UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral Citation Number: [2022] UKUT 260 (LC)

Case number LC-2022-000072

Rolls Building, Fetter Lane, London, EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – Contracts and Options – Pre-emption and overage agreements – interpretation of contract – whether sale a disposal triggering pre-emption rights – whether transfer to third party effective to terminate pre-emption rights

APPEAL AGAINST A DECISION OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL (LAND REGISTRATION DIVISION)

BETWEEN:

FAIRHAVEN SHIPPING COMPANY (UK) LTD

Appellant

-and-

ROLF HUGO MUNDING

Respondent

Re: Land and Buildings at Falmouth Wharves,
Falmouth,
Cornwall,
TR11 2TF
(Title Number CL200109)

The Hon. Mr Justice Fancourt

Heard on: 27 July 2022

Decision Date: 27 September 2022

Mr Leslie Blohm QC (instructed by Stephens Scown LLP) for the Appellant
Mr Adrian Pay (instructed by Freeths LLP) for the Respondent

The following cases are referred to in this decision:

EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA Civ 844; [2022] 1 WLR 717

Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173

Introduction

1. On 11 December 2015, the Respondent, Mr Munding, agreed to sell for £550,000 his 100 shares in the Appellant company ("Fairhaven") to Mr James Frederick Alford and Mrs Josephine Helen Alford. At the time, the Alfords owned the other 100 shares in Fairhaven. Fairhaven's business was to own and operate Falmouth Wharves, an established, deep-water, commercial marine site in Falmouth, Cornwall ("the Property").

2. The sale of Mr Munding's shares was on terms that secured to Mr Munding for a period of time potential benefit from a valuable development of the Property, Thus, it was agreed by him and the Alfords that they could not sell any shares in Fairhaven without offering him a right of first refusal. There was also an agreement that if, within 15 years, Fairhaven wished to dispose of the Property or part of it, Mr Munding would have a right of first refusal. Finally, it was agreed that if, within 15 years, planning permission was obtained, the Alfords would pay Mr Munding 20% of the net uplift in value of the Property above a specified level.

3. Detailed terms were agreed between the Alfords, Mr Munding and Fairhaven to protect Mr Munding's contingent rights to the shares, the Property and the overage. These were set out in 3 documents all signed on the same day: a Share Purchase Agreement ("SPA"); a Pre-emption Agreement ("PA") and an Overage Agreement ("OA"). The terms included restrictions to be placed on the registered title to the Property, so that a transfer or lease of the Property could only be registered if the relevant terms of the agreements had been complied with or did not apply. The terms agreed in the 3 separate agreements were, it is common ground, all aspects of a single transaction.

4. As recorded in para 1 of the decision of the First-tier Tribunal ("FTT") now under appeal, restrictions were registered and these required the provision of certificates by Mr Munding prior to registration of any registrable disposition: under the PA, a certificate that the provisions of clause 5 of the PA had been complied with or did not apply; and under the OA, a certificate that the provisions of clause 2.2 of the OA had been complied with or did not apply.

5. On 31 May 2018, Fairhaven executed a transfer of the Property ("the Transfer") in favour of Southern Wharfage Ltd ("SWL"). Fairhaven sought cancellation of the two restrictions on title on the basis that Mr Munding's pre-emption and overage rights had expired. Mr Munding opposed the cancellation. That dispute was referred by the Land Registry to the First-tier Tribunal ("FTT") for determination.

6. The basis on which Fairhaven contends that Mr Munding's rights have terminated is as follows:

    (1) The PA provides that the right of pre-emption terminates if an offer to sell the Property to Mr Munding in the form of a notice under the PA is made and not accepted within 8 weeks of the offer, and if the Property is then disposed of within a further 6 months on terms no less favourable to Fairhaven than those offered to Mr Munding.

(2) The OA provides that it too terminates 8 weeks after an offer by Fairhaven to sell Mr Munding the whole of the Property, if that offer is not accepted.

(3) On 15 November 2017, Fairhaven gave notice to Mr Munding offering to sell him the whole of the Property, on terms set out in the notice.

(4) Mr Munding received but did not accept that offer within 8 weeks.

(5) The Transfer was executed within the period of 6 months from expiry of the 8 week acceptance period and was on terms no less favourable to Fairhaven than the terms set out in the notice served on Mr Munding.

(6) Accordingly, both agreements terminated and the restrictions should be removed because they no longer protected any subsisting rights of Mr Munding.

7. Mr Munding's opposition was primarily on the basis that the transfer to SWL was not a "Disposal" as defined in the PA, because it was not made to an independent person in an arm's length transaction. That was because SWL was a company under the same control as Fairhaven, and accordingly the notice dated 15 November 2017 was invalid and Mr Munding's pre-emption rights were unaffected. Alternatively, Mr Munding contends that it was not a Disposal on terms "no less favourable to [Fairhaven] than those set out in the Grantor's Notice" for two reasons:

(1) Unlike Mr Munding, whose offer was on terms that he pay the price of £4,000,000 on completion, SWL did not have to pay Fairhaven the price until after it was registered as proprietor of the Property;

(2) The offer to Mr Munding required a 10% deposit of £400,000 to be paid on acceptance of the offer but, being a connected party, SWL was not expected to (and did not) pay a deposit of 10% on exchange of contracts.

