Neutral Citation Number: [2019] EWHC 1358 (Ch)

Case No: PT-2018-000321

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 06/06/2019

Before:

CHIEF MASTER MARSH

- -

Between:

THE DAVID ROBERTS ART FOUNDATION LIMITED	**Claimant**
- and -	
NICOLE MARLENE RIEDWEG	**Defendant**

- -
- -

Zoe Barton (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
Edward Meuli (instructed by **Forsters LLP**) for the **Defendant**

Hearing dates: 20 and 21 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimant is a charitable company registered with the Charity Commission. It has applied for judgment on its claim pursuant to CPR 24.2 on the basis that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the claim should be disposed of at a trial. It is common ground between the parties that when considering the test in CPR rule 24.2 the court may rely on the well-known guidance provided by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch).

2. The claimant was the freehold owner of 15a and 37 Camden High Street, London NW1 7JE registered with HM Land Registry with title number LN206404 ("the property"). The claimant entered into a contract ("the Agreement") for the sale of the property to the defendant on 5 May 2017 for £8,010,000 and paid a deposit of £410,000. The contract incorporated the Standard Commercial Property Conditions (Second Edition) and fixed a completion date of 31 October 2017. The defendant failed to complete the purchase on the due date and on 23 November 2017 the parties entered into a deed of variation which made minor adjustments to the purchase price and provided for a new completion date on 15 December 2017.

3. The claimant served notices to complete on 15 December 2017 and 5 February 2018. On 23 February 2018, the claimant gave notice of rescission in accordance with Condition 9.5.2 of the Standard Conditions. The notice was accompanied by a letter of claim from the claimant's solicitors to which there was no response. Subsequently, the property was sold by the claimant to a third party for £5,500,000 on 23 February 2018. The difference between the price the defendant agreed to pay and the price paid about a year later by a third party is striking.

4. This claim was issued on 25 April 2018 and in its unamended form the claimant sought a declaration that the contract had been validly rescinded and that the deposit was forfeit, with judgment for the balance of the deposit under the terms of the contract and damages. However, the defendant, by her defence, alleged that the contract of sale of the property is unenforceable as a result of being invalid, void or ultra vires because the claimant failed to comply with the provisions of Part 7 the Charities Act 2011 ("the 2011 Act") concerning the disposal of land by a charity. By her counterclaim the defendant seeks the return of the deposit paid by her. The points taken in the defence and counterclaim had not been raised by the defendant previously and caused the claimant to review its position. By way of amendment the claimant now seeks an order for rectification of the contract.

5. The core issues that arise for determination concern the provisions of Part 7 of the 2011 Act which provide restrictions on the sale of land by charities. There is no authority that deals with the effect of a failure to comply with its requirements.

The Statutory Regime

6. The default position is contained in section 117 (1) of the 2011 Act:

> "No land held by … a charity is to be conveyed, transferred, leased or otherwise disposed of without an order of –

(a) the court, or

(b) the Commission.

But this is subject to the following provisions of this section, sections 119 to 121 … and section 127 …".

7. However, section 117(2)(b) enables the sale of charity land to take place without obtaining an order from the court or the Commission if certain 'requirements' that are set out in section 119(1) are complied with.

8. The claimant did not obtain an order from the court or the Commission. However, the restriction in section 117(1) does not prevent a charity entering into a contract to sell land and subsequently seeking an order approving its conveyance or transfer prior to completion albeit there are likely to be practical difficulties in obtaining an order speedily. However, the claimant did not apply for an order before serving notice to complete and, therefore, it is necessary to consider section 119 which sets out the 'requirements' that are forecast in section 117(2)(b):

"(1) The requirements mentioned in section 117(2)(b) are that the charity trustees must, before entering into an agreement for the sale … of the land

(a) obtain and consider a written report on the proposed disposition from a qualified surveyor instructed by the trustees and acting exclusively for the charity,

(b) advertise the proposed disposition for such period and in such manner as is advised in the surveyor's report (unless it advises that it would not be in the best interests of the charity to advertise the proposed disposition), and

(c) decide that they are satisfied, having considered the surveyor's report, that the terms on which the disposition is proposed to be made are the best that it can reasonably be obtained for the charity." [my emphasis]

9. Section 119(3) provides a definition of who is a "qualified surveyor" and section 119(4) states that any report prepared for the purposes of section 119(1) must contain certain information and deal with such matters as are prescribed in regulations. No regulations have been made under the 2011 Act. However, I was referred to The Charities (Qualified Surveyors' Reports) Regulations 1992 (1992 No. 2980) which were made under the predecessor section which was similar but not identical to section 119. It is, however, unnecessary to refer to the regulations in detail. It suffices to remark that they are highly prescriptive about the contents of the report and require it to include:

(1) details of the property and measurements of the land and buildings;

(2) a statement about whether it benefits from or is subject to any easements, restrictive covenants or rent charges;

(3) information about the state of repair, whether repairs are needed and, if so, the estimated cost;

(4) advice about the benefit to be obtained from alterations to buildings;

(5) advice about the manner of disposal of the property;

(6) advice about VAT (where the surveyor is able to give such advice);

(7) the surveyor's opinion as to value.

