



Neutral Citation Number: [2024] EWHC 1637 (Ch)

Case No: CH-2023-BRS-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)

On appeal from the County Court at Gloucester and Cheltenham
Mr Recorder Edwards

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 27/06/2024

Before:

MR JUSTICE ZACAROLI

Between:

RARITY HOLDINGS LTD

Appellant

- and -

DAVID SAMUEL PARKHILL

Respondent

Daniel Black (instructed by **Hacking Trust Legal Services**) for the **Appellant**
Charlie Newington-Bridges (instructed by **BPE Solicitors LLP**) for the **Respondent**

Hearing date: 13 June 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on Thursday 27 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Zacaroli:

1. This is an application for permission to appeal, with the appeal to follow if permission is granted, from the decision of Mr Recorder Edwards, sitting in the County Court at Gloucester and Cheltenham.
2. At the end of the hearing, on 13 June 2024, I announced my decision to refuse to give permission to appeal, with short reasons to follow. These are my reasons.
3. The appellant, Rarity Holdings Ltd (“Rarity Holdings”) entered a property owned by it at 33 The High Street, Chipping Sodbury (the “Property”) into a public auction to be held on 15 April 2021.
4. The Respondent (“Mr Parkhill”) became aware that the Property was for sale. Prior to the public auction, he contacted the vendor’s agent and made an offer to purchase the Property. His initial offer of £270,000 was refused, but on 14 April 2021 his increased offer of £275,000 was accepted.
5. By email timed at 16:09 on 14 April 2021, the vendor’s agent sent the contract to purchase, and said: “to remove the property from tomorrow’s auction I will need your authority to exchange contracts and balance of deposit before 6pm this evening.” The form of words for the authority to exchange contracts was set out, and the email continued: “I would then proceed to sign the contracts on your behalf and scan a copy back to you confirming the exchange – at that point your deposit funds would no longer be refundable and you will secure the property prior to auction.” In an email sent 20 minutes later, Mr Parkhill duly provided the requested authority.
6. Over the course of the next few weeks, Mr Parkhill discovered matters – including additional charges and a lower than advertised yield on rental income – which led him to seek to withdraw from the agreement. Rarity Holdings served a notice to complete, which Mr Parkhill’s solicitors rejected on the grounds that the contract was invalid as it did not comply with s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (“s.2(1)”). The auctioneers sent Mr Parkhill a notice on 23 June 2021 purporting to rescind the contract, although in fact the Property had already been sold at another auction held on 18 May 2021.
7. Mr Parkhill sought the return of his deposit. In an extempore judgment at the trial on 5 June 2023, the learned Recorder concluded: (1) the contract was void because it failed to comply with s.2(1) (by reason of the fact that the written agreement did not incorporate all the terms the parties had expressly agreed); (2) the contract was not made at a public auction (and was not, therefore, exempt from s.2(1)); and (3) the consideration for the payment of the deposit had wholly failed, so that Mr Parkhill’s claim in restitution to recover the deposit succeeded.
8. Rarity Holdings seeks to appeal only the third conclusion. On this issue, the Recorder found as follows:
 - (1) Mr Parkhill accepted in cross-examination that one of the conditions agreed upon when the deposit was paid was that the Property was withdrawn from the public auction due to take place the following day;

- (2) There was, however, no evidence that Mr Parkhill wanted anything other than to secure the Property at the price he had agreed upon.
 - (3) The agreed basis of the transfer of the deposit was the transfer of legal rights in the Property, and that had failed.
 - (4) Accordingly, there was a total failure of consideration and Mr Parkhill was entitled to the return of the deposit.
9. Rarity Holdings advanced two grounds of appeal.
 10. The first ground of appeal is that the Recorder's finding that the only basis for the transfer of the deposit was the transfer of legal rights in the Property is irrational, in light of Mr Parkhill's admission that one of the reasons he paid the deposit was to have the Property taken out of the live auction.
 11. The second ground is that the Recorder was wrong in law to find that there was a total failure of consideration. It contends that the basis on which the deposit was paid was to have the property taken out of the live auction and for it to be purchased on terms. That, it is said, is a portmanteau purpose because the two elements are inextricably linked and, since the first element was fulfilled (the property was taken out of the live auction), the consideration had not wholly failed.
 12. Mr Black, who appeared for Rarity Holdings, put the second ground first, and I will do the same.