That being so, under the terms of the PA Mr Munding's pre-emption rights were not extinguished by the Transfer and so the restrictions should not be cancelled.

8. The FTT decided that Mr Munding's rights had not terminated and accordingly declined to direct cancellation. It held that the sale to SWL was not a "Disposal" within the meaning of the PA; alternatively, that the sale to SWL was on terms less favourable to Fairhaven because Fairhaven would not receive the purchase price for the Property until (if it happened) SWL was registered as proprietor.

9. Fairhaven now submits that the FTT was wrong to decide that the sale to SWL was not a "Disposal". It argues that, on the true interpretation of the PA, a sale of the Property to a connected person not at arm's length is a "Disposal". It further contends that the FTT was wrong to decide that the terms of the contract and Transfer to SWL, under which Fairhaven would not receive £4,000,000 until after SWL became registered, was less favourable to Fairhaven than a sale to Mr Munding under which Fairhaven would receive £4,000,000 on completion.

10. By a Respondent's Notice, Mr Munding contends that the FTT was wrong to reject the argument that the transfer to SWL was less favourable to Fairhaven because a deposit of 10% was not going to be paid.

11. The FTT recorded in its decision some helpful common ground, which remains common ground on the appeal:

> "It was accepted by the parties that unless the transfer by Fairhaven to [SWL] qualifies as a "Disposal" – being the intended transaction of which notice was given by the Notice to Mr Munding – the Notice was invalid as a Grantor's Notice, as defined by clause 5.1 of the Pre-Emption Agreement. It follows that under the terms of clause 7.1 of that agreement, Mr Munding's right of pre- emption will not have ended on the Transfer to [SWL]; and likewise, the Overage Agreement will not have terminated under clause 5.1 of that agreement, so that Mr Munding is entitled to maintain his two restrictions. It was also accepted that the Transfer by Fairhaven to [SWL] was not to an independent party at arm's length, insofar as that is a requirement, due to Mr. Rogers' directorship of Fairhaven, [SWL] and KML, and his ownership of the shares of [SWL].

12. In view of that common ground, the only issues that need to be decided on appeal are:

(1) Whether the proposed sale to SWL was a "Disposal" within the meaning of the PA;

(2) Whether the sale to SWL was less favourable to Fairhaven than the sale offered to Mr Munding for either of the reasons advanced by him.

THE CONTRACTUAL TERMS

The Share Purchase Agreement

13. By clause 4.3 of the SPA, the Alfords as Buyers agreed:

> "Subject to the Seller complying with [its completion obligations], the Buyers shall (or shall procure):
>
> 1. pay the Purchase Price at Completion …
>
> 2. deliver to the Seller duly executed:
>
> a. the Licence;
>
> b. the Pre-emption Agreement; and
>
> c. the Overage Agreement"

14. Clause 5 of the SPA was an agreement by each Buyer not to sell or otherwise dispose of any shares in Fairhaven except where required or permitted to do so by the SPA, and only to do so where the entire issued share capital of Fairhaven was proposed to be sold. Any transfer of shares by a Buyer was subject to pre-emption rights requiring them to give a transfer notice to Mr Munding, offering to sell the shares at a specified cash price. Mr Munding had 7 business days in which to apply to Fairhaven (acting as agent for the Alfords) to buy the shares. Clause 6.12 provided:

> "If the Offered Shares are not sold under the pre-emption provisions contained in this clause 6, the Company shall so notify the Seller Shareholder and the Seller Shareholder may at any time, within two calendar months after receiving such notification, transfer to a third party the Offered Shares at any price not less than the Transfer Price."

The Pre-Emption Agreement

15. Mr Munding was also granted pre-emption rights in relation to the Property. These were more limited in that they were for a period of 15 years from the date of the PA. Clause 5.1 of the PA provided:

> "In the event that Grantor wishes to make a Disposal of the whole of the Property or a part thereof between the date hereof and the remainder of the Pre-Emption Period the Grantor must give notice to the Grantee of such desire in the form of the notice annexed hereto ("the Grantor's Notice")."

16. "Disposal" is defined in clause 1.1 as meaning:

> "… **a sale or exchange of an agreement for sale of the whole or any part of the freehold interest of the Property or grant of a lease of more than 20 years of the whole or any part of the Property or the grant of a lease for redevelopment of the Property whether pursuant to section 19(1)(b) of the Landlord and Tenant Act 1927 or otherwise*, in each case whether or not for money's worth to an independent party at arm's length*** **and "Dispose" shall be construed accordingly**."

The words italicised by me are those on which the dispute about whether the transfer to SWL was a "Disposal" mainly turns.

17. Clause 5.2 provided that the Grantor had to specify the price and identify the property comprised within the intended Disposal, and clause 5.3 provided that the Grantor's Notice could not be withdrawn or amended and was valid for 8 weeks following service. By clause 5.4, Fairhaven was not entitled to make a Disposal during that period unless Mr Munding had declined the offer in the Grantor's Notice.