10. Section 122(2) and (3) of the 2011 Act deal with additional requirements that are not part of the requirements arising under section 117. They provide that:

"(2) An instrument to which this subsection applies must state –

(a) that the land is held by or in trust for a charity,

(b) whether the charity is an exempt charity and whether the disposition is one falling within section 117(3)(a), (b), (c) or (d), and

(c) if it is not an exempt charity and the disposition is not one falling within section 117(3)(a), (b), (c) or (d), that the land is land to which the restrictions on disposition imposed by sections 117 to 121 apply.

(3) Where any land held by or in trust for a charity is conveyed, transferred, leased or otherwise disposed of by a disposition to which section 117(1) or (2) applies, the charity trustees must certify in the instrument by which the disposition is effected –

(a) (where section 117(1) applies) that the disposition has been sanctioned by an order of the court or of the Commission (as the case may be), or

(b) (where section 117(2) applies) that the charity trustees have power under the trusts of the charity to effect the disposition and have complied with sections 117 to 121 so far as applicable to it"

11. It is convenient to refer to the requirements of section 122(2) as being a "statement" to distinguish it from the requirements of section 122(3) pursuant to which the trustees must certify certain matters in the transfer ("the certificate"). The statement must be included in the contract because section 122(1) specifies that it applies both to a contract of sale and to the transfer. This contrasts with section 122(3) which only applies to the transfer. Thus, the contract must include the statement and the transfer must include both the statement and the certificate.

12. This claim does not directly concern section 122(3) because the defendant failed to complete the sale and the claimant exercised its right of rescission, or at least on the defendant's case purported to rescind. However, it is important to see the statutory

framework in its complete form when considering whether a failure to comply with any of its provisions may affect the validity of the contract of sale.

13. The statement was described in the White Paper "Charities: A Framework for the Future" which preceded the 1992 Act as "a flagging procedure". It is designed to draw to the attention of the purchaser that the trustees with whom it is dealing (or the charitable company) are subject to a special procedure. The White Paper goes on to say that the requirements of the statement indicate to purchasers that there is a need to obtain either a certificate in the transfer or approval from the Commission or the court. Clearly, as a safeguard, it is desirable that every purchaser is made aware that the vendor is a charity and is subject to a special regime. But was it intended that a purchaser could take advantage of the charity's failure to include the statement in the contract where the purchaser is aware of the status of the vendor, and the statutory framework, and fails to complete the contract? On the one hand, it might be thought that the statutory protection was intended to apply for the benefit of sales of land that actually complete. However, on the other hand, it might be that a strict regime was intended to apply for the overall benefit of purchasers. This is a subject to which I will return later in this judgment.

14. Section 123(1) provides that the statement (whether contained in the contract of sale or the transfer) must be in such form as may be prescribed by land registration rules. There is, however, no current prescribed form for the certificate.[1]

15. There are saving provisions in respect of a disposition of land contained in section 122(4) and sections 122(5) and (6). Section 122(4) applies where section 122(3) has been complied with. It provides that a purchaser for money or money's worth is entitled to rely on the facts stated in the section 122(3) certificate which are conclusively presumed to be accurate. Under sections 122(4) and (6), where section 122(3) has not been complied with, a disposition in favour of a purchaser for money or money's worth in good faith is valid. These saving provisions only apply to a disposition of land, not to a contract of sale. They are of no direct assistance where, as here, the vendor charity has rescinded, or purported to rescind, the contract and the defendant relies on the charity's failure to comply with the requirements of section 119.

16. It is necessary to consider the correct approach to construing sections 119 and 122 and whether the Act tolerates any degree of non-compliance. At one end of the spectrum, in view of the language used in the relevant provisions, it may be that any failure to comply with the 'requirements' of section 119(1) or a failure to provide a statement in the correct form will lead to the transaction being void or voidable. At the other end of the spectrum, it may be thought a failure to comply with the Act's requirements, or a failure to provide a statement, has no effect on the transaction, albeit that it may leave the trustees open to a claim. In between those two extremes, there are clearly degrees of compliance and the possibility that the court may be able to construe the provisions, as Ms Barton who appears for the claimant submitted, to pay primary regard to whether the transaction is obviously for the benefit of the charity. Mr Meuli,

[1] Regulation 180 of The Land Registration Rules 2003 contains prescribed wording for the statement required by section 37(1) of the 1993 Act. No comparable regulation has been made relating to the requirements of the 2011 Act.

who appeared for the defendant, submitted that regardless of the proper construction of the statutory provisions, there are issues of fact that arise concerning the manner in which purported compliance took place and such issues will bear on whether the requirements of the section have been complied with. He says that the case is not suitable for summary judgment and should be left to proceed to a trial.

17. The requirements of section 119 are not easy to follow as a template to be applied in relation to every disposal of land in view of the myriad of ways in which a transaction involving the disposal of land may proceed; and it would be harsh to conclude that a contract of sale is void or voidable as a consequence of a failure by the surveyor's report to comply with each and every requirement of the regulations. That cannot have been Parliament's intention in view of the numerous tripwires that are found in the regulations. Adopting a realistic position, Mr Meuli does not press such a submission.

18. At first sight, compliance with section 119(1) merely requires the trustees (or the directors) to do three things: (1) obtain and consider a report; (2) advertise the proposed disposition (unless advised in the report that advertisement is not required); (3) decide after having considered the report that the "terms on which the disposition is proposed to be made" are the best that can reasonably be obtained for the charity. The trustees are required to 'obtain', 'consider', 'advertise' and 'decide'. There are difficulties, however, with the sequence in which these actions are to happen.