The second ground of appeal

13. In order for a claim in restitution to succeed on the grounds of a "failure of basis", the failure of basis must be total: see Goff & Jones, the Law of Unjust Enrichment, 10th Ed, at §12-16, citing *Whinchup v Hughes* (1871) LR 6 CP 78. In that case there was a claim to the return of a payment for an apprenticeship, which was due to last six years but which ended on the master's death after only 11 months. The claim failed because the basis of the payment had not wholly failed.
14. In the context of a deposit paid in respect of a transaction which is ineffective (such as here), therefore, the failure to confer enforceable legal rights on the payer does not automatically amount to a failure of consideration. The fundamental question is whether the agreed basis of the transfer has failed: Goff & Jones (above) at §14-09.
15. It was common ground that the identification of the basis for the deposit is to be ascertained on an objective basis: Goff & Jones (above) at §13-02.
16. Mr Black pointed to the substantial benefits Mr Parkhill received by reason of the Property being withdrawn from the auction, which flowed from the fact that it was a "live" auction. These included, importantly, the publicity surrounding such an auction: everyone can see what others are bidding, with the purpose and effect of driving the price up. By ensuring that the Property was withdrawn from the live auction, Mr Parkhill benefitted from avoiding the risk of the price being driven higher by other bidders. Mr Parkhill's own evidence was that he habitually tried to buy privately, prior to an auction, in order to avoid the "uncertainty and restrictive nature of a live auction".

17. He also submitted that Mr Parkhill received a period of exclusivity, in return for paying the deposit, during which the Property would not be offered to others.
18. As examples of cases where a buyer received benefits from the payment of a deposit to purchase a property additional to the transfer of legal rights in the property, so that there was no total failure of consideration, Mr Black cited *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, and *Rabiu v Marlbray*[2016] 1 WLR 5147.
19. In *Sharma v Simposh*, the defendant was a property developer which acquired a site in order to convert it into flats to be sold. Stage one of the development involved converting the site into eight flats. The claimants initially agreed to pay £1,600 in consideration of the defendant agreeing not to market the property for two weeks. During that time, a further agreement was reached, under which the claimants paid £53,400 in return for the defendant agreeing not to offer the property for sale, or sell it, to anyone else before completion of the development, when the defendant would sell it to the claimants. At first instance, the judge concluded that the parties had attempted to create an option for the claimants to purchase the property in return for a non-refundable deposit, but the contract was void for non-compliance with the requirement of writing in s.2(1). Accordingly, he held that the claimants were entitled to repayment of the deposit. The Court of Appeal reversed that decision, holding that because the claimants' expectations had been fulfilled by the defendant taking the property off the market and keeping open its offer to sell to the claimants at a fixed price until completion, there had been no total failure of consideration.
20. In *Rabiu v Marlbury*, a husband entered into a contract on behalf of him and his wife to purchase a 999-year lease of a room in a hotel yet to be built. The husband paid a deposit, but later pulled out of the contract. The trial judge found that the contract was not valid and enforceable because the wife had neither entered into it nor authorised her husband to do so on her behalf. The Court of Appeal overturned that decision, holding that the contract was valid and enforceable (and that it had complied with s.2(1)). The Court of Appeal went on, *obiter*, to consider whether there would have been a claim for return of the deposit if the contract had been unenforceable. Gloster LJ concluded that the case was materially indistinguishable from *Sharma v Simposh*, holding (at §92):

