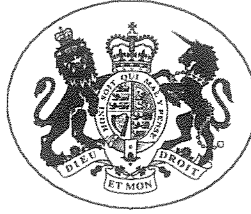


[2019] UKFTT 0506 (PC)

REF/2018/0420

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

Before Tribunal Judge Timothy Cowen
Sitting in Canterbury

BETWEEN

THEMEPLACE LIMITED **Applicant**

- and -

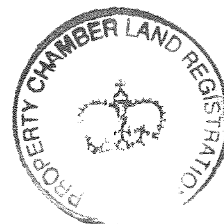
MR MOHAMED ABID ALSAHIB ABID ALMULA **Respondent**

Property Addresses:
12 Clifton Street, Margate CT19 1SP - Title Number: K412608
16 Clifton Street, Margate CT19 1SP - Title Number: K354104
18 Clifton Street, Margate CT19 1SP - Title Number: K346443
20 Clifton Street, Margate CT19 1SP - Title Number: K89151

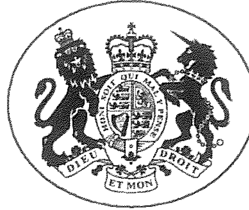
SUBSTANTIVE ORDER

The Chief Land Registrar is directed to allow the Respondent's application to cancel the unilateral notices as if the objections by the Applicant had not been made.

Dated this 15th day of July 2019
Timothy Cowen



BY ORDER OF THE TRIBUNAL



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SUBSTANTIVE DECISION

Introduction

1. This is a dispute about whether a contract for the sale of land continues to bind the seller's title to some plots of development land. The Applicant buyer says that it does and has registered unilateral notices to that effect. The Respondent seller says that he has rescinded the contract. The Applicant buyer denies that the contract has been rescinded (a) because the seller was not ready able and willing to deliver vacant possession of the plots and good title; and because (b) there was no notice of rescission.

The Relevant Background

2. The Respondent is the registered proprietor of 12, 16, 18 and 20 Clifton Street, Margate CT19 1SP ("the Remaining Properties"). They are plots of open land on a street in Margate with the benefit of planning permission to erect five dwellings.

3. On 1 November 2016, the Respondent exchanged contracts to sell to the Applicant 5 titles ("the Properties"):

   a) the four Remaining Properties; and

   b) No. 22 Clifton Street

   The sale of all the Properties was contained in one contract. The contract price was £166,000. The contractual completion date was 21 November 2016. The Applicant did not complete on that date. The Respondent served a notice to complete on 2 December 2016. The Applicant did not comply with that notice within the requisite 5 working days or at all. In December 2016, the Applicant entered unilateral notices on all the titles to the Properties registering its interest in the estate contract. The Respondent applied for the removal of those unilateral notices and, for reasons which are unclear but which are not relevant in these proceedings, the unilateral notices were removed in early 2017 without the Applicant apparently being aware of the application to remove.

4. So from early 2017 until November 2017, unbeknown to the Applicant, its rights (if any) under the estate contract were unprotected on the register. During that time, the Respondent sold No. 22 to a Mr Barry Smith, whose wife Mrs Melanie Smith is the registered proprietor of No.s 24, 26, 28 and 28A Clifton Street from which she operates a business.

The Application and the Dispute

5. The Applicant eventually discovered what had happened and entered new unilateral notices on the Remaining Properties on 6 November 2017. The Respondent applied on 30 November 2017 by UN4 to cancel the unilateral notice on No. 20. The Applicant objected to its removal and the dispute has been referred to this Tribunal by HM Land Registry under section 73(7) of the Land Registration Act 2002.

The Hearing

6. The Applicant was represented at the hearing by its director Kim Hawkins. A Mr Henry William Cope Harrison gave evidence for the Applicant. The Applicant had the benefit of advice and preparatory work by solicitors' Messrs Mills & Reeve, but the solicitors did not attend and did not instruct counsel. The Respondent represented himself and gave evidence through an interpreter. Since the Respondent did have an understanding of written and spoken English and was able to express himself in English, the interpreter's role was merely to assist him occasionally rather than providing a full formal interpreting service.