19. The Act seems to contemplate that the report, or reports, will be provided by a person. In practice, it will commonly be the case that the report is a report not of an individual but of a firm and may well be the work of more than one person. No doubt the draftsman did not intend that such niceties should be a ground for a transaction being declared void or being avoided.

20. These and similar issues can be seen from Chapter 7 of the Law Commission's Report entitled Technical Issues in Charity Law (Law Com No 375) dated 26 July 2017. At paragraph 7.75 the report provides its conclusion in the following way:

> "The Part 7 regime [in the 2011 Act] is loved by some and loathed by others. Stone King LLP summarised the position neatly; "there are numerous examples of both very significant help from the current regime plus examples of its clumsiness and disproportionality." Part 7 undoubtedly saves charities from bad bargains in some cases, but does that justify a universal top-quality advice requirement?".

21. Before Parliament intervened in 1855, charity trustees had the power to sell land, whether it was authorised in its founding instrument or not. However, a disposal was always liable to be set aside if the purchaser could not show that the transaction was beneficial to the charity. The onus was on the purchaser.[2]

22. Section 29 of the Charitable Trusts Amendment Act 1855 imposed for the first time a restriction on the disposal of land by charity trustees without the approval of the

[2] per Kay LJ in *Re Mason's Orphanage v London and North Western Railway Company* [1896] 1 Ch 596 at 603 to 604).

Board of the Charity Commissioners. In a more modern era restrictions were found in section 29 of the Charities Act 1960. Later the Charities Act 1992 did away with the technical distinctions between endowment land and other land held by charities. The Charities Act 1993 was consolidating legislation and was the immediate predecessor to the 2011 Act. Its provisions relating to the disposal of land were similar to the 2011 Act but there are material differences. Sections 36 and 37 of the 1993 Act were considered by the Court of Appeal in *Bayoumi Women's Total Abstinence Union Ltd* [2004] Ch 46.

23. The approach under sections 36 of the 1993 Act, in the same way as section 117 of the 2011 Act, was to prohibit the sale of land without the approval of the court or the Commissioners, subject to an exception where the trustees obtained and considered a surveyor's report. The exception was contained in section 36(3). Thus, the regime provided for an exception to the overarching rule that consent had to be obtained. It is fair to note, however, the observation of the authors of Tudor on Charities 10th Ed. that the exception is so widely used that it is in reality the rule. [3]

24. Importantly, the drafting of section 36 of the 1993 Act was different to that contained in section 117 of the 2011 Act. The former applies to land "sold, leased or otherwise disposed of" whereas the latter applies to land "to be conveyed, transferred, leased or otherwise disposed of". Section 37(4) of the 1993 Act provided protection to a purchaser in good faith acquiring for money or money's worth but this only applied to land sold, leased or otherwise disposed of. The equivalent provision in section 122(6) of the 2011 Act applies more broadly to the acquisition of an interest in land.

25. In *Bayoumi* the charity contracted to sell land to a Mr Perkins (the second defendant) for £3.2 million and a deposit of £200,000 was paid. The contract contained the 'statement' required by section 36 of the 1993 Act which was in a similar form to that required under the 2011 Act. However, the charity had not obtained a surveyor's report before entering into the contract. Ten days after exchange of contracts, Mr Perkins assigned the benefit of the contract to Mr Bayoumi on payment of £450,000: in addition, Mr Bayoumi agreed to reimburse the deposit. Thus, the property was 'flipped' within days at an immediate profit of £650,000. Subsequently the charity declined to complete the sale to Mr Bayoumi alleging that the contract was void by reason of its failure to comply with the requirement in section 36 of the 1993 Act to obtain and consider a surveyor's report.

26. The central point in the appeal was whether Mr Bayoumi was entitled to obtain the protection afforded by section 37(4). The Court of Appeal declined to follow the decision of Danckwerts J in *Milner v Staffordshire Congregational Union (Inc)* [1956] Ch 275 in which he construed the expression "make any sale" (an earlier provision relating to dispositions by charities) as including a contract of sale. In *Bayoumi* the Court of Appeal held that an uncompleted contract for the sale of land was not a disposition for the sale of land for the purposes of section 36(1) and section 37(4) could only validate a disposition to which section 36(1) applied.

27. There are two other aspects of the decision that are of more direct relevance to this case. The first concerns the effect of a failure to comply with the requirements of

[3] Tudor on Charities 10th Ed. at 17-046

section 36(3) to obtain and consider a report. In giving the leading judgment in *Bayoumi*, with which Buxton and Rix LJJ agreed, Chadwick LJ, set out at [25] a summary of the scheme of the 1993 Act the material part of which is:

> "(1) Where land is held by or in trust for a charity … the charity trustees must, before entering into an agreement for the sale of that land, comply with the requirements of section 36(3) of the 1993 Act. In particular, the charity trustees must satisfy themselves, after consideration of a written report from a qualified surveyor instructed by them and acting exclusively for the charity, that the proposed sale is on terms which are the best that can reasonably be obtained: section 36(3)(a) and (c).
>
> (2) It follows that, if the charity trustees have not complied with the requirements of section 36(3) of the Act, it is unlawful for them to enter into – or, where the charity is a company having charitable objects, for them to cause or permit the charity to enter into – an agreement for the sale of the land. That, as it seems to me, is the clear purpose and effect of section 36(3)."

