

[2014] EWHC 4737 (CH)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Civil Justice Centre,
The Priory Courts,
33 Bull Street,
Birmingham B4 6DS

Tuesday, 9 September 2014

BEFORE:

HIS HONOUR JUDGE PURLE QC
(Sitting as a Judge of the High Court)

BETWEEN:

GET NOMINEES LIMITED

Claimant

- and -

TRINITY WELSH HOMES LIMITED

Defendants

MR J BRENNAN (instructed by Lanyon Bowdler LLP) appeared on behalf of the Claimant.
MR M ROBERTS (instructed by Pritchard Jones Lane) appeared on behalf of the Defendant.

Judgment

(As Approved)

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Tuesday, 9 September 2014

J U D G M E N T

THE JUDGE:

1. This is the trial of an action under which the claimant seeks specific performance of an agreement made between itself and the defendant dated 22 June 2010 relating to a freehold property at Bethel Road, Caernarfon, Gwynedd for a sum of £613,500. The claimant was the seller, and the defendant was the buyer.
2. There were complicated provisions within the agreement concerning applications to be made for planning permission. There was also express provision concerning what was to happen if planning permission was not satisfactorily obtained. In very broad terms, the failure to obtain satisfactory planning permission gave rise to what the contract described as an “event of default”, which is a little difficult to get one’s head round at first, because the definition of an “event of default” required one to look, not to an event, but to a non-event, namely there being no final, unappealed grant of planning permission by a specific date, which in this case was 21 June 2013 (referred to as the “termination date”).
3. I have summarised broadly the nature of an event of default. The precise details do not matter, as it is common ground that by 21 June 2013 an event of default had by then, but not earlier, occurred. The consequences of that were dealt with in a schedule to the sale contract. Clause 2.1 of that schedule provided as follows:

“2.1 If an event of default shall occur either the seller or the buyer shall have the right to rescind this agreement by notice in writing given within 14 (fourteen) days of the event of default to the other party (as the case may be) whereupon this agreement shall immediately determine but without prejudice to the accrued rights and liabilities of any party against the other parties and the parties shall not be entitled to be paid any costs or compensation whatsoever.”
4. Clause 2.2 went on to provide:

“If either party exercises his right to rescind under paragraph 2.1 the seller will be entitled to retain the deposit and all accrued interest...”
5. Clause 2.3 made consequential provision for the cancellation of any entry made in the register of title.
6. Clause 4.1 of the schedule further provided as follows:

“4.1 Completion of the sale and purchase of the property and payment

of the balance of the purchase price in the sum of £613,500 by the buyer to the seller shall take place on the completion date as defined in this schedule being the date 14 days after whichever is the earlier of the operative date and the termination date on or before 2.00 pm at the offices of the seller's solicitors or where they may reasonably direct."

That 14 days also ran, in the events which happened, from 21 June. Accordingly, there was a 14-day period, at the end of which completion was to take place, but during which either party had the right to rescind.

7. The question is whether time is of the essence under clause 2.1. It is not, in my judgment, the position, nor do I think it was seriously suggested, that time was of the essence of the completion date, notwithstanding some tinkering with the special conditions in this case, disapplying condition 8.1.1 of the Standard Commercial Property Conditions (2nd Ed) which expressly provides that time is not of the essence of the contract unless a notice to complete is served. Even without that, time did not become the essence of the obligation to purchase without service of a completion notice, because there was nothing else, despite the disapplication, to make it so.

8. What in fact happened is that on 10 July 2013 the claimant's solicitors wrote as follows to the defendant's solicitors:

"As the termination date defined in the contract was 21 June 2013, and as neither party has rescinded the contract, completion should now take place immediately. Please confirm that you are in a position to complete.

We enclose the engrossment of the transfer in duplicate in order that we may retain the duplicate executed by your client on completion."

9. That was answered the next day by the defendant's solicitors, who wrote as follows (in the material part):

"Please accept this letter as notice to rescind the agreement on behalf of Trinity Welsh Homes Limited. Your client may retain the deposit and any accrued interest.

Your client is well aware of the difficulties by our client in complying with the planning permission condition of the contract.

