Neutral Citation Number: [2019] EWCA Civ 800

Case No: A3/2018/0494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr John Martin QC (sitting as a Deputy Judge of the High Court)
HC 2015-004050

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2019

Before:

LORD JUSTICE MCCOMBE
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

PERSIMMON HOMES LIMITED	**Respondent /Claimant**
- and –	
(1) ANTHONY JOHN HILLIER **(2) COLIN MICHAEL CREED**	**Appellants/ Defendants**

Timothy C. Dutton QC (instructed by **Whitehead Monckton Limited**) for the **Appellants**
Michael Fealy QC (instructed by **Walker Morris LLP**) for the **Respondent**

Hearing dates: 22 January 2019

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Approved Judgment

Lord Justice David Richards:

1. This is an appeal against an order of John Martin QC, sitting as a Deputy High Court Judge, whereby he ordered the rectification of a share sale agreement, and a related disclosure letter, and declared the appellants to be in breach of warranties given by them in the agreement, as so rectified, and liable to pay damages. There are two grounds of appeal. First, the judge was wrong, on the evidence before him, to order rectification of the agreement and the disclosure letter. Second, and in any event, the disclosure letter was as a matter of law incapable of being rectified and the judge was therefore wrong to order its rectification.

2. The respondent to the appeal and claimant in the action, Persimmon Homes Limited (Persimmon), is a major housebuilding company which holds significant amounts of land for future development, including land for which planning consent has not been granted but which Persimmon considers to have development potential.

3. The appellants, Mr Hillier and Mr Creed, had built up and for many years ran a successful housebuilding business, mainly in Kent and Sussex. They too held properties or options to acquire properties with a view to future development, including properties without planning consent. This enterprise was conducted through a number of companies. These included Hillreed Holdings Limited (Holdings) whose subsidiaries included Hillreed Homes Limited (Homes), and Hillreed Commercial Limited whose subsidiaries included Hillreed Investments Limited (Investments). These companies were owned as to 95% by Mr Hillier and Mr Creed. Mr Hillier and Mr Creed alone also owned Hillreed Developments Limited (Developments).

4. By two share purchase agreements dated 5 October 2012, Persimmon purchased all the shares in respectively Holdings and Developments. It also agreed to purchase from Investments a freehold office building in Maidstone used as the Hillreed group's head office (the Maidstone freehold).

5. The rectification ordered by the judge related to the warranties given in the agreement for the sale of Developments and had the effect of including within the list of properties warranted to be owned by Developments the freehold interests in a property known as 11a Crawley Down Road, Felbridge, West Sussex and in the rear garden to a property known as 3 Crawley Down Road (the Felbridge freeholds). The judge ordered the disclosure letter given by Mr Hillier and Mr Creed to be rectified by restricting disclosures in relation to the property at Felbridge to "the land subject to the four option agreements" which refers to the options to purchase the rear gardens of the properties at 1, 5, 7 and 11 Crawley Down Road. The effect of the rectification of the agreement and the disclosure letter was that the sellers gave an unqualified warranty that Developments, inter alia, owned and occupied the Felbridge freeholds. (It is a curiosity observed by the judge that the agreement for the sale of Developments assumed that it held the benefit of the four options, whereas in fact they were held by Homes, but nothing turns on this as Persimmon acquired Holdings with its subsidiary Homes at the same time as it acquired Developments.)

6. The rear gardens of 1, 5, 7 and 11 Crawley Down Road, over which Homes held options, together with the rear garden of 3 Crawley Down Road, were capable of forming a single plot of undeveloped land, to which access could be given over 11a Crawley Down Road. (There was no rear garden to 9 Crawley Down Road.) The

potential value of this complete site (the Felbridge site) was enhanced by the ownership of adjacent undeveloped land by another developer.

7. At all material times, including at the time of the share sale agreements, and thereafter, the Felbridge freeholds were owned by Investments, not by Developments. As a result, Persimmon indirectly obtained ownership of the options to purchase the rear gardens to 1, 5, 7 and 11 Crawley Down Road through its purchase of Holdings but did not obtain indirect ownership of the Felbridge freeholds, which were critical to any development of the Felbridge site.

8. The judge rejected Persimmon's case that, on their proper construction, the warranties of the properties owned and occupied by Developments included the Felbridge freeholds. There is no appeal against that decision.

9. The judge went on to consider and to accept Persimmon's alternative case for rectification of the warranties and the disclosure letter.