28. Later in his judgment Chadwick LJ considered the effect of the failure to comply with section 36(3) on a contract for the sale of charity land:

> "43 Although, as I would hold, section 36(1) of the 1993 Act does not, itself, have the effect of making void an agreement for the sale of charity land into which the charity trustees have entered without first complying with the requirements of section 36(3) of the Act, it is plain that (absent an order of the court or the commissioners) a transfer made in purported performance of such an agreement will be void; unless saved by section 37(4). It follows that, in a case such as the present, where the purchaser becomes aware, before completion of the contract by transfer or conveyance, of the failure of the charity trustees to comply with the requirements of section 36(3), he cannot compel performance of the contract.
>
> 44. It remains, however, to consider whether the agreement is made void by section 36(3). As I have said earlier in this judgment, a contract into which, by virtue section 36(3) of the act, it was unlawful for the charity trustees to enter will, prima facie at least, be void for that reason. That, as it seems to me, is, plainly, the position where the charity trustees are, themselves, the purported vendors – that is to say, in the case where the land is held by them as trustees upon charitable trusts. But I think the position is less clear where the land is held by a company with charitable objects. In such a case the charity trustees – who will be the directors, or other persons with powers of management over the affairs of the company – will not, themselves, be the purported vendors. The vendor will be the company."

29. Chadwick LJ then went on to consider the provisions of sections 35 and 35A of the Companies Act 1985 but was unable to conclude whether they were capable of saving the transaction in the absence of adequate evidence of <u>full</u> consideration having been given for the sale. However, he was clearly willing to accept the possibility that in the case of a charitable company the relevant provisions of the Companies Act might be capable of saving the transaction.

30. The facts in *Bayoumi* are entirely different from this case. In *Bayoumi*:

(1) The charity had taken no steps to comply with the requirement to obtain and consider a surveyor's report.

(2) Despite this failure, the contract contained the statutory statement and so the decision provides no assistance about the consequences, if any, of a failure to do so.

(3) There were obvious doubts about whether the sale terms were the best that were reasonably obtainable in light of Mr Perkins' ability to obtain a further £650,000 within days of the contract being entered into.

(4) It was the charity asserting that the contract should not be enforced and not the purchaser or his assignee.

31. It is also right to record that Chadwick LJ's remarks about a contract being prima facie void where section 36(3) was not complied with are obiter. He took it as axiomatic that a failure to take steps to take advantage of the statutory exception led to the contract being prima facie void. However, the court in *Bayoumi* was presented with the unequivocal position of the charity having done nothing at all to comply with its statutory requirements to take advantage of the exception to the general rule that consent from the court or the Commissioners (now the Commission) must be obtained. Consideration will be given later in this judgment whether any failure to comply with the requirements will inevitably lead to the contract being void, unless it is saved by what is now section 42 of the Companies Act 2006.

Companies Act 2006

32. The modern equivalent of sections 35 and 35A of the Companies Act 1985 are found in sections 39, 40 and 42 of the Companies Act 2006. Under section 39(1) the validity of an act done by a company may not be called into question on the ground of lack of capacity resulting from anything in the company's constitution. Under section 40, the powers of the directors are deemed to be free from any limitation in favour of a person dealing with the company in good faith. Section 42 partially disapplies the effects of sections 39 and 40 where the company is a charity:

> "(1) Sections 39 and 40 … do not apply to the acts of a company that is a charity except in favour of a person who –
>
> (a) [omitted]
>
> (b) gives full consideration in money or moneys worth in relation to the act in question and does not know (as the case may be) –
>
> (i) that the act is not permitted by the company's constitution, or
>
> (ii) that the act is beyond the powers of the directors."

33. Under section 42(3), the burden of proving that an act was not permitted by the company's constitution or was beyond the powers of the directors lies on the person asserting that fact.

Statutory construction

34. Ms Barton submitted that the court should approach the construction of the 2011 Act having regard to the principles of construction that can be derived from the speech of Lord Steyn in *R v Soneji* [2006] 1 AC 340 and the judgment of Sir Terence Etherton C in *Natt v Osman* [2015] 1 WLR 1536.

35. This involves the court having the regard to the approach stated by the High Court of Australia in *Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 which was cited with approval in both those decisions. The task of the court is "to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole."

36. *R v Soneji* was decided two years after *Bayoumi*. It indicates an important change of direction in the approach the court should take when considering the consequences of a failure, in whole or in part, to comply with a requirement expressed in the imperative form in a statute:

> "14 A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows.
>
> …".

37. After referring to the analysis provided by Lord Hailsham in *London & Clydesdale Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189 – 190, and cases that had applied his dictum, Lord Steyn reached the following conclusion:

> "23 Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. …".

38. *Natt v Osman* concerned the validity of a notice served by a lessee under the Leasehold Reform, Housing and Urban Development Act 1993. The Chancellor adopted the approach to statutory construction provided by the Australian High Court in *Project Blue Sky* observing at [25] that:

> "… the characterisation of the statutory provisions as either mandatory or directory does no more than state a conclusion as to the consequence of non-compliance, rather than assist in determining what consequence the legislature intended. The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation."