The Issues

7. The primary issue I have to decide therefore is whether the Applicant is entitled to a unilateral notice registered against title to the Remaining Properties. Specifically, the issue is whether the Applicant has any rights in an estate contract which binds the Respondent's title to the Remaining Properties, because that is the basis on which the Applicant claims to be entitled to a unilateral notice.

8. It is common ground between the parties that the contract was formed and that it relates to the Remaining Properties. It seems to me that the Applicant is therefore entitled to the unilateral notice, unless the Respondent can establish his case that the contract has been terminated by rescission.

9. The Applicant denies that the contract has been rescinded for two main reasons:

   a) The Respondent was no entitled to rescind the contract because the notice to complete was not valid. The basis for that claim is that the Respondent was not ready willing and able to give vacant possession of the Properties, because of the vehicles parked on the Properties and because of Mr and/or Mrs Smith's parking rights claim; and

   b) Even if the Respondent was entitled to rescind the contract, there was never a notice of rescission sent to the Applicant or any of its agents by or on behalf of the Respondent.

The Respondent's Case

10. The Respondent's case is follows. He urgently needed to sell the Properties in the summer of 2016 and that Mr Hawkins of the Applicant knew that. The Properties were on the market for £300,000, the land was vacant and fenced. There were signs on the

land telling people not to park vehicles there. There was a contract between the Respondent and Mr Barry Smith for the sale of all of the Properties to Mr Smith, but that fell through and was rescinded. The Respondent then entered into the contract with the Applicant, which is the subject of this application, at a much lower price than he was hoping for. That was on 2 November 2016. On 11 November 2016, the Applicant went onto the land, removed an existing fence and erected a new fence separating No. 22 from the rest of the Properties. This was done without the Respondent's consent or knowledge.

11. The Respondent said in his chronology that his then solicitors, Healys LLP, informed him on 12 December 2016 that they had rescinded the contract with the Applicant as a result of the Applicant failure to comply with the notice to complete, which had been served on 2 December. In his statement of case, however, he exhibited an email from him to Healys LLP dated 13 December 2016 instructing them to rescind the contract.

12. I have also seen a long and substantive email from Healys addressed to the Applicant's solicitors, Black Graf, dated 10 March 2017, which states that the contract has been rescinded. I will consider that email in detail below under the heading "Rescission".

13. In March 2017, Mrs Melanie Smith (the wife of Mr Barry Smith) applied for the registration of an easement to park on the Properties. The Respondent thinks that the Applicant has conspired with Mr and Mrs Smith to encourage Mrs Smith to make an application for an easement of parking, presumably in order to drive down the price of the Properties.

The Applicant's Case

14. The Applicant mostly agrees with the Respondent's chronology of the key events with the following exceptions:

    a) Mr Hawkins says that he and Mr Harrison visited the Properties on 11 November 2016 to clear the site and to erect hoarding to protect the site pending completion. It is not clear on what basis the Applicant claims to be entitled to have done so, but that is not an issue in this dispute.

    b) The Applicant found Mr Barry Smith parking a large white van on No. 22. Mr Smith told Mr Hawkins and Mr Harrison that he claimed a right of parking on the Properties. It was put to Mr Harrison that it was not possible for a van to have been parked on No.

22 because there is a 1.5 m vertical drop at that point. Mr Harrison conceded that there were more convenient parking opportunities elsewhere, but he insisted that it was possible to access No. 22 by vehicle without crossing that vertical drop and that there was a van parked there on that day.

c) Mr Smith also told Mr Hawkins and Mr Harrison that Mr Smith had informed the Respondent about the parking claim.

d) The Respondent had not mentioned the parking rights claim

e) On 23 November, the Applicant's solicitor informed the Respondent's solicitors that the site was not vacant, because of the presence of the vehicle(s) and because of the parking claim, and that completion could not take place until the vehicles and any claims were cleared.