18. The scheduled form of Grantor's Notice offers to sell the part of the Property identified on an accompanying plan. It requires a deposit of 10% of the price to be paid on acceptance of the offer and states that completion should take place 28 days after acceptance.

19. Clause 4.1 of the PA is an agreement by Fairhaven that it will not make a Disposal without first carrying out the pre-emption procedure, i.e. by serving a Grantor's Notice. Clause 4.2 was intended to set out the terms of an agreed restriction to be registered against Fairhaven's title to the Property, preventing registration of a disposition of the registered estate without a certificate signed by Mr Munding – but what the certificate had to certify is unknown because crucial words are missing from the clause.

20. Clause 7 of the PA stated:

> 7.1 If the Grantee does not accept the offer contained within the Grantor's Notice within 8 weeks of the service thereof the Grantor may at any time within 6 months of the expiry of the Grantor's Notice make a Disposal *on terms no less favourable to the Grantor than those set out in the Grantor's Notice* and on making such a Disposal of the Property (or part thereof) the subject of the Grantor's Notice the Pre-Emption Right will be extinguished but only in respect of the land covered by the Grantor's Notice and for the avoidance of doubt the Pre-Emption Right shall continue in respect of the remainder of the Property.
>
> 7.2 The Grantor may only make a Disposal at a sum equal to or in excess of the price set out in the Grantor's Notice and otherwise on the same terms as have been offered to the Grantee in the Grantor's Notice.
>
> 7.3 In the event the Grantor wishes to make any Disposal at a sum less or on materially different terms than that set out in the Grantor's Notice or at any time after 6 months of the expiry of the Grantor's Notice if the Grantor has not made a Disposal during such period the Grantor shall go through the same procedure as set out in clause 5 of this Agreement." (*emphasis added*)

21. The PA therefore does not prevent Fairhaven from making a disposition of the Property, or part, that does not amount to a Disposal. It does grant Mr Munding the right to have a restriction placed against the title to the Property. What if any effect a disposition that is not a Disposal could have would therefore depend on the nature of the disposition (i.e. whether registration was required) and the terms of any restriction in fact registered.

<u>The Overage Agreement</u>

22. During the overage period of 15 years, Mr Munding stood to benefit from a share of any uplift in value attributable to a grant of planning permission for the Property or part of it. On each occasion during the 15-year period during when planning permission is granted, Mr Munding is to be paid 20% of the net uplift in value above £2 million. However, the OA was to terminate early, upon the expiry of 8 weeks after the service of a Grantor's Notice under the PA to sell the whole of the Property without Mr Munding having accepted the offer (clause 5.1.1).

23. The overage rights granted by the OA were protected under its terms by an agreement restricting dispositions of the Property. By clause 2.1, Fairhaven agreed that during the overage period it would not make any application to remove or vary the restriction on title

referred to in clause 2.4 (which, it is common ground, should have referred to clause 2.3) and would not make any disposition without complying with the provisions of clause 2.3 (which, it is common ground, should have referred to clause 2.2). This provides:

> "The Company is not to make (and the Buyer is to procure that the Company is not to make) a Disposition unless its Successor:
>
> 1. executes a Deed of Covenant [in the form set out in schedule 2] on or before the date of the deed or document effecting the Disposition and delivers it the Seller's Solicitors; and
>
> 2. ……
>
> 3. makes an application to the Land Register on form RX1 for a restriction to be entered onto the proprietorship register of the Title Number in the form of the restriction set out in Schedule 1."

24. "Disposition" is defined in clause 1.1 as meaning:

> "one or more of the following in respect of the Property whether by the registered proprietor of the Property or by the registered proprietor of any Security:
>
> (a) the transfer or assent of part of Property (but not the whole of the Property), whether or not for valuable consideration;
>
> (b) the grant of a lease of more than 20 years of the whole or any part of the Property;
>
> (c) the grant of a lease for redevelopment of the Property whether pursuant to section 19(1)(b) of the Landlord and Tenant Act 1927 or otherwise, in each case whether or not for money's worth to an independent party at arm's length; or
>
> (d) the grant of Security over the whole or any part of the Property".

25. Schedule 1 comprises the following words:

> "**Land Registry restriction**
>
> No disposition of the registered estates by the proprietor of the registered estate, or by the proprietor of any registered charge, not being charge registered before the entry of this restriction, is to be registered without a certificate signed by Rolf Hugo Manning of ….. or its conveyancers that the provisions of [date and description of this Agreement] have been complied with or that they do not apply to the disposition."

26. By clause 2.3 of the OA, Fairhaven agreed without qualification to apply to enter a restriction on the registered title in that form.

27. Schedule 2 contains a draft deed of covenant to be made the Successor and Mr Munding, under which it covenants (essentially) to comply with Fairhaven's obligations in the OA and Mr Munding covenants to comply with his obligations. The Successor further covenants in its own right to apply to the Land Registrar to enter a new restriction on the title to the Property in terms of Schedule 1 to the OA.