“In the present case, as in *Sharma's* case there has not been a total failure of consideration in the sense required under the law of unjust enrichment: see para 12-16 of Goff & Jones on The Law of Unjust Enrichment. The first respondent has had part of the benefit which underpinned the payment of the deposit: namely the specific unit which he chose to buy has been taken off the market; it has been secured for his purchase at a specific price; the developer, no doubt (although I speculate) with the use of the first respondent's deposit as collateral, has completed the works; and, upon payment of 10% of the deposit, the first respondent became entitled to 10 free days stay at the Riverbank Park Plaza Hotel.”
21. In my judgment, there is no real prospect of establishing that Mr Parkhill received any benefit independent from and additional to the transfer of legal rights in the Property. On a proper analysis, the benefits which Mr Black relies on are benefits which simply flowed from entering into the agreement to purchase the Property. The vendor's agent's

email of 14 April 2021 makes clear that the property would be removed from auction because – on signing the contracts pursuant to the authority requested in her email – Mr Parkhill would have secured the property prior to the auction.

22. This is not a case where a purchaser has bargained, in return for a deposit, for a period of exclusivity prior to entering into a contract of purchase.
23. In each of *Sharma* and *Rabiu*, the claimant acquired a form of option in return for paying the deposit. As Toulson LJ put it in *Sharma*, in return for the payment of the deposit, the defendant agreed to keep open its offer to sell the completed development at the agreed price.
24. In this case, in contrast, while Rarity Holdings was precluded from selling the Property elsewhere, that was because it had (or at least it believed it had) *already contracted to sell it* to Mr Parkhill. In other words, as Mr Newington-Bridges – who appeared for Mr Parkhill – put it, withdrawing the Property from the auction would be an inevitable consequence of legal rights in the Property being transferred to the purchaser on entry into the contract of purchase. This is not a case where Mr Parkhill acquired, in return for the deposit, an additional benefit of an exclusivity period within which to consider whether to proceed with the purchase.
25. No do I accept that Mr Parkhill received any independent or additional benefit arising from the special features of a live auction. There is no material difference in principle between a seller who, having agreed to sell a property to a buyer, agrees to discontinue negotiations with an existing alternative buyer and to take the property off the market, and a seller such as Rarity Holdings who agrees to withdraw the property from a live auction. In each case, the seller is doing no more than what is required once a contract for the sale of the property has been entered into.
26. In each of *Sharma* and *Rabiu*, the buyer obtained significant additional benefits, over and above the transfer of legal rights in the property. In the first case, the buyer obtained the vendor’s agreement to complete the conversion into flats of the development, to refrain from offering for sale any of the flats and to keep open the offer to sell to the buyer. In the second case, the buyer obtained similar benefits, plus the right to stay at the riverbank park plaza for ten days. Those decisions are clearly distinguishable from the facts in this case.

The First ground of appeal

27. Although the threshold for obtaining permission to appeal is relatively low (is there a real prospect of success?), it is well-established that an appeal against a finding of fact faces a high hurdle. An appeal will succeed only where the “finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached”: *Haringey LBC v Ahmed* [2017] EWCA Civ 1861, at §31.
28. Mr Black submitted that this hurdle is overcome in this case, because the finding that there was “no evidence” that Mr Parkhill wanted anything other than to secure the Property at the agreed price is inconsistent with the Recorder’s acknowledgment that Mr Parkhill accepted that the deposit was paid on condition that the Property was withdrawn from the auction.

29. That finding of the Recorder's must, however, be read in context. The key conclusion of the Recorder in this part of his judgment was that the basis for the transfer of the deposit was the transfer of legal rights in the Property, as Mr Parkhill "received no independent benefit" from having the Property withdrawn from the public auction. As he went on to say in the following sentence: "In isolation, the very fact that it was taken off the market on 15 April 2021 did not benefit [Mr Parkhill], it only benefited him if the remainder of that contract was fulfilled, namely that the Property was sold to him for the agreed figure."
30. Read in context, I see no inconsistency between Mr Parkhill's admission in cross-examination and the Recorder's conclusion. As I have noted above, having the Property withdrawn from the auction was not an independent benefit in itself, but was a benefit which flowed from the fact of the agreement to sell having been reached.

Conclusion

31. For the above reasons, I did not think there is a real prospect of success on the appeal, and I declined to grant permission to appeal.