10. The judge summarised the applicable legal principles at [24]-[26], by reference to the decisions of this court in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 and *Daventry DC v Daventry and District Housing Ltd* [2012] 1 WLR 1333. This summary is not challenged but it is said that the judge did not correctly apply the principles to the evidence.

11. At [28], the judge stated that in order to deal with the rectification claim, it was necessary to set out the course of negotiations "in considerable detail". Over the following 72 paragraphs, the judge examined the evidence with care and in detail but at no greater length than the case required.

12. For the purposes of this judgment, it is necessary only to highlight a few features and findings as regards the negotiations.

13. Having decided to sell their housebuilding business and, if the price were right, the landholdings, Mr Hillier and Mr Creed engaged KPMG in late 2011 to finder a buyer. In April 2012, KPMG contacted Persimmon with the proposal to sell a South East-based housebuilder, stating that "additional strategic land of 1900 units can be included in the sale if of interest". Having signed a non-disclosure agreement, Persimmon was sent an information memorandum, containing a substantial amount of information on, among other things, the strategic landholdings. In addition to properties for which detailed or outline planning consent had been given, the memorandum stated that "The shareholders through a sister company Hillreed Developments control a significant portfolio of strategic sites in excess of 1900 units….The shareholders will consider including these in the Transaction". The Felbridge site was described in the memorandum and it was said to be "Part owned, part held under option by Hillreed Developments". The memorandum contained disclaimers by the sellers and KPMG as to the accuracy of the information contained in the memorandum.

14. On 8 May 2012, Persimmon submitted an indicative offer of £45.5 million for the share capital of Holdings and for "all strategic land interests" to which an indicative value of £2.5 million was ascribed. Persimmon was short-listed as a possible

purchaser and informed that the shareholders would consider a sale of the shares of Developments "in the event that all or most of the strategic land is required by you".

15. The judge found that three things were clear from the documents up to this point. First, Developments was proposed by KPMG as a vehicle for a sale of the strategic land if a purchaser were interested in all or substantially all of it. Second, the strategic land included the Felbridge site. Third, Persimmon had made an indicative offer that included the entirety of the strategic land.

16. A data package was provided to Persimmon at the end of May 2012. In summarising what it said about the Felbridge site, the judge found that it treated all the back gardens as included in one site with 11a Crawley Down Road. It referred twice to "Hillreed" without indicating any particular company, demonstrating as the judge found that Mr Hillier and Mr Creed paid little regard to the corporate structure. He also held that, objectively construed, the data package clearly suggested that, if Persimmon were to purchase Developments, it would acquire control of all the interests in the Felbridge site, regardless of which Hillreed companies were then entitled to such interests.

17. The judge held that answers provided on 11 June 2012 to questions raised by Persimmon, objectively construed in the light of the parties' prior dealings, amounted to confirmation that the sellers controlled "the entire site required", that the site was the whole of the Felbridge site, including all five rear gardens and 11a Crawley Down Road, and that "ownership and control" of the entire site would pass to Persimmon if it bought all the strategic land interests.

18. On 15 June 2012, Persimmon sent an "indicative, non-binding, offer" of £32 million for Holdings, including £1 million for the strategic land interests. The judge held that the terms of the offer made clear that the consideration of £1 million related to all strategic land interests.

19. The significantly lower indicative price offered by Persimmon led to email exchanges and a meeting between the parties. The judge held that a lengthy email and its attachments sent by KPMG to Persimmon on 26 June 2012, objectively construed, made plain that the entirety of the Felbridge site was on offer and would be included in a sale of Developments if the price were right.

20. A further meeting took place on 19 July 2012 attended by Mr Hillier, Mr Creed, representatives of KPMG and representatives of Persimmon. None of those attending who gave evidence could remember anything of use about it. The judge said that there was nothing in the internal papers of Persimmon or in anything coming from KPMG that suggested that it had been made clear at the meeting that the Felbridge freeholds were not included in the proposed sale.

21. On 8 August 2012, there was a telephone conversation between Mr Killoran, the finance director of Persimmon, and Mr Crosby, the lead partner at KPMG. In their grounds of appeal and in the submissions of Mr Dutton QC on their behalf, the appellants lay great stress on this discussion and what is said to have been the judge's failure to make findings on what was discussed and agreed in the course of it. (The appellants consistently state in their grounds and in Mr Dutton's skeleton argument that the conversation was between Mr Killoran and Mr Houlahan of KPMG, but it is

accepted that it was Mr Crosby, not Mr Houlahan, who participated in the conversation.)