28. Clause 2.5 provides:

> "**Duty of Good Faith**
>
> The Buyer and separately the Company acknowledge that each of them owes the Seller a duty of good faith when taking any action or deciding to refrain from taking any action under the terms of this Agreement."

29. Mr Munding's rights to overage, so long as they continued, were therefore to be protected by preventing the making of a Disposition, as defined, unless the disponee covenanted to comply with Fairhaven's overage obligations.

APPROACH TO INTERPRETATION

30. There was, unsurprisingly, no dispute about the law applicable to the interpretation of these provisions in the three contracts, but there was some disagreement about how the agreed principles applied to the facts of the OA and the PA and the result of correctly applying them.

31. As for the applicable principles of interpretation, I gratefully adopt the summary of the well-known and often-cited decisions of the Supreme Court by Carr LJ in EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA Civ 844; [2022] 1 WLR 717:

> 56. The relevant well-known legal principles of contractual construction are non-contentious and to be found in a series of recent cases, including Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; Arnold v Britton [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] AC 1173.
>
> 57. In summary only then, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties'

subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (see Rainy Sky SA v Kookmin Bank (*supra*), at paras 21 and 23).

58. In Wood v Capita Insurance Services Ltd (*supra*), at paras 9–11 Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

ISSUE (1): WAS THE TRANSFER A "DISPOSAL"?

32. In the Decision, the FTT referred to the underlying authorities cited by Carr LJ, highlighting the particular passages on which Mr Munding relied for his contention that the proposed sale to SWL was not a "Disposal" within the meaning of the PA.

33. As previously indicated, the critical part of the definition of "Disposal" is the words following the comma, namely: "*whether or not for money's worth to an independent party at arm's length*". For the full context, see [16] above.

34. Mr Pay, for Mr Munding, contended that the words "whether or not" were to be read as governing only the words "for money's worth", and that the definition was not to be read as including transactions whether or not they were proposed to be made with an independent party and whether or not they were negotiated at arm's length. A Disposal was therefore only a transaction that was proposed to be made with an independent party (which SWL was not) and if it was an arm's length deal (which the proposed transaction with SWL was not).

35. Mr Blohm QC, for Fairhaven, contended that, on the contrary, the words "whether or not" govern all the words that follow them in the clause, and that a transaction of the types identified in the first part of the definition was therefore a Disposal whether or not it was for money's worth, whether or not it was with an independent person and whether or not it was negotiated at arm's length. That being so, the Grantor's Notice dated 15 November 2017 was correctly served. It was for the sale of the whole of the Property, and so, 8 weeks after service, Mr Munding's pre-emption rights in relation to the whole of the Property terminated, there having been no acceptance of the offer.

36. The FTT rejected an argument on behalf of Fairhaven that, owing to the way in which a single comma was used before the relevant clause and no comma within it, there was no

ambiguity in the definition of Disposal, and so there was no occasion to weigh the commercial purpose of the clause or the consequences of one or other interpretation being correct. It considered that commas (present or absent) could not be regarded as decisive and that patent ambiguity arose from the two possible interpretations of the relevant clause itself.

37. The FTT concluded that the reference in the definition to transactions to an independent party at arm's length demonstrated that the draftsman was aware of the risk of collusive agreements calculated to defeat pre-emption and overage rights and was seeking to address that risk. It referred to a text, *Hewitt on Joint Ventures*, cited by Mr Pay, in which there is a discussion of the types of restriction that might be included in company share sale agreements to give an effective right of pre-emption to a party, in particular to address the risk of side deals with a third party purchaser and poison pills aimed at the party with the purchase rights. The text suggests ways in which protection against such matters may be conferred, including that any offer from a third party should be from a *bona fide* unconnected person acting at arm's length.

38. The FTT stated at para 42.2:

> "I consider that such concerns were being addressed in the definition of "Disposal" and that as a matter of commercial common sense the most likely reason for the inclusion of the words "to an independent party at arm's length" was to guard against transactions that might be collusive, that is, were not to an independent party at arm's length. There is no other plausible reason for referring to such matters in the definition. On Fairhaven's interpretation, however, it makes no difference whether or not the transaction is to an independent party at arm's length.".

39. The FTT's further reason for preferring the interpretation advanced on behalf of Mr Munding – that is to say that the words "whether or not" governed the words "for money's worth" only and that a "Disposal" therefore had to be an arm's length transaction to an independent party – were given in para 42.4:

> "As noted by Mr. Bloom in his skeleton argument, the words "whether or not for money's worth" add something to the definition. Whereas "sale" normally means a transfer of property in exchange of money, "money's worth" extends to all forms of non-monetary consideration so that that the definition is thereby widened to any sale for contractual consideration. In contrast, on Fairhaven's construction – where the words "whether or not" also qualify "to an independent party at arm's length" – this adds nothing to the definition. On that reading, the words "to an independent party at arm's length" are as Mr. Pay submitted, a mere pleonasm, since if they were omitted, there would be no difference in the range of transactions covered by the definition; a sale to a party who is not independent and/or which is not at arm's length would not be excluded by the definition in either case. On Mr. Munding's construction, such words do add something by way of limiting the range of transactions, adding an additional requirement. A construction in which words serve some purpose is generally to be preferred to one where they are redundant.