In the contract dated 22 June 2010 time has not been made of the essence to rescind the agreement and it has not been made of the essence since. Our client is therefore perfectly entitled to rescind the agreement at this stage, despite the fact that the purported completion

date has passed.”

10. On 31 July the claimant’s solicitors replied:

“Thank you for your letter of 11 July. Although time is not of the essence of the contract in respect of the contractual completion date, we do not agree that time is not of the essence in connection with the specific provisions as to rescission. Accordingly, we do not accept your notice to rescind the contract.

Our client is ready, willing and able to complete and we hold a transfer executed on behalf of our client company. Accordingly we enclose a completion notice together with a duplicate which kindly receipt and return.”

11. The completion notice is not something which I need to read, and was strictly only necessary for the purpose of making time of the essence for completion and thereby enabling the seller, if it thought fit, to rescind. The seller has not rescinded, but instead challenges the right of the buyer to have rescinded at the time when it purported to do so.

12. Thus, the only issue for my decision is whether or not time is of the essence of the right to rescind under clause 2.1 of the schedule. That schedule grants rights to both parties. Mr Roberts, for the defendant, says that it follows from the general approach of the law, informed as it is now by the practice of the former courts of equity, not in general to treat time stipulations as being of the essence of any particular provision of a contract. Mr Brennan, for the claimant, does not dispute that general approach, but contends that, as regards this particular clause (clause 2.1) the parties must be taken to have intended that time should be of the essence. This clause is, he said, like a pair of options, and everyone knows that options have to be exercised strictly in accordance with their terms, and that time is of the essence. In Di Luca v Juraise Springs Limited & Others [1998] 2 EGLR 125, Nourse LJ said at page 126 that, in regard to options to purchase land, the rules were so well-established that they needed no explanation. That particular comment was prompted by counsel for the appellant’s reliance on certain observations of Lord Diplock in United Scientific Holdings v Burnley Borough Council [1978] AC 904, in which the House of Lords held that time was not usually of the essence in relation to timetables specified in rent review provisions in leases (though subsequent drafting techniques may have limited somewhat the impact of that particular decision). At page 929C Lord Diplock said:

“Again I will refrain from repeating the more elaborate juristic analysis of the distinction between the two types of contract that I attempted in the *United Dominions Trust* case [1968] 1 WLR 74, pp 83-4. A more

practical business explanation why stipulations as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end.”

13. Counsel in the Di Luca case relied upon those observations as a basis for submitting that the rule did not apply where it could be shown that the grantor did not reasonably need to know with certainty the date when the option period had come to an end. That approach was summarily rejected by Nourse LJ with the comment that I have already mentioned.
14. Mr Brennan also took me to certain passages in the United Scientific Holdings case, again from the speech of Lord Diplock. In that case, Lord Diplock distinguished between (on the one hand) provisions which would bring into being (or bring to an end) a contractual relationship and (on the other hand) provisions such as a rent review clause which, as explained at 930C, neither brought into existence a fresh contract, nor put an end to one that had existed previously. It was for that reason that rent review clauses could not, in general, be equated with options or break clauses, which Lord Diplock recognised, at page 929F, as in general creating obligations where time is of the essence.
15. Mr Roberts in this case laid considerable emphasis upon the fact, as he put it, that both the seller and the buyer had mutual rights under clause 2.1, so that the case could not, on that argument, be likened to a unilateral right (such as an option or break clause) requiring strict compliance.
16. The reason for Mr Roberts’ approach can be seen from passages in the standard textbooks.
17. Thus, in Megarry and Wade, the Law of Real Property (8th Ed), it is said at paragraph 15.09.7:

“Time is of the essence where a contract is unilateral, such as an option under which it rests with one party to take action by a certain date if the other party is to be placed under an obligation.”
18. That was dealing with an option and not a break clause, but it is clear that the same considerations apply when the right of one party to terminate a contract is

conditional upon service of a notice by a particular date so as to relieve that party of his obligations under the existing contract.

19. Likewise, in Lewison's *The Interpretation of Contracts* (5th Ed), it is said:

“Under contracts which are only unilateral one party (the promisor) undertakes to do or refrain from doing something on his part which any party (the promisee) does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing. The commonest contracts of this kind are options granted for good consideration to buy or to sell land or other property or to grant or to take a lease, competition for prizes, and the like.”