f) Rather than conspiring with Mr & Mrs Smith, the Applicant in fact assisted the Respondent to oppose Mr & Mrs Smith's claim for parking easements by obtaining two statutory declarations from neighbouring residents in support of the Respondent's position. Mr Harrison gave evidence that Mr Smith was trying to disrupt the sale to the Applicant by making a bogus claim, so the Applicant company was a victim of Mr Smith's activities, not a co-conspirator with him.

g) On 6 December 2016, Barry Smith emailed the Applicant directly to say that his solicitor had applied to HM Land Registry on the basis of 22 years' parking. There is no record of a land registry application having been made before that date.

h) On 8 December 2016, the Respondent's then solicitors stated that they had also been instructed by Mr Smith to assert an alleged right to park on 22 Clifton Street on the basis of 20 years' usage. The statement was made in an email sent on that date to the Applicant's then solicitors.

15. The Applicant's then solicitors prepared draft particulars of claim to be issued in the county court. The proposed claim was for specific performance of the contract, amongst other things. They sent the draft pleading to the Respondent's then solicitors in early 2017, but as far as I am aware, that claim was never issued. The claim includes a statement that the Respondent had not yet purported to rescind the contract.

The Contract

16. The contract dated 1 November 2016 incorporates the Standard Conditions of Sale (Fifth Edition) and also contains the following relevant Special Conditions which are expressed by the contract to prevail over the standard conditions:

    a) Special Condition 3 states: "The property is sold with vacant possession"

    b) Special Condition 6 altered the time for compliance with a notice to complete from 10 working days to 5 working days, by altering standard condition 6.8.2.

    c) Special Condition 7 makes the sale "subject to any matters as are apparent from inspection and survey".

    d) Special Condition 12 informs the Applicant that "the residents of neighbouring properties have previously used the land for parking; this has not been authorised by the seller and it is noteworthy that his predecessor in title arranged for letters to be sent to the owners f parked cars in 2011 to inform them that the parking is considered as trespass. A notice concerning the parking is registered on the title to 2 Booth Place [K382383]". That title is not included in the sale.

17. The contract defines "Incumbrances on the Property" as being only those which are shown on the registers of title as at 2 August 2016.

18. Clause 3.1.2 of the standard conditions specifies that the Properties are sold subject to those incumbrances which are "discoverable by inspection of the property before the date of the contract" (3.1.2(b)) and "those the seller does not and could not reasonably know about" (3.1.2(c)).

19. The copy of the contract which I have in the bundle is not signed and does not have a contractual completion date marked in it. It is common ground however that a contract in the same terms was signed and exchanged on 1 November 2016 and that the contractual completion date was set for 21 November 2016.

Notice to Complete

20. The starting position at law is that time is not of the essence in a non-commercial contract. Contracts for the sale of land are non-commercial contracts for those purposes. The question whether time is of the essence in any contract is important, because failure to comply with a deadline is regarded as a repudiatory breach (for which

the non-defaulting party can terminate the contract) only if time is of the essence of performance of that part of the contract.

21. The purpose of a notice to complete is to make time of the essence for completion, so that failure to comply with the notice to complete is a repudiatory breach for which the non-defaulting party can rescind the contract. Standard Condition 6.8.1 specifies when a notice to complete can be served:

> "At any time after the … completion date, a party who is ready, able and willing to complete may give the other a notice to complete."

22. It is clear in this case that the contractual completion date (21 November 2016) had passed by the time the Respondent purported to serve a notice to complete (2 December 2016). The only remaining question on this issue therefore is whether the Respondent was "ready, able and willing" to complete on that date.

Ready able and willing

Vacant possession

23. If the serving party is not able to give vacant possession of the property on that date, then that is one of the grounds for saying that he is not ready willing and able to complete. The test for whether the seller is able to give vacant possession includes the question whether there are lawful occupiers (not including persons merely exercising rights - see *Horton v Kurzke* [1971] 1 WLR 769) or trespassers who need to be removed or removable physical impediments to vacant possession which substantially interfere with the enjoyment of the property (see *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 and *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683). It is clear that the authorities are referring to physical impediments which are left there by the seller, rather than things brought onto the land by third parties without the seller's permission.