22. In the light of this, it is necessary to identify the relevant evidence of the telephone conversation before the judge. Mr Killoran gave evidence but could not recall the content of the conversation. Mr Crosby was not called by the appellants to give evidence. The only evidence of what was discussed is contained in an email sent on the same day by Mr Crosby to Mr Hillier and Mr Creed. The material part was quoted in full by the judge. It reads:

> "I have now had a verbal update from Persimmon's FD Mike Killoran on where they are. As relayed by him, they have reconsidered all aspects of the deal and taken into account the collection of points we have all made to them and after further detailed consideration by the deal team, FD and CEO are confident of delivering on their revised pricing. There are a couple of points that need further clarification but fundamentally they are at c£37m as a final price for Holdings, Developments and the Maidstone freehold. They re-iterated that they have looked at it in the round and have not given a granular breakdown (although I obviously tried to get this). There have been some valid elements in the working capital that needed adjustment from their previous offer and hence they've moved I estimated some £1m or so based on any information we had given them. I do not think there is likely to be any material movement from this figure *nor an ability to extract material sites out of the deal* and I re-went through the various points we made before." (Emphasis added by the judge.)

23. The judge said that the passage emphasised by him in the email "appears to me to make entirely clear that nobody on the Hillreed side had suggested to or informed [Persimmon] of an intention to withdraw the Felbridge freeholds…and I find as a fact that they never did inform [Persimmon], directly or indirectly, that the Felbridge freeholds would not be included in a sale of Developments".

24. Draft heads of terms were sent by KPMG to Persimmon on 15 August 2012, amended by Persimmon and returned on 21 August and accepted by Mr Hillier and Mr Creed. The heads recorded that their purpose was to set out the understanding between the parties for the sale of Holdings, Developments and the Maidstone freehold, subject to the agreement and signing of a detailed, legally binding sale and purchase agreement. The heads stated that "For the avoidance of doubt the Transaction excludes the following: The freehold premises in Horsham; and the freehold warehouse in Aylesford".

25. On 29 August 2012, Persimmon sent to Mr Hillier check lists for each of the properties included in the proposed sale. Each was headed "Planning & Commercial Pre-Purchase Report". One of them related to the Felbridge site. The answers provided in writing by Mr Hillier proceed on the basis that the whole of the Felbridge

site was included in the proposed sale. In evidence, Mr Hillier said that, when he provided the answers, he understood that Persimmon had agreed to buy the entirety of the Felbridge site, but that his answers were incorrect. The judge said that his answers in the document were "consistent only with an expectation and intention on his part that the whole of the Felbridge site, including 11a Crawley Down Road and the rear garden of number 3, would pass to [Persimmon] if the purchase of the shares in Developments proceeded".

26. Steps were then taken by the parties' solicitors to agree the terms of the sale and purchase agreements for each of Holdings and Developments and for the Maidstone property. The judge found that the commercial terms had in substance been concluded at the time of the heads of terms and that the task of the solicitors was to embody them in formal documents. However, the deal nearly foundered when on 13 September 2012 Persimmon reduced its offer from £36.75 million to £30.95 million because of its assessment of an unrelated site. Mr Hillier called off the transaction, but agreement was reached later in the month on a price of £34.2 million. The parties confirmed that in all other respects the heads of terms remained as agreed. The sale and purchase agreements were finalised and executed.

27. Having examined in detail the evidence, the judge concluded at [102]:

> "I am satisfied that, viewed objectively, the correspondence crossing the line demonstrates that PH on the one hand and Mr Hillier and Mr Creed on the other hand understood and intended that the sale of the shares in Developments would carry with it title to the freehold of 11a and the freehold of the garden of number 3 (as well as the options relating to the other four gardens), notwithstanding that the freeholds were vested in Investments. It was urged on me by the Defendants that PH knew at all relevant times that the freeholds were held by Investments and cannot have believed that they had been transferred to Developments before the Developments SPA became effective. This failure to focus on the mechanism by which the freeholds were to be included in the sale was said to be fatal to the rectification claim. I do not agree. Mr Hillier and Mr Creed at all times had control over Investments, and had relied on that control in their descriptions of the Felbridge site. Whether they gave legal effect to that control, and if so how, was a matter for them. The point may be demonstrated by assuming that Schedule 6 to the Developments SPA had in fact specifically included 11a and the garden of number 3. Leaving aside the possible effect of the Disclosure Letter, it would have been no answer to a claim on the warranties that everybody had known that those two properties were owned by Investments, not by Developments. I find nothing odd in the concept that the controlling shareholders of Developments should be prepared to warrant that net assets of a company controlled by them and forming part of the same group were included in the sale. In fact, it seems to me that it would have been possible for them to give effect to the common intention even after execution of the

> Developments SPA, since their control continued afterwards. Mr Hillier and Mr Creed were cross examined on the basis that they had changed their mind at some point in September 2012 and had understood from that point that the Felbridge freeholds were not included. I do not accept that proposition: in my view, they entered into the Developments SPA under the same mistaken apprehension as did PH, and sought to take advantage of the situation when the mistake was discovered."

