evidence and/or was one that no reasonable judge could have reached. As a result the misrepresentation claim based on the description of the scope for development and potential for investment would have failed for want of reliance even if the Judge had found there to be misrepresentations and he was entitled to arrive at this finding. Ground 3 fails.

90. The fourth ground was what the Judge described as the pleading point. Specifically it is argued that the Judge was wrong to exercise his discretion to allow the Respondent to argue (the matter not having been pleaded) that the common auction conditions and/or SDL's auction conditions had been incorporated into the contract of sale.

91. Mr Taylor submitted that the only way that the Respondent expressly pleaded that the terms and conditions were incorporated was as a result of the Appellant signing the memorandum of sale. However, as the contract was concluded when the hammer fell, this argument was clearly wrong.

92. Mr Diggle submitted that the Respondent's case that the terms and conditions set out in the brochure were incorporated into the contract which was formed when the hammer fell was set out with paragraph 9 of the particulars of claim. He relied on the use of the words "together with the terms and conditions" and argued that the Appellant well knew that incorporation was through the content of the auction catalogue. As a result the Judge was correct to find that the issue was properly before the Court and no amendment was needed. Further the Judge specifically stated that he did not accept that the Appellant's evidence would have been presented differently *"if the pleaded case was more obviously saying that. The Defendant has been able to address the issues in relation to the terms and conditions"*.

93. It is unfortunate that the arguments as to the adequacy of the pleading did not lead to a determination by the Judge at the outset of the case. Both parties would then have known where they stood. As I understand matters (and no transcript is before me) it was left unresolved until the Judgment within which the Judge found that the pleadings were adequate and even if they had been he would have allowed an amendment.

94. The ground refers to an exercise of discretion, but the Judge's primary finding was that the pleading was adequate. Mr Diggle (who did not settle the pleading) concedes that it was not as clear as it might have been but adequately raised the issue. If the Appellant was in doubt as to what was being advanced further information could have been requested.

95. Mr Taylor submitted that he conducted the case on the basis that the incorporation of the terms and conditions in the brochure at the fall of the hammer was not a pleaded issue and so not one that he needed to address. He did not seek extra evidence before the trial such as video recording of what transpired at the auction and did not cross-examine the Defendant's witnesses on the point. As I have set out the Judge, who had the benefit of hearing all the submissions and questioning of witnesses expressly rejected that submission.

96. I have recently reviewed the importance of pleadings and the principles to be applied when a dispute arises at the outset of a case as to whether a case is being advanced beyond what is in the pleadings in **Charles Russell Speechly PLC-v- Beneficial House (Birmingham) Regeneration LLP** [2021] EWHC 3458 (QB). As I stated in that case it has long been a fundamental rule of litigation that a Claimant's statement of case must include all relevant facts. CPR 16.4.1(a) states that particulars of claim should include a concise statement of the facts relied upon. Relied in this context upon must means relied upon as establishing and supporting a cause of action. CPR 16.4(1)(e) sets out that particulars of claim should also include any matters required by a PD. Relevant to the issue of the formation of a contract CPR PD 16.5 sets out;

> "7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken
>
> 7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done."

97. As I set out in **Charles Russell Speechly PLC**

> "If a point is taken that the pleading does not cover the case to be advanced, and no application to amend is made, the court should consider what the issues are in the case are and specifically whether the issue said not to be covered is one that falls for determination. This is necessary so that the parties know where they stand. To do so, it is first necessary to determine whether and to what extent the departure may cause prejudice." As Lord Phillips further observed in **Loveridge**:
>
> "Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."
>
> As Richards LJ observed in **UK Learning Academy Ltd v Secretary of State for Education** [2020] EWCA Civ 370, a Judge may in appropriate circumstances allow a party to depart

> from its pleaded case where it is just to do so, although it is always good practice to amend pleadings, even at trial. However, I accept Mr Barclay's submission, set out above, that the prejudice threshold is a low one and a party need only show that a departure from the pleaded case "might" cause prejudice before an application to amend is required. If that threshold is met, it would ordinarily not be just to allow a party to depart from the pleaded case advanced up to trial. Context is important. A party who has prepared for trial not anticipating that a particular point will arise may not have the ability at the outset of the trial to fully assess the implications of a point, whether evidential or in terms of applicable law, without time, something that an adequately pleaded case would have afforded him. What Mummery LJ referred to as the orderly progress of the case in **Boake Allen** has been disrupted and too require more than the potential for prejudice would be unfair.

98. I repeat that it is unfortunate (and I assume Counsel are correct in their recollections on this matter) that the Judge did not provide a ruling at the outset of the case as to whether the pleaded case adequately covered the Respondent's case as to incorporation of the terms and conditions so that the issue fell for determination. He should have done so. As for his ruling as set out in the reserved judgment, whilst I can see considerable force in the submission that the pleading could have been clearer and "more obvious" and, despite the fact that he pleading did not expressly cover the matters required in Practice Direction, given the relevant factual circumstances in this case I do not accept that he fell into error in finding that the issue was adequately raised so as to be before the Court. It is also clear that if the Judge had been of the view that the issue was not properly pleaded he would either permitted a departure from the pleaded case or allowed an application to amend.

99. Mr Taylor submitted that the approach of the Judge caused prejudice to the conduct of the case. He had raised this issue before the Judge and it was soundly rejected. The Judge was in a far better position that this appellate court to consider the extent to which this issue could have or did cause potential prejudice and having heard Mr Taylor I am not persuaded that the Judge fell into error in his assessment. For these reasons ground four does not succeed.

100. The fifth ground was that as there was no evidence of any reference to SDL Auction conditions the Judge was wrong in law to have found that these conditions were incorporated into the contract. The Judge found that the terms and conditions in the catalogue, the "common auctions conditions", were incorporated into the contract and there is no direct challenge to this finding save in relation to the pleading issue. The Judge referred to these conditions and specifically terms A4 (the "exclusion provision"), G1.3, G 4.1. and his reasoning placed no reliance on the separate SDL auction conditions (hence the Respondent's notice). As a result this ground would not assist the Appellant if all other grounds failed.

101. The sixth ground; that the Judge was wrong to ignore (without explanation) the jointly instructed expert's view that (a) the respondent had greatly overpaid for the land and (b) in relation to the representation being misleading was not pursued by Mr Taylor.

102. By reason of the matters set out above it is not necessary to address the matters set out in the Respondent's notice.

103. By virtue of the matters set out above the appeal succeeds.

104. I leave Counsel to try and agree a consequential order.