24. In any event, even if the obligation to give vacant possession did include a duty not to leave physical impediments belonging to independent third parties, I think there is another important feature of the present case to bear in mind: the allegation by the Applicant is not that vehicles were left permanently on the Properties so as to amount to a substantial interference with the enjoyment of the Properties. The allegation was that

Mr and/or Mrs Smith were using the Properties to park their vehicle temporarily. There is no long term evidence cataloguing the times when the van arrived and departed, but the inference from the evidence is that the van was parked there while Mr Smith was visiting or working at his wife's commercial premises and then it was driven away when he left.

25. This is illustrated by the fact that when Mr Hawkins and Mr Harrison first visited the Properties, the van was not there and later on Mr Smith brought the van and parked it on the Properties. In my judgment, the temporary and unauthorised appearance of a vehicle on part of the Properties is not a breach of the Respondent's obligation to give vacant possession, because the vehicle has not been left on the Properties by the Respondent or by Mr Smith except for the brief periods when it is parked. There is no evidence that the vehicle would have been on the Properties for the entire duration of any particular date. There is no reason why the Applicant could not have taken vacant possession of the Properties on the completion date at a time when Mr Smith's van was not parked on the Properties and then taken measures to block the access to prevent future parking. The obligation of vacant possession does not require the seller to secure a piece of open land to the extent that no third party can trespass on it. The obligation only requires the seller to ensure that no persons are occupying the land and no objects are left permanently on the land in such a way as to substantially interfere with the buyer's enjoyment of the property. I find that the Respondent would have satisfied the obligation of being able to deliver vacant possession on the date of the notice to complete.

26. In my judgment therefore the parking of Mr Smith's van on the Properties on the day of the Applicant's visit was not evidence of a breach of the Respondent's obligation to give vacant possession on the relevant date.

Good title - incumbrances

27. Another ground for deciding that the seller was not ready able and willing to complete on any particular date would be if the seller was unable to give good title. Failure to give good title would include an inability to give title free from incumbrance (other than those to which the contract is expressly subject). An easement to park cars by reason of 20 years user as of right might be such an incumbrance.

28. There is evidence that Mr and/or Mrs Smith were claiming an easement of parking around the time of the exchange and completion. There is no clear evidence whether the Respondent knew of their claim at the time of exchange of contracts. But in my judgment, the Respondent's knowledge is not relevant for the following reason: it is clear from the authorities that an easement of parking is an incumbrance, but an unresolved claim for an easement is not of itself an incumbrance. There was no evidence before me that Mr and/or Mrs Smith were actually entitled to an easement over the Properties. In fact, both of the parties before me were asserting at the hearing that the Smiths were not entitled to such an easement. The Applicant had obtained statutory declarations to that effect from neighbouring landowners.

29. I was not supplied with a copy of any application or evidence submitted by the Smiths in support of their claim, they were not before me to give evidence about their claim and, as far as I am aware, there has been no finding by a court, tribunal or HM Land Registry that there is such an easement in their favour. It follows that there are no grounds for me to hold that there was an incumbrance on the Respondent's title on the completion date so as to prevent the Respondent from being ready able and willing to give good title to the Applicant.

30. The highest the matter can be put is that there was a dispute about whether the Smiths had an easement. If the Respondent had failed to inform the Applicant about that dispute, then that, in my judgment, would not amount to a failure to give vacant possession nor a failure to give good title. It might have given rise to some kind of contractual or tortious claim against the Respondent based on failure to disclose the (potential) dispute, but it would not be the repudiatory breach alleged in these proceedings.