40. In support of the FTT's decision, Mr Pay argued that an agreement to pay overage – which the PA and the OA were seeking to protect – was always vulnerable to abuse and that it was

obvious, commercially, that the parties intended only arm's length, unconnected transactions to give rise to the pre-emption machinery. It made no sense to leave Mr Munding exposed to the risk of collusive related party transactions (e.g. a high price offered to Mr Munding that would not be paid by the third party). He submitted that an overly technical, grammatical approach to interpretation should not be taken, and that if the definition were syntactically correct and had the meaning contended for by Fairhaven there should have been (but is not) a second comma after the words "arm's length".

41. In my judgment, the FTT, while right to consider that there is an ambiguity in the language of the definition of "Disposal", accepted too readily the suggestion that the words in dispute were intended to prevent collusive avoidance of the right of pre-emption and therefore the definition was limited to transactions to an independent party at arm's length. My reasons follow.

42. As for the ambiguity, I am unable to accept Mr Blohm's argument that the particular use of commas in the definition puts the meaning of the relevant clause beyond doubt. There is in fact only one comma, where in accordance with generally understood correct usage there should have been others, at least one after the word "Property", where it appears for the third time, and one after the words "arm's length". The single comma therefore appears to have been used to emphasise to the reader that all the different types of disposal previously listed were governed by the words starting "whether or not". The absence of a comma after the words "money's worth" seems to me to be consistent with the drafting style in the definition and indeed the PA as a whole, where punctuation (including commas) is generally avoided, and it cannot be read as obviously being a deliberate omission aimed at identifying as a single conceptual unit the words following the comma, as Mr Blohm submitted.

43. In any event, as Lord Hodge JSC stated in Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 at [37], there are no set rules for the use of commas in this type of clause and so the use of commas is not a strong pointer to the correct interpretation, particularly if the drafting is erratic. In the 21st Century, with writing and drafting styles being so variable, it seems to me to be generally inappropriate to allow their use to determine the meaning of a contract without regard to the other interpretative considerations described in the decisions of the Supreme Court.

44. Further, the PA is not a model of drafting and perfect syntax, which might otherwise encourage one to attribute significance to the use of punctuation. Clauses 2.2 and 3 introduce the concept of a Qualifying Event, which is unnecessary given the terms of clauses 5 and 6; clause 4.2 is defective because it omits crucial wording of the intended restriction; clause 7 includes three slightly different, apparently inconsistent provisions purporting to state the circumstances in which Fairhaven could proceed to sell to a third party and those in which it had to serve a new Grantor's Notice; and the definition of "Disposal" itself includes the words "pursuant to", in the phrase "whether pursuant to section 19(1)(b) of the Landlord and Tenant Act 1927", when what is meant is "falling within" or "as defined in". The draftsman appears to have eschewed punctuation in the main, so it is hard to draw a clear conclusion from the absence of a comma.

45. As for collusion, there was no evidence that this was a matter of particular concern in the circumstances of the SPA, or that the parties were likely to have had recourse to texts on joint ventures when drafting the SPA, PA and OA. In para 42.2, the FTT wrongly equates all transactions that are not to an independent party at arm's length with collusive transactions. What protection for Mr Munding's right of pre-emption the parties agreed to provide was a question to be answered by reference to the terms of the three contracts considered as a whole, rather than from suggestions made about the use of expressions such as "bona fide", "arm's length" and "unconnected" in a textbook. It is self-evident that the terms of the PA and OA are intended to protect Mr Munding's rights, but the relevant question is: what protection was agreed?

46. The FTT concluded, accepting the submission of Mr Pay, that the words "whether or not for money's worth" were not superfluous but served a distinct purpose, namely to include within the machinery of the PA Disposals that were to be made for valuable consideration other than cash. However, it concluded that the words immediately following "money's worth" were pleonasms, having no meaning or significance, unless it attributed to them the different purpose of excluding transactions that carried a risk of a collusion by Fairhaven and others. Since that appeared to be the only meaning that prevented the words being pleonastic, the FTT held that their meaning was that a Disposal had to be "to an independent party at arm's length".

47. I am not clear why the FTT considered that the expression "whether or not for money's worth" served a meaningful purpose in the definition but the words "whether or not … to an independent party at arm's length" could not. The expression "whether or not for money's worth" is notably not the more familiar expression "whether for money or money's worth". Strictly, as Mr Blohm QC submitted, the words "whether or not for money's worth" do not serve any purpose in delimiting the nature of a Disposal, since both transactions that were for money's worth and transactions that were for any other or no consideration are thereby described. But, what the words are obviously intended to do, for the avoidance of doubt, is make clear that a transaction for non-monetary consideration can fall within the definition of "Disposal".