28. In his subsequent judgment on costs, the judge made clear that when referring, in the passage just cited, to the appellants "taking advantage of the situation when the mistake was discovered", he was not suggesting that they had behaved in a way that would merit an order for indemnity costs.

29. Before the judge, the appellants placed, as he recorded, great reliance on the heads of terms. They submitted that it was to the heads, not to any of the preceding documents, that the court should look to determine the parties' true intentions and the true nature of the commercial deal. Their importance was underlined by the fact that, after the final negotiations on price in September 2012, the deal was reinstated only on the basis that the heads were to continue to apply. The parties knew that the sale of Developments would carry only those properties owned by it and, as all parties knew, they did not include the Felbridge freeholds owned by Investments.

30. The judge rejected this approach at [79]:

> "I do not accept this argument. Because the heads of terms did not have contractual force, they are no more than a part of the negotiations leading to the Developments SPA - albeit an important part. I see no reason to treat them as the proper starting point of the negotiation, as the Defendants urged: the totality of the parties' dealings up to the time at which they contracted is in my view relevant. But viewed in the context of the parties' dealings prior to signature of the heads of terms, those heads of terms do not accord with the common intention evinced up to that time. Nor, to anticipate, are the parties' subsequent dealings consistent with the Defendants' contentions. In reality, the argument based on the heads of terms treats them as definitively identifying the parties' intentions; but, just as the terms of the Developments SPA - which, as a contractual document, is on the face of it to be taken as expressing the parties' true intentions - must yield to a different common intention, so also must the heads of terms. Put shortly, if both are affected by the same mistake, neither can stand."

31. It is this approach that has been central to the appellants' submissions on this appeal. They submit that the commercial deal was struck between the parties in August 2012, save only for the later negotiations on price in September 2012 and it is therefore only to the discussions, exchanges and the agreed heads of terms in August 2012 that the

court should look to identify the terms agreed by the parties. They should be objectively construed to determine whether there was, as Persimmon contended, a common continuing intention to include the entirety of the Felbridge site in the sale of Developments.

32. The grounds of appeal focus principally on a specific challenge to the way the judge dealt with the telephone conversation between Mr Crosby of KPMG and Mr Killoran of Persimmon on 8 August 2012. It is said that "the most important question" for the judge was to identify the commercial deal struck in the course of that telephone conversation and whether it was accurately recorded in the heads of terms. For that purpose, the judge needed to make findings of fact about what was said and agreed in that conversation but, it is said, he made no such findings. The grounds go on to assert that, there being no direct evidence of what was said in the conversation, the judge should have regarded the heads of terms as indirect evidence of what was said and agreed. Further, the judge's reasoning was circular. The events prior to the conversation could only cast light on what was said if it was assumed that the conversation did not mark any radical departure from what had previously been discussed, but that was to beg the very question the judge needed to decide.

33. In my judgment, there is no substance in the criticisms of the way the judge dealt with the conversation on 8 August 2012. For reasons already given, there was no oral evidence of the contents of the conversation. However, there was contemporaneous evidence in the form of the account given by Mr Crosby in his email sent on the same day to the appellants. The judge quoted the material part of the email in full in his judgment at [73] which I have earlier set out. There can be no doubt that he accepted the email as containing an accurate summary of the telephone conversation and therefore, again contrary to the grounds of appeal, made findings as to the content of the conversation.

34. It is, in my judgment, clear from Mr Crosby's email that the conversation was concerned with the price that Persimmon was prepared to offer and not with other aspects of the deal so far discussed. In particular, it is crystal clear from Mr Crosby's important comment that there was unlikely to be any "ability to extract material sites out of the deal" that there had been no change in the position previously agreed that the entire Felbridge site would be included in the deal.