39. Later in his judgment, he said at [28]:

> "The cases cover a very broad spectrum of legislative and factual situations. For the purposes of this appeal, a distinction may be made between two broad categories: (1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question."

40. It strikes me that the requirements of Part 7 of the 2011 Act do not fit neatly in either category 1 or category 2. They neither concern the act of a public body nor involve a statute conferring a property or similar right. Instead, the relevant provisions set out a regime for controlling the disposal of land held by charities. Part 7 of the 2011 Act appears to have two main objectives. First, ensuring that the charity is protected from a disposal at less than the best price reasonably obtainable. It is open to the trustees to sell land if they follow the procedure set out in section 119 but with a clear default provision that requires the trustees to obtain the approval of the court of the Commission if that procedure is not adopted. Secondly, the provision of steps that need to be taken to ensure that a purchaser is aware that the transaction involves a charity and that there are restrictions. As to the former, it might be thought that the disposal route that is permitted by section 117(2) and section 119 is intended to facilitate the disposal of charity land, rather than provide a purchaser with a means of invalidating the transaction. However, it is notable that Chadwick LJ in *Bayoumi* approached the previous provisions as a matter of vires; if the trustees fail to comply with the requirement to obtain a surveyor's report, they lacked the power to enter into the contract. As to the latter, if the purchaser has been made aware of restrictions but does not insist on the contract containing a statement, at first sight, the statutory purpose would appear to have fulfilled. Waiver or contracting out of statutory provisions may be permitted by the statute.[4]

The evidence

41. A costs and case management conference was due to be heard on 7 December 2018. However, the parties agreed that it should be adjourned because the claimant intended to issue an application under CPR 24.2. The order Deputy Master Nurse made on that date required the claimant to issue its application by 21 December 2018 and gave directions for the listing of the application and for evidence in answer to the application. The defendant was permitted to serve evidence 'if so advised' by 4pm on

[4] See Bennion on Statutory Interpretation at 7.4.

31 January 2109 with further evidence 'if so advised' from the claimant by 4pm on 15 February 2019.

42. The claimant's evidence was provided in a statement by David Payton dated 20 December 2018. He is a partner at Dentons UK & Middle East LLP. (Dentons replaced Simkins LLP who acted for the claimant in the transaction and up to the service of the defence and counterclaim). The defendant chose not to serve any evidence in response to Mr Payton's statement. On receipt of the skeleton argument prepared by Mr Meuli, the claimant considered that it was necessary to provide additional evidence to meet what are said to be new factual assertions made by the defendant, albeit they are only made in a skeleton argument. A further statement of Mr Payton was served on 19 March 2019.

43. The defendant objected to the statement being relied on by the claimant. During the course of the hearing, having heard submissions from Ms Barton for the claimant and Mr Meuli I admitted the further statement. I did so on the basis that the claimant was taken by surprise by new matters raised in Mr Meuli's skeleton argument and it was right that the claimant should have the opportunity to place further evidence to the court. Furthermore, in reality, the additional statement provided only limited new evidence and therefore the possibility of prejudice to the defendant was slight. Mr Meuli did not apply to adjourn the hearing and I am satisfied that there was no material prejudice to the defendant.

44. In the course of submissions concerning whether the statement should be admitted, Mr Meuli submitted that the claimant needed to obtain relief from sanctions. I do not accept that is right and it is unhelpful for the *Mitchell* and *Denton* jurisprudence to be relied on in such circumstances. There was no sanction attached to the Deputy Master's order and it cannot be said that the claimant failed to comply with it or any provision of the CPR. The claimant was not seeking an extension of time. The application was dealt with on the straightforward basis that it was the defendant who was seeking to introduce new material well beyond the time permitted for doing so and, in those circumstances, it was plainly right, in the interests of justice, that the claimant should have an opportunity to deal with it.

45. Some reliance is placed on the fact that Mr Payton has no first-hand knowledge of the relevant events and can only provide evidence on the basis of information provided to him by others. His statement contains a somewhat strangled version of the common formulation dealing with knowledge where he says that the evidence is provided from his "…own knowledge and belief, including documentation, save where I indicate otherwise, where I indicate the source of that knowledge." However, there are a number of occasions where he does not explain the source of material evidence. However, in his second statement, Mr Payton says that his evidence is based on the documents he exhibited to his first statement and from instructions provided to him by Mr Anthony Quayle who is a director of the claimant.

46. It need hardly be said that careful compliance with paragraph 18.2 of Practice Direction 32 is always essential and particularly where an application is made for summary judgment. Where a party is seeking to persuade the court to enter judgment on the claim or an issue it is always preferable for evidence to be provided by a witness who has first-hand knowledge of the events.

47. The property was purchased by the claimant on 25 February 2009 for £1 million plus VAT. The eponymous David Roberts is a director of Edinburgh House (Estates) Ltd, which is a substantial property investment company. It is clear from its accounts for the year ended 31 December 2008 that Edinburgh House made a charitable donation to the claimant of £1 million and this donation enabled the claimant to acquire the property which is owned beneficially by the claimant.