48. The same is surely true if the words "whether or not" also govern "to an independent party at arm's length". In accepting the argument that in the one case the words "whether or not" served a purpose but in the other the expression would be pleonastic, the FTT fell into error, in my judgment. In both cases, the words can be argued to be superfluous but in both cases they can be understood as indicating, for the avoidance of doubt, that a transaction with the stated characteristics was not excluded from being a Disposal. Whether that is what the parties objectively meant by the phrase, or whether they meant the opposite as regards transactions to a connected person or not at arm's length, is the ambiguity to be resolved by the iterative process of interpretation explained by the Supreme Court.

49. The fact that a transaction "for money's worth" and not just for cash could be a Disposal is, however, of some significance in addressing Mr Pay's argument about how the ambiguity should be resolved. If the FTT was right about the disputed words being intended to prevent collusive avoidance of Mr Munding's rights, the fact that a Disposal could be for money's worth is rather startling. It means that the Property could be sold to an independent third party in return for the issue of shares, or share options, by that person, or in exchange for

other property owned by them. Such a transaction would require Fairhaven to serve a Grantor's Notice specifying that consideration as the price, but in many or most such cases Mr Munding would be unable to pay that price and would therefore be unable to exercise his pre-emption right.

50. The content and structure of the PA as a whole also suggests that the purpose of the definition of Disposal was not to exclude dispositions between connected parties or transactions not negotiated at arm's length, but rather to include them.

51. Mr Munding's right of pre-emption is protected by a restriction preventing registration of a disposition unless the terms of clause 5 of the PA have been complied with *or do not apply to the disposition*. If certain types of disposition are excluded from the definition of Disposal, such that a Grantor's Notice does not have to be served in relation to them, Fairhaven is entitled to proceed to make those dispositions. Critically, there is no restriction in any of the three agreements on Fairhaven making a disposition that is not a Disposal. The terms of the restriction registered pursuant to the PA would not entitle Mr Munding to withhold a certificate, because clause 5 of the PA does not apply to excluded dispositions or transactions: it only applies to Disposals, as defined. That means that, if Mr Munding is right, Fairhaven is entitled under the PA in any event to make an excluded disposition, such as a related party transaction.

52. The PA does not of course operate in isolation but in in tandem with the OA, conferring overage rights on Mr Munding. These are protected in a similar way to the pre-emption rights under the PA. The protection is that certain types of disposition may not be made by Fairhaven without causing the disponee to enter into a new deed of covenant with Mr Munding, replicating the overage obligations. The definition of "Disposition" in the OA is not the same as "Disposal" in the PA. The draftsman of the OA, who appears to be a different person from the draftsman of the SPA and PA, has clearly had regard to the terms of the PA and the definition of Disposal, but has drafted bespoke provisions to protect Mr Munding's overage rights.

53. In particular, a transfer of the whole of the Property is not a "Disposition". That is likely to be because, if pre-emption rights under the PA were taken up, Mr Munding would become the owner of the Property, whereas if they were not taken up the OA would terminate: cl. 5.1.1. of the OA. Transfers or assents of parts of the Property are "Dispositions" whether or not they are for valuable consideration. Agreements to transfer or grant a lease are not included in the definition of "Disposition", probably because they would not themselves result in a change in the registered proprietor. What is included is:

> "the grant of a lease for redevelopment of the Property whether pursuant to section 19(1)(b) of the Landlord and Tenant Act 1927 or otherwise, *in each case whether or not for money's worth to an independent party at arm's length*".

The italicised words and the inaccurate use of "pursuant to" are the same as in the definition of "Disposal" in the PA.

54. Mr Blohm submitted that the draftsman's use of the same words in the OA is significant, in that Mr Munding's protection under the OA machinery will be greater the wider is the

meaning given to the definition of "Disposition". Further, the words must have been intended to have the same meaning as the identical clause in the definition of "Disposal". If the clause excluded transactions with related parties or that were not negotiated at arm's length, then on such a transaction there would be no obligation on Fairhaven under the OA to obtain a deed of covenant from a related lessee under a redevelopment lease. That, he submitted, was an indication that, in the definition of Disposal, the parties intended the extent of transactions falling within the definition to be wide and include related party transactions and ones negotiated otherwise than at arm's length. This argument was not made to the FTT and so is not addressed in its decision.

55. It is correct that upon a transfer or sale of an interest in the Property that is not a "Disposition", Fairhaven has no requirement to obtain a deed of covenant from the transferee. It might be said that the use of a lower case 'd' in the word "disposition" in clause 2.1.2 of the OA was deliberate and intended to impose a further fetter on other disposals, but I do not consider that to be correct. Clauses 2.1.1 and 2.1.2 contain obvious mistakes; "disposition" is not used elsewhere in the OA as having a broader meaning than "Disposition", as defined; and the machinery for protection of overage rights is that set out in clause 2.2, as reflected in the wording of the restriction, which contemplates that there may be made a disposition to which clause 2.2 does not apply. See also clause 4.1 of the PA, by way of comparison.