35. The absence of any evidence of further discussions in August and September 2012 on the sites to be included in the deal inevitably meant that the judge had to have regard to the discussions and documents passing between the parties to determine the agreed terms and their continuing common intention. That evidence is overwhelming that they agreed that the entire Felbridge site would be included in the sale of Developments and there is no basis in the evidence, other than the terms of the executed agreements and (perhaps) the terms of the heads of terms, to suggest that there was any change in that agreement and common intention. On the contrary, the evidence suggests that there was indeed no change. I say that the terms of the heads were "perhaps" contrary to the inclusion of the entire Felbridge site because, unlike the judge, I am far from certain that they were contrary to its inclusion. Unlike the executed agreement, the heads did not contain any detail as to the properties that were to be owned by Developments on completion**.** The common intention of the parties had been that Developments would be the corporate vehicle for the sale of the strategic landholdings. A simple reference to a sale of Developments in the heads

does not therefore necessarily import any inconsistency with the parties' common intention.

36. Mr Dutton submitted that a buyer, particularly a sophisticated commercial concern such as Persimmon, would know that if it purchased the shares of Developments, it would indirectly acquire only those assets owned by that company and it was known that the Felbridge freeholds were owned by Investments. In my judgment, the judge was right in his response to this point when he said at [102], quoted above, that the mechanics for including the freeholds in the sale were a matter for the appellants who, as the controlling shareholders of Developments and of Investments' holding company, could without difficulty ensure that the freeholds were owned by Developments by the time of completion.

37. For the reasons given above, the judge was in my view fully entitled on the evidence before him to conclude that the Developments share sale and purchase agreement and the associated disclosure letter did not accurately record the terms agreed between the parties and that the requirements for rectification of those documents had been met.

38. The appellants' second ground of appeal is that, as a matter of law, the disclosure letter is not a document that can be the subject of an order for rectification. They submit that a disclosure letter of this sort is a unilateral notification by the sellers to the purchasers of particular facts existing at the date of the letter. Those facts, if not disclosed, would give rise to a breach of warranty under the sale and purchase agreement. A unilateral document of notification, whether of a fact or of a breach or of the exercise of a right (such as a notice to quit), is not susceptible to the remedy of rectification and, in any event, it would be wholly improper to rectify it so as to re-write history and delete a correct statement of fact. The only question that can arise as to the meaning and effect of such a disclosure letter is how it would be understood by a reasonable recipient. The existence of any mistake by the sender or the recipient is irrelevant.

39. The judge dealt shortly with rectification of the disclosure letter at [104], where he said that the same mistake informed both the Developments sale and purchase agreement and the disclosure letter. There was in those circumstances "no difficulty in principle about rectifying both contractual documents so as to give effect to the common intention".

40. It is important to start with the judge's finding, which for the reasons given above I would uphold, that the parties' common intention, as demonstrated by the communications between them and continuing up to the execution of the Developments share sale and purchase agreement, was that the Felbridge freeholds would be and were owned by Developments on the date of the agreement, which was also the contractual completion date, and would therefore indirectly pass to Persimmon on the sale of Developments. It follows that neither the warranties in the agreement nor the statements in the disclosure letter that Developments did not own the freeholds gave effect to the continuing common intention of the parties as to the transaction between them.

41. The disclosure letter, as much as the sale and purchase agreement, was prepared and signed in order to give effect to the parties' intended transaction. Drafts of the disclosure letter passed between the parties' solicitors and its terms were agreed

between them. The disclosure letter is defined in the agreement and its contents, by the terms of the agreement, qualify the warranties given by the sellers. It is an integral part of the suite of documents designed to give effect to the parties' intended transaction. If, as the judge found, it does not give effect to the terms of the transaction, I can see no reason why it should not be as much capable of rectification as the agreement itself. The fact that it is, in form, unilateral is no bar. Unilateral documents may be rectified if they do not give effect to the intention of the maker: see *Re Butlin's Settlement Trust* [1976] Ch 251 (a settlement) and *Lee v Lee* [2018] EWHC 149 (Ch) (a notice of severance of a joint tenancy). The disclosure letter did not give effect to the intention of the appellants, as well as of Persimmon. Likewise, rectification of the disclosure letter does not re-write history but gives effect to the common intention that Developments should be warranted as being the owner of the Felbridge freeholds. The position is the same as if the agreement itself had qualified the warranties by a statement that Developments did not own the freeholds. Such a provision would clearly be capable of rectification and there is no basis for a different treatment of the disclosure letter.

42. I therefore reject the appellants' submissions on rectification of the disclosure letter, as well as on the first ground of appeal, and I would accordingly dismiss the appeal.

Lord Justice Newey:

43. I agree.

Lord Justice McCombe:

44. I also agree.