48. Mr Payton's first statement says that "in and around November 2016", the directors of the claimant decided to sell the property and Robert Irving Burns (RIB) were instructed to market it. RIB undertook from 9 November 2016 "a targeted marketing campaign where the Property was offered to prospective purchasers of Use Class D1 accommodation via well respected agents acting in the market." The statement goes on:

> "21. Mr Damien Field of RIB managed the marketing campaign. I am instructed by him that various potential buyers expressed an informal interest in purchasing the Property. On or around 13 December 2016 the Defendants made a formal bid of £8,000,000 to buy the property."

49. The claimant instructed Simkins LLP to act for it on the sale of the property. Forsters LLP acted for the defendant. Heads of terms were agreed for a sale at £8,000,000 subject to approval by the trustees and signed heads of terms were sent to Forsters on 22 December 2016.

50. The claimant instructed Mr Bryn Williams of DTZ Tie Leung Ltd (trading as Cushman & Wakefield) to prepare a report. The formal engagement took place on 10 January 2017 by Cushman & Wakefield's engagement letter being counter-signed by Mr Quayle who was a director of the claimant. A report was provided on 20 January 2017 which valued the property on a 'Red Book' valuation at £7,500,000.

51. The report consists of two elements. The first is a report in the form of a letter from Cushman & Wakefield signed by Mr Williams and addressed to Mr Quayle on behalf of the claimant. Mr Williams is a Member of the Royal Institution of Chartered Surveyors and is an RICS Registered Valuer. This part of the report records that it is was provided for the trustees in connection with the disposal of the property and it sets out the relevant parts of section 119 of the 2011 Act. The second element of the report records that a valuer named Laura Kaufman inspected the property on 3 January 2017 (the first part of the report says it was 4 January 2017). It goes on to provide a full description of the property including measurements. The valuation is arrived at by capitalising the market rent of the property having regard to the three rental comparables and three investment comparables that are summarised in the report. The valuation is the product of a three-page calculation. It is clear that the valuation was the product of a careful analysis of market evidence.

52. The report does not deal with marketing in any detail. It records, incorrectly, that the property had been marketed "for the past 3-4 months". It also says:

> "We understand from Robert Irving Burns that, although not widely marketed, the property was targeted at D1 occupiers with an original quoting price of £7 million. We understand there were a number of other bidders between £7 million

> and £8 million, but we have not been made aware of the number of bidders or exact bids due to confidentiality reasons."

53. It goes on to say: "we consider the marketing campaign likely to have targeted the most likely buyers in the market" and "we would not envisage a marketing period of longer than six months as being required to sell the Property".

54. Plainly the report is inaccurate where it provides this marketing summary because the evidence the claimant has provided is that the property was not marketed until early November 2016 and there was no question of there being a marketing period of 6 months. The report also does not provide advice about advertising the "proposed disposition" or that it would not be in the claimant's best interests to advertise.

55. Mr Meuli made a number of submissions about the form of the report including that it was not, in fact, one report but two and that there was uncertainty about the identity of the valuer. There is nothing in these points. The document is one report, albeit comprising different elements. It is also evident that the valuation is provided by Mr Williams. He signed the report on behalf of Cushman & Wakefield LLP. The fact that part of the report reveals input form other persons is irrelevant. It is plain that Mr Williams has taken responsibility for the report and the fact that it is provided in the form of a report from the legal entity he is associated with, whether as a director, member or employee, is a point of no substance whatever.

56. The conveyancing process between Simkins and Forsters led to an exchange of contracts on 5 May 2017 at a sale price of £8,010,000 with a completion date of 31 October 2017. The defendant paid a deposit of £410,000. The main body of the Agreement did not contain a section 122(2) statement. However, paragraph 9 of the Agreement specified that the transfer to the defendant was to be in an agreed form that was annexed to the Agreement. The draft transfer contained a certificate in the following terms:

> "11.5 The David Roberts Art Foundation Limited as a non-exempt charity certify that they have power to effect this disposition and that it has complied with the provisions of Sections 117-121 of the Charity Act 2011 [sic] (formerly sections 36-39 of the Charities Act 1993) so far as applicable to this disposition pursuant to the restriction dated 10 March 2009 at entry 3 of the Proprietorship register of title number LN20604."

57. It will be necessary to consider whether, as Ms Barton submits, the draft transfer can be treated as incorporated into the contract and, if so, whether it complies in whole or in part with the requirements of section 122(2). Nothing turns, in my judgment, on the clause being drafted in the form of a certificate. In this context, wording that certifies can equally be taken to state and vice versa. The label given to the formulation is unlikely to be determinative about its compliance with the statutory requirements.

58. It can be readily discerned from clause 11.5 of the draft transfer that:

(1) The vendor of the land is a charity – section 122(2)(a);

(2) It is a non-exempt charity – section 122(2)(b);

(3) Possibly that the land is land to which sections 117 to 121 apply, although the language is equivocal – section 122(2)(c).

59. Clause 11.5 of the draft transfer does not say that the disposition is not one falling within section 117(3)(a), (b), (c) or (d), although, in fact, it was not within those provisions.

60. The draft transfer in the original form prepared by Simkins for the claimant contained a clause that was more limited, going no further than providing the wording of a certificate required by section 122(3). The version that was agreed, as set out above, was proposed by Forsters because "the Land Registry can be a bit funny about exact wording."