56. The restriction registered at the Land Registry only protects Dispositions falling within clause 2.2 of the OA, i.e. those where a deed of covenant and an application for a further restriction are first required to be made by the transferee. Mr Munding would therefore be bound to accept that clause 2.2 did not apply to a redevelopment lease to a connected person, if his argument about the meaning of Disposal is right. Such a lease could very well give rise to the grant of planning permission within the overage period for a valuable redevelopment of the Property. The restriction on registration would not apply and no deed of covenant would be made. That would not be the case, and Mr Munding would be better protected, if dispositions to related parties or not at arm's length were Disposals.

57. For essentially six reasons, I therefore conclude that the FTT was wrong to conclude that the SWL transaction was not a "Disposal" within the meaning of the PA:

    (1) First, as I have already explained, the reasons given by the FTT for its conclusion are unpersuasive and seem to me to be unjustified.

    (2) Second, the more natural reading of the words in dispute, in the context of the whole definition of "Disposal", is that the phrase "in each case whether or not for money's worth to an independent party at arm's length" is a single composite, in which each of the three components are governed by the words "whether or not", with the single purpose of making clear that all such types of disposition are within the definition of "Disposal". A less natural reading is that it comprises two different provisions, one of which broadens the definition of Disposal and the other narrows it. Given that there is ambiguity, the natural reading of the clause is not necessarily the answer and one must consider the context of the three agreements and the commercial purpose served by the definition in that context, and the consequence of one or other possible interpretation being correct.

(3) Third, the commercial purpose of protecting Mr Munding's pre-emption and overage rights is as well if not better served by including related party transactions in the definition of Disposal, for the reasons explained above. If not included, there would be no pre-emption rights for him in relation to such a transaction. That might be of no consequence if other transactions were forbidden, but they are not, and the intended Land Registry restriction (assuming that it was registered in the terms that the parties intended) does not protect Mr Munding against a registrable disposition that is not a Disposal to which clause 5 of the PA applies. It therefore cannot be said that the commercial purpose of the PA supports Mr Munding's interpretation.

(4) Fourth, the same clause in the definition of "Disposition" in the OA must have been intended to have a wide meaning, including related party transactions, otherwise there would be no deed of covenant required by a related party redevelopment lessee, thereby enabling Fairhaven easily to grant a long redevelopment lease to a group company. While that would still leave Fairhaven's obligation to pay overage in place, the protection provided to Mr Munding by the OA depended on the obligation passing to the beneficial owner of the Property rather than resting with Fairhaven's and the Alfords' personal obligations.

(5) Fifth, some measure of protection against abusive or collusive conduct was provided by the good faith obligation assumed by Fairhaven and the Alfords in clause 2.5 of the OA. This applied when they took any action or decided to refrain from taking any action under the terms of the OA. While it can be said that this would not apply to protect pre-emption rights on a transfer of the whole of the Property or on agreements to sell or grant leases, it is nevertheless an additional component in the protection of Mr Munding's overage rights. It is part of the protective structure that was in fact agreed by the parties.

(6) Sixth, the mere fact that Fairhaven's interpretation leaves open the possibility of collusive avoidance does not mean that it is the wrong interpretation. Because of the proprietary interests involved, it is difficult to draft a wholly watertight contract of this type, protecting a party against fraud and collusion. How far the parties go in providing such protection depends on their perceptions of the risks, when they are negotiating, and what they are able to agree. There is no standard drafting that avoids all risk.

58. I therefore conclude that the sale of the Property to SWL for £4,000,000 was a "Disposal" within the meaning of the PA.

ISSUE (2): WERE THE TERMS OF THE SALE TO SWL LESS FAVOURABLE TO FAIRHAVEN THAN THE TERMS OFFERED TO MR MUNDING?

59. Whether Mr Munding lost his rights under the PA and the OA, by not accepting the offer made in the Grantor's Notice, therefore depends on whether the FTT was right to conclude that the contract and Transfer were not "on terms no less favourable" to Fairhaven than the terms that were offered to Mr Munding in the Grantor's Notice. If the terms were no less

favourable then the Transfer was valid and Mr Munding's rights under the PA and the OA were extinguished. If the terms were less favourable, his rights were not extinguished.

60. Under the standard conditions of the contract with SWL, as in the terms offered to Mr Munding in the Grantor's Notice, a deposit of 10% was payable no later than the date of the contract. Under standard condition 9.4, the amount payable on completion was the purchase price less any deposit payable to the seller or its agent.

61. The contract with SWL also contained special conditions, which adverted to the restrictions on the title, stated that there was no reason known why Mr Munding should not provide the requisite certificate, but acknowledged a risk that he might not, which was a matter outside the parties' control. Special condition F stated:

> "Due to the above points, the parties agree that execution of the transfer document will be deemed as completion and full transfer of the property, however, payment for the sale price is agreed to be deferred until registration of title is confirmed. Although not anticipated, if there is a significant delay in the ability to register title, the ongoing mechanics of this will be agreed between the parties."

62. Thus, whereas Mr Munding would have been required to pay the purchase price on completion, SWL was not required to do so: it was not required to pay it until its registration as proprietor of the Property was confirmed or the parties agreed otherwise. This did not mean that completion did not take place, as special condition F expressly states. So SWL would become the equitable owner of the Property on completion, entitled to possession and the income of the Property as against Fairhaven, but would not have to pay for those benefits until its title was registered.