He then goes on to consider the theoretical and practical reasons for this rule.

20. It is desirable not to get bogged down in terminology in areas such as the present. The answer to the question does not, in my judgment, depend upon whether a particular clause can be described as unilateral or mutual. Insofar as it is necessary to describe clause 2.1, it is clear that both the seller and the buyer are given the same right, but the construction cannot be any different from what it would be if only one of them were given that right. Either of them might have exercised the right to rescind timeously, of its own initiative, without any cooperation from the other. Had the person seeking to exercise the right to rescind been the only party upon whom that right was conferred, the analogy with a unilateral break clause would be complete, and time would clearly be of the essence. The construction (and result) cannot be different just because they each had a right to rescind, which either of them could exercise.
21. Accordingly, this clause does, in my judgment, have more of the flavour of an option or break clause, where time is of the essence. That is rather borne out by the fact that the draftsman of the agreement carefully provided for the completion date in clause 4.1 to coincide with the date of expiry of the rescission period (though perhaps somewhat strangely at 2 p.m rather than the close of business). That meant that rescission might take place later on the same day, in which case completion would no longer be required.
22. Mr Brennan drew my attention to words in clause 2.1 to the effect that any rescission was without prejudice to the accrued rights and liabilities of any party against the other. The last date for completion and rescission was 5 July. In the absence of a rescission by that date, the obligation was to complete, and persisted thereafter. There was no attempt at rescission in the present case until the letter of 11 July, by which time the claimant was pressing for completion and had already tendered an engrossment of the transfer in duplicate. The right to be paid had therefore arisen, and the purported rescission (if effective) was subject to the accrued right of the seller to be paid, and the correlative liability of the buyer to pay. This, in my judgment, confirms that time was of the essence, as it would be a nonsense to suppose that the buyer could both retain a right to rescind beyond the

completion date whilst subject to the accrued liability to pay. In my judgment, the right to rescind within 14 days had to be strictly complied with, and therefore had to be exercised by 5 July 2013 or not at all.

23. Against this, I was referred by Mr Roberts to the decision of Sales J in Alchemy Estates Limited v Astor & Astor [2008] EWHC 2675 (Ch). In that case a right of rescission was held not to have been validly exercised, because it was exercised in circumstances where the person seeking to rescind was estopped from doing so. No question of estoppel arises in this case. In addition, the person seeking to rescind was found (estoppel apart) to have exercised its contractual right to do so too late.
24. The rescission in that case arose out of section 8 of the Standard Conditions, concerning the need to obtain the consent of the landlord to let, assign or sub-let. Either party might rescind the contract by notice to the other party if 3 working days before the completion date the consent had not been given, or had been given subject to a condition to which a party reasonably objected. Sales J, having dealt with the estoppel argument, also considered the interpretation and effect of the Standard Condition, and at paragraph 52 said that this was informed both by the background rules of equity governing the operation of contracts for the sale of land (referring in that connection to Re Hewitt's Contract [1963] 1 WLR 1298 at 1301) and by the general scheme of the Standard Conditions of which that provision formed part. I am not concerned in this case with the operation of the Standard Conditions, but the observations of Sales J are nevertheless pertinent. He noted that there was also provision in the Standard Conditions for service of a notice to complete so as to make time of the essence, including, he observed, in relation to matters of title such as obtaining a landlord's consent for assignment of a lease. He went on to say:
- “The purpose of serving such a notice is to give the recipient fair opportunity to put right any problem which stands in the way of completion. If it were possible for the right of rescission under Standard Condition 8.3.3 to have extended application in the period after the contractual completion date has arrived, allowing a notice of rescission to be served without warning at any stage, it would undermine the general scheme of the Standard Conditions under which reasonable notice is ordinarily required before rescission is possible. This cannot have been the intention of the drafters of the Standard Conditions.”
25. He went on to conclude that Standard Condition 8.3.3 had a very specific object, namely to allow the parties to a sale agreement to assess their respective positions where landlord's consent had not been obtained at a specific point in time a short period before the contractual completion date in order to decide whether they wished to go on with the agreement in circumstances where it had become clear that there might be a difficulty in obtaining such consent. It was a provision which allowed an area of uncertainty as to how a stranger to the contract (the landlord)

might act which remained unresolved in the immediate lead up to the contractual completion date to be brought to a head by either party opting to treat the contract as rescinded on that basis. Thus, certainty could be achieved. He went on later:

“It is significant that the provision creates an option for either party to rescind at that stage, which is to say that it allows for each of them to re-assess in the light of the up-to-date information available at that point the extent of the risks which he will assume if he proceeds with the agreement, and to choose to unwind it if he then decides he does not wish to accept the obligations which the agreement will impose upon him moving forward into the future. I consider that it is clear that neither the drafters of the Standard Conditions nor the parties intended that the effect of a right to rescind arising under standard condition 8.3.3 shortly before the contractual completion date should continue indefinitely thereafter so as to afford each party the potential ability to bring the agreement to an end without any warning at all (no matter how much time, effort and expense the other may have put into working for the proper completion of the agreement after the contractual completion date has passed, and no matter how close they may be to being able to achieve completion). If the right of rescission under standard condition 8.3.3 is not exercised promptly - by which I mean by the contractual completion date (which was found to be acceptable in Aubergine Enterprises) or perhaps a matter of a day or two thereafter - both parties must be taken to have decided that they wish to proceed with the original allocation of risk set out in their agreement.”

26. Later on in paragraph 56 he concluded:

“The contractual right of rescission under the standard condition must be exercised promptly, which means by the contractual completion date or, possibly, within a day or two thereafter.”

27. In both those passages the reference to “a day or two thereafter” was qualified by, in the one case, the word “perhaps”, and, in the other case, the word “possibly”. Moreover, the context was Standard Condition 8.3.3 rather than the Special Condition which the parties have adopted in the schedule in this case. Most noteworthy is that Sales J used the language of an option, and the main thrust of his observations was to reject comprehensively the suggestion that the right to rescind survived for any substantial period after the completion date, and that one of the parties, whilst working towards completion thereafter, might bring the axe down at any time.

28. Much of the language of Sales J, especially the “option” reference, was consistent

with time being of the essence, and the general requirement of notice under the Standard Conditions pointed against extending the unilateral right to rescind indefinitely beyond the completion date. The problem faced by Sales J however was that Standard Condition 8.3.3 did not in terms fix a date by which notice of rescission had to be given. He therefore construed the Standard Condition in context as requiring the right to rescind to be exercised “promptly”, and his reference to a day or two after completion was not a reference to a time after an essential date had passed, but was his identification of the date, given the requirement of promptness, by which time became of the essence. In other words, this was Sales J’s interpretation of the implicit contractual requirement to act “promptly”.

29. None of that, in my judgment, helps Mr Roberts when I turn to the construction of clause 2.1 in the present case. Even assuming that the day or two after completion allowed by Sales J might apply to this case (which I very much doubt) that does not help him. The most extra time that Sales J allowed, and then only “possibly”, was a day or two. What he roundly rejected was that the right could survive substantially beyond the completion date. Accordingly, Mr Roberts’ reliance upon that decision does not assist him at all in this case, as the obligation to complete and the expiry of the right to rescind occurred on the same day, and the right to rescind was not exercised for another week. In addition, it is not necessary to search for what is meant by “promptly”, because in this case (unlike in the Alchemy case) the contract expressly provided for a maximum 14 day period for exercising the right to rescind.
30. It follows from the foregoing observations that time was in my judgment of the essence of clause 2.1.. Both parties are properly to be regarded as intending the right of rescission to be exercised within the time limited for such exercise, or not at all. There were (conventionally expressed) two unilateral rights which either party might exercise, and the position is the same as in the case of a simple option or break clause. Strict compliance was required.
31. In those circumstances, the claimant is entitled to succeed. Although I have not yet heard argument on the point, in the light of that conclusion I apprehend that it is unlikely that there will be any dispute as to a second matter claimed by the claimant, which is the cost of its own notice to complete in the princely sum of £100.
32. I will now hear counsel as to the consequences of this ruling.