61. The parties agreed a variation to the contract in consideration of a payment of £30,000 by the defendant and set a new completion date under the Deed of Variation dated 23 November 2017 of 15 December 2017. Notice to complete was served on that day and a further notice to complete was served on 5 February 2018. On 23 February 2018 the claimant gave notice that it was rescinding the contract.

62. There is only limited evidence about the steps taken by the claimant to approve the transaction before exchange of contracts and it is notable that there is no evidence provided by any the directors/trustees. In his first statement Mr Payton says the claimant "having considered [Cushman & Wakefield's] report, was obviously satisfied that the sale terms agreed with the Defendant were the best that could reasonably be obtained. In particular, the Defendant had unusually agreed to pay more than £500,000 above the Property's open market value as advised by Mr Williams. Plus, no buyer had even made a formal offer during the marketing campaign.".

63. Mr Payton then says the claimant's trustees met on 5 May 2017 and approved the terms of the contract which was exchanged later than day. Minutes of a meeting are exhibited.

64. Mr Payton's second statement provides the following further information about the process followed by the claimant:

(1) On 20 April 2017, Mr Adrian Nelson of Simkins, who was a trustee and the solicitor acting for the claimant, sent draft minutes of the proposed meeting of the directors. He queried with his fellow director, Mr Quayle whether Cushman & Wakefield should be asked to update their advice, the report having been provided on 20 January 2017.

(2) In response to a request from Mr Quayle, Cushman & Wakefield provided a draft letter dated 26 April 2017 confirming that the contents of the report were correct as of 26 April 2017. A signed final version of that draft letter was issued in materially identical terms on 4 May 2017.

(3) The board meeting took place on the morning of 5 May 2017. The draft board minutes were finalised after the meeting. They were signed by Mr Smith who chaired the meeting later that morning.

65. Mr Meuli criticises the claimant's evidence about the steps taken by the trustees. He is also critical of the minutes. He submits that the minutes do not refer to the test in the Charities Act 2011 and do not say that the Cushman & Wakefield report produced in January 2017 was considered.

66. The following elements of the minutes can be highlighted:

(1) The business of the meeting is described as being "… to consider and, if deemed fit, to approve documents relating to a proposed sale of [the property] to Nicole Riedweg for a price of £8,010,000.00."

(2) Documents were produced to the meeting "for consideration". They included the contract and transfer and "the report prepared by Cushman & Wakefield dated 26 April 2017". They are collectively defined as "the Documents".

(3) " Resolutions

After due and careful consideration, the directors confirmed their full understanding of the effect and implications for the Company of entering into the Documents and unanimously expressed the opinion that:

6.6.1 having regard to the factors relevant to the decision, and having regard to the matters referred to in section 172(1) of the Companies Act 2006 and the charitable objects of the Company, the directors were satisfied that entering into the Documents would promote the success of the Company and permit the Company to pursue its charitable objects by more effective means;

6.6.2 …".

(4) The board resolved to approve the terms of the transactions contemplated by the Documents.

67. Clearly the drafting of the minutes could have been improved. For example, it was unhelpful to include the report as one of the documents the claimant was to enter into and indeed to the 'report' dated 26 April 2017 when that was a draft letter confirming that the valuation advice produced earlier in the January 2017 report remained valid. Furthermore, the minutes do not say that the board had in mind the test under section 119(1)(c) or that, having considered the report, the terms were the best that could reasonably be obtained for the claimant.

68. Mr Payton's second statement points to the fact that price the defendant agreed to pay was £500,000 more than Cushman & Wakefield advised was the market value, that the defendant had entered into an overage deed in addition and that the defendant's offer was the only formal one that had been made during the marketing campaign. He goes on to say:

"These compelling facts are exactly why I say at paragraph 35 of my 18 December 2018 witness statement that it is "obvious" that [the claimant's] trustees, having considered the Report, concluded the sale terms were the best that could reasonably be obtained by [the claimant]. It is fanciful to suggest that the Defendant's generous offer could be improved on, even if there were other

> serious buyers which there were not. This very scenario is presumably why section 119(c) [sic] of the Charities Act does not mandate that the board minutes of the relevant charity have to state the section's requirements in express terms."

69. Mr Payton makes clear the source of his evidence in his second statement. Clearly it would have been preferable for the court to have been provided with evidence direct from Mr Quayle who was present at the board meeting. The critical evidence is not what the minutes record but what happened at the meeting. The two may or may not coincide. I will return to this subject later in this judgment when considering Mr Meuli's submission that the claim is unsuitable for summary judgment under CPR 24.

Pleadings

70. It is unnecessary to refer to the statements of case in detail. However, Mr Meuli rightly draws attention to aspects of the claimant's pleaded case that are relevant when considering whether judgment should be entered in favour of the claimant.

71. The claimant asserts at paragraph 5k. that the terms of the draft transfer, and therefore the certificate, were incorporated into the contract by reference. It is said that the certificate was language required to be included in the Transfer by reason of section 122(3) of the 2011 Act. The pleading continues:

> "6. By reason of a mistake common to both parties, the Certificate (alone) was not apposite to achieve the result that was the parties' common intention, namely that the Agreement be a valid binding agreement for the sale of the Property:
>
> a. The parties omitted the wording required by s.122(2) of the Act. The Transfer should have included the following words immediately preceding the Certificate at clause 11.5: "[omitted]" ("the Statement"). The Statement was language required to be included in the transfer by reason of s.122(2) of the Act and the form of the Statement is prescribed by the land Registration Rules 2003.
>
> b. Further, if contrary to the parties' understanding … the Certificate is not wording that satisfies the requirements of s.122(3) of the Act, then it should have provided as follows: "[omitted]" ("the Amended Certificate")."