63. The FTT heard evidence to the effect that SWL had not in fact paid the deposit due under the contract and it was accepted by Mr Rogers, the witness on behalf of Fairhaven, that it was not intended that SWL would do so. Mr Munding submitted that this amounted to a side agreement between SWL and Fairhaven, such that the terms agreed between Fairhaven and SWL were less favourable to Fairhaven, as it would not receive £400,000 on the date of the contract. Alternatively, Mr Munding argued that the terms of special condition F override the obligation in the general conditions to pay a 10% deposit on exchange of contracts.

64. The FTT accepted Mr Munding's argument that the terms agreed with SWL were less favourable to Fairhaven. It decided that, comparing the position of Fairhaven under a contract with Mr Munding with its position under the contract with SWL, the position was clearly less favourable to Fairhaven under the SWL contract because Fairhaven might not receive the purchase price for a substantial time. It was clearly a benefit to Fairhaven to be paid the price on completion rather than at an uncertain time in the future, if at all. The FTT held, however, that the terms of the contract with SWL required payment of a 10% deposit and that Mr Rogers' understanding and intention that the deposit would not in fact be paid at that time was irrelevant to the question of whether the terms of the contract with SWL were less favourable to Fairhaven.

65. It is convenient to deal with the deferred payment issue first.

66. Mr Blohm submitted, as he did to the FTT, that the difference in the terms only reflects the fact that completion and registration of a sale to Mr Munding was necessarily different from completion and registration of a sale to a third party: Mr Munding was the person whose certificate was required before registration could take place. Whereas Mr Munding would obviously provide the certificate on a sale to himself, he might not do so on a sale to a third party. A third party would be under no duty, as Mr Munding would have been, to cooperate in the removal of the restriction. It would therefore, to that extent, be advantageous for Fairhaven to sell the Property to Mr Munding.

67. The terms agreed with SWL simply reflected that reality, and overall they were no less advantageous to Fairhaven. The terms agreed with SWL were to address an issue that had to be addressed, given the existence of the restriction that was registered pursuant to the PA. Many or most third parties might be unwilling to exchange contracts and pay a deposit until the restriction was removed. So the terms agreed with SWL were, if anything, more favourable to Fairhaven than any other third party sale contemplated by clause 7.1 of the PA.

68. I agree that there was necessarily a difference between a contract and completion with Mr Munding and a contract and completion with a person other than Mr Munding. I can accept that many third party purchasers would not have been prepared to go as far as SWL went in exchanging contracts and becoming liable to pay a deposit and complete, subject to title matters. However, the relevant comparison is not whether the terms agreed with SWL were more advantageous to Fairhaven than the terms likely to be agreed with other purchasers: it is whether the terms agreed with SWL were no less favourable to Fairhaven than those offered to Mr Munding.

69. In effect, Mr Blohm's argument is that an unavoidable difference between a sale to Mr Munding and a sale to another person should be disregarded, in making the comparison that clause 7.1 requires. I cannot accept that argument. The terms of clause 7.1 are unambiguous and require a direct comparison between the terms offered to the third party and the terms set out in the Grantor's Notice. It is accepted by both parties that the right test is that posited by clause 7.1, despite the slightly different formulations in clauses 7.2 and 7.3. As the FTT recognised, the same term as to payment on registration could have been offered to Mr Munding (or the restriction could first have been removed so that the third party would agree to pay on completion), so there is no necessity to read down the words of clause 7.1 to make the machinery work. Nor is there any warrant for implying a disregard of differences in the positions of Mr Munding and any other purchaser.

70. That being so, the answer to the question whether the terms of the sale to SWL were no less favourable to Fairhaven than those set out in the Grantor's Notice is clear: they were not, because Fairhaven's receipt of the purchase price was delayed, there being no certainty about when or if it would be paid. The FTT reached the right conclusion for the reasons that it gave, briefly, in para 57 of its decision. As a result, the Transfer was not a Disposal that extinguished Mr Munding's pre-emption right and therefore the restriction would remain in place.

71. That conclusion makes it unnecessary for me to decide the remaining issue about the 10% deposit. I will however indicate, briefly, that it seems to me that the FTT reached the right conclusion on this issue too. It was entitled to conclude, having heard Mr Rogers' evidence, that there was no tacit variation of the written contract with SWL merely because a director of Fairhaven and SWL intended that the deposit would not be paid. As the FTT said, the relevant comparison is the terms of the contract and the Grantor's Notice, not what Mr Rogers intended or believed. As a matter of interpretation of special condition F, in the context of a contract that provides for payment of a 10% deposit on exchange, what is deferred is not the payment due on exchange of contracts but the "sale price" that was otherwise due to be paid on completion. That sum is the purchase price less the deposit that has been paid. The fact that Mr Rogers did not intend to pay the deposit in any event does not affect the objective interpretation of the special condition.

DISPOSAL

72. Despite my conclusion in favour of Fairhaven on Issue (1), its appeal is dismissed because the FTT came to the right conclusion on Issue (2).

Mr Justice Fancourt

27 September 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.