Special Condition 12

31. In any event, contrary to the Applicant's submissions, in my judgment it is clear to any reasonable reader of Special Condition 12 in the contract that, in the context, the phrase "residents of neighbouring properties" is intended to refer to occupiers of neighbouring properties and is not intended to distinguish between domestic and commercial occupiers. It is true that the word "resident" ordinarily refers to a person occupying a home, but in this context (where neighbouring properties are occupied for domestic and business purposes) it is obvious that the Respondent is not saying that he can identify

that the only vehicles parked on the Properties belong to the home occupiers rather than the business occupiers. There is also no evidence that such a distinction would have made any difference to the Applicant or to its enjoyment of the Properties.

32. Special condition 12 informs the Applicant that the Properties have been used for "parking". The fact that it also says that letters were sent to the owner of parked "cars", in 2011, does not mean that special condition 12 applies only to cars and not vans, as alleged by the Applicant. It may simply be that there were no vans being parked in 2011 at the time when the letters were sent.

33. In any event, the purpose of special condition 12 is to make the Applicant aware that there is the possibility of someone in the locality claiming the right to park on the Properties. It was not submitted to me that it would have made any difference to the Applicant whether the person claiming that right was a home-occupier or a business user, a car-owner or a van-owner. In my judgment, therefore, special condition 12 put the Applicant on notice of the possibility of the kind of claim being made by the Smiths.

34. I therefore find that the Respondent was not in breach of his obligation to give good title on the date of the notice to complete (or at all).

35. It follows from all the above that, in my judgment, the Respondent was ready able and willing to complete on the date of the notice to complete and I reject the Applicant's submissions to the contrary.

<u>Notice of rescission</u>

36. Where one party has committed a repudiatory breach of a contract (in this case by failing to complete within 5 working days of the service of notice to complete) then the contract is terminated when the other party rescinds the contract by accepting the repudiation. The repudiatory breach itself does not bring the contract to an end, because "an unaccepted repudiation is a thing writ in water" (*Howard v Pickford Tool Co* [1951] 1 K.B. 417, 421)

37. The acceptance does not need to be in any special form and does not even need to be an express statement to that effect. It only needs to be something which communicates to the defaulting party that the non-defaulting party has elected to rescind the contract. See Chitty on Contracts paragraph 24-013 and the authorities cited there.

38. My findings of fact in relation to rescission are as follows. I believe that the Respondent was told by Healys LLP at some point in December 2016 that they had rescinded the contract by sending a notice to that effect to the Applicant's solicitors, but there is no actual copy of that notice and the Respondent does not accept that its solicitors received it. The Respondent acted on that information by putting the Properties back on the market by auction as evidenced by an auctioneer's invoice dated 23 January 2017 showing that the properties were to be entered into an auction on the Respondent's behalf on 6 February 2017. It is however clear that counsel who drafted the Particulars of Claim in January/February 2017 on behalf of the Applicant did so on the basis that the Respondent had not yet purported to rescind the contract, because the draft Particulars of Claim said so.

39. I therefore do not have sufficient evidence to find on the balance of probabilities that a notice of rescission was sent to on behalf of the Respondent before 10 March 2017.

40. The 10 March 2017 email from Healys LLP (for the Respondent) to Black Graf (for the Applicant) is expressly responding to the draft Particulars of Claim and says:

> "our client takes the view that he was entitled to rescind the contract following your client's failure to complete at the time specified in the notice to complete, and that our client is free to put the site back on the market."

It also says:

> "our client was entitled to serve a notice to complete on 2nd December 2016, and your client failed to comply with a notice and the contract has been rescinded."

41. On one hand, the 10 March 2017 email appears to be written by someone who thinks that the contract had already been rescinded by a notice sent earlier. The Applicant therefore submitted that a letter reporting that the contact had already been rescinded was not itself a rescission - after all, the Respondent's solicitors do not appear to intend the 10 March 2017 email to be a notice of rescission. On the other hand, however, as a matter of law, rescission by acceptance of repudiation does not need to be in a specific form nor does it even need to be accompanied by a specific intention. It needs only to be a clear and unequivocal communication that the non-defaulting party, here the

Respondent, has elected to treat the contract as terminated. In my judgment the quoted content of the 10 March 2017 email does exactly that and therefore satisfied the requisite test.

42. The copy of the 10 March 2017 email which I saw was one which appeared to have been sent to the Respondent by his solicitors and is marked "draft". There is generally an unfortunate scarcity of relevant correspondence in this case. It would be much better if copies of the full conveyancing files were available. But doing the best I can with a few isolated pieces of copy correspondence, I need to piece together as best I can the flow of relevant communications.

43. The question of fact therefore is whether a communication with the same content as the 10 March 2017 email was in fact sent to Black Graf, the Applicant's solicitors. The Applicant's own chronology (on which it relied at the hearing) states that "A substantive response [to the draft Particulars of Claim] was received on 13th March 2017 from the solicitors acting for [the Respondent] addressed to the solicitors acting for [the Applicant]". It is very likely that this is referring to a letter/email with the same content as the 10 March 2017 email because that email was drafted as a response to the draft Particulars of Claim and neither party has been able to point to any other "substantive response" around that date.

44. I was also informed at the hearing that a copy of an email/letter in the terms of the 10 March 2017 email has been seen in the Black Graf file. Also, the Applicant does not assert that such a communication was never received by its solicitors. Furthermore, there is no reason why Healys LLP might have failed to send it or why they might have sent something completely different. It is clear from all the evidence that the Respondent did intend to rescind the contract and that he had instructed Healys LLP to do so.

45. In my judgment, there is therefore ample evidence on the balance of probabilities to infer that a written communication with the same content as the 10 March 2017 email was sent by Healys LLP to Black Graf between 10 March 2017 and 13 March 2017 and I so find. I therefore also find that that communication contained an acceptance of the Applicant's repudiatory breach of the contract and thereby terminated the contract by rescission (if it had not already been terminated).

Conclusion

46. It follows from all of the above that (a) the Respondent was entitled to serve a notice to complete in December 2016, (b) the Applicant failed to complete in accordance with the notice to complete and (c) by 13 March 2017, the Respondent had elected to terminate the contract by rescission and had communicated that to the Applicant. The contract therefore has been terminated, is no longer enforceable and does not give the Applicant any interest in the Remaining Properties. I find accordingly that the Applicant is not entitled to the unilateral notices.

47. It further follows that the Respondent's UN4 applications to cancel the unilateral notices must succeed.

48. My conclusion is based entirely on my findings of fact (having heard the oral evidence of the parties and viewed the documents) and my application of the law to those facts, as set out in full above. That conclusion also happens to be the right answer as a matter of equity, in my judgment. Otherwise the Respondent's title to the Remaining Properties would be bound by a contract over 2 years after the Applicant refused to complete, in circumstances where the price would need to be apportioned to take account of the sale of No. 22 in the interim. The Applicant has done nothing to enforce the contract other than to register the unilateral notices. It would be difficult to imagine that any court exercising a discretionary jurisdiction would now make an order for specific performance of the contract in those circumstances, even if the contract had not been terminated. That is not the basis of my decision, but it is a helpful indication that the analysis I have conducted has resulted in the most just outcome.

49. I therefore direct the Chief Land Registrar to allow the Respondent's application to cancel the unilateral notices as if the objections by the Applicant had not been made.

Costs

50. I have decided on a preliminary basis that costs should follow the event in accordance with paragraph 9 of the Practice Direction made under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). This means that I am minded to make an order that the Applicant should pay the costs incurred by the Respondent since the date when this matter was referred to the Tribunal. I intend to carry out a summary assessment of the Respondent's costs on the standard basis. To that end, the

Respondent is ordered to file at the Tribunal and serve on the Applicant by 4 pm on Wednesday 31 July 2019 a schedule of the costs he has incurred.

51. If either party has grounds to submit that I should make a different order on costs, then they should file at the Tribunal and serve on the other party, by the same date, submissions explaining what the costs order (if any) should be and why.

52. I shall make final decision on the question of costs after 31 July 2019 based on the material submitted by the parties.

Dated this 15th day of July 2019

Timothy Cowen

BY ORDER OF THE TRIBUNAL