72. Paragraph 7a. to c. of the Amended Particulars of Claim sets out the claimant's case that alleges there was a mistake that was common to both parties. It goes on to say:

> "d. Save as aforesaid, the parties' solicitors did not expressly consider the requirements imposed by the Act as to the precise language to be employed in the Agreement and the transfer. Accordingly, they included the Certificate pursuant to the foregoing agreement and omitted to include the Statement at all."

73. The defendant puts the claimant to strict proof that it complied with the requirements of section 117(2) of the 2011 Act. As to the absence of a section 122(2) statement in the Agreement, the defendant asserts that as a consequence the Agreement was "invalid and/or null and void and/or ultra vires and/or of not effect". At paragraph 13 of the amended defence the defendant notes "the Claimant's concession [in paragraph 6 of the Amended Particulars of Claim] that the Agreement in the form that it was

agreed and executed was not a valid binding agreement for the sale of the Property …".

74. Two important points emerge from the reply:

(1) The claimant denies that a failure to comply with section 122 of the 2011 Act renders the Agreement void.

(2) However, the claimant stops short of saying that the Agreement is enforceable. Instead the claimant makes the following case:

"It is averred that the Agreement is valid, albeit that it may not be capable of enforcement by the Claimant until rectified as sought in these proceedings."

75. Thus, the claimant stops short of claiming that even if the Transfer is incorporated by reference into the Agreement, that the Agreement is valid and enforceable in the absence of rectification. However, the claimant describes what appears to be a concession at paragraph 6 of the amended particulars of claim as being intended "… to reflect the existence (as opposed to the correctness) of arguments (the existence of which are evidenced by these proceedings being on foot) as to the enforceability of the Agreement."

76. Finally, it is necessary to consider the claimant's answers to two requests for further information:

(1) In answer to a question concerning compliance with section 122(3) of the 2011 Act and whether the trustees considered a report, the claimant refers only to the report dated 20 January 2017. No reference is made to the report which is listed in the minutes of the board meeting, or to the January 2017 report having been updated.

(2) In answer to a question about how the trustees were satisfied that the terms on which the sale of the property was proposed, the claimant again refers only to having considered the report (singular).

Claimant's submissions

77. Ms Barton's submissions are based upon the premise that the court can be satisfied on the evidence that the sale price in the contract was the best price reasonably obtainable by it. She submits that it is open to the court, as a matter of statutory construction, to hold that:

(1) A partial failure to comply with the requirements of section 119(1) does not on the facts of this case lead to the Agreement being void or otherwise unenforceable; and

(2) The failure to include the statement required by section 122(2) does not have any effect on the validity of the Agreement.

78. In the alternative, she submits that the failure to include the section 122(2) statement can be cured by the Agreement being rectified.

79. Ms Barton also relied on section 42 of the Companies Act 2006. However, this is not part of the claimant's pleaded case and no application for permission to re-amend the particulars of claim was made.

Defendant's submissions

80. Mr Meuli submits that the claimant is unable on the evidence before the court to satisfy the burden of establishing that judgment should be entered in favour of the claimant. He did not rely on the second limb of CPR 24.2.

81. Mr Meuli submits that the requirements of section 119 must be strictly complied with. He submits that the trustees must follow the sequence of events that are required by section 119 in the right order. Thus, it is necessary, for example for advice about marketing to be obtained before the property is marketed. His principal submissions about the trustees' failure comprise the following:

    (1) The property was marketed before Cushman & Wakefield were instructed. It is clear that the property was not marketed in a manner and for a period that was advised by the surveyor.

    (2) The report does not contain any prospective advice about marketing and does not provide advice about the need for the property to be advertised for sale.

    (3) The property was not advertised for sale.

    (4) The evidence of the trustees having considered a report is inadequate and there is inadequate evidence that the trustees were satisfied that the proposed sale was the best that could reasonably be obtained.

Discussion

82. It is unnecessary to consider in any detail the well-understood principles that apply to an application for judgment under Part 24. There are, however, several observations that are apposite in the circumstances of this case:

    (1) The claimant is applying for judgment based on its pleaded case. It is not open to the claimant to go beyond the confines of its case without seeking and obtaining permission to amend the particulars of claim.

    (2) It is for the parties to decide what evidence they place before the court. In the case of the claimant, the evidence must be sufficiently cogent to satisfy the court that the defendant has no real prospect of success; that the defendant's prospects of success are fanciful. Although it is permissible for the applicant to rely on evidence from its solicitor, in a case that cannot be proved by reference to documents, the absence of evidence from a witness with first-hand knowledge inevitably makes it more difficult for the claimant to achieve its objective.

    (3) The defendant has chosen not to provide any evidence. There are cases in which this would place a defendant at a significant disadvantage. In this case there is little if anything that could be said by the defendant about the steps

taken, or not taken, by the claimant to comply with its statutory obligations. This is not a case where the evidential burden passes to the defendant.

(4) The defendant points to gaps in the claimant's case. In particular, the defendant says that there is inadequate evidence about the trustees' decision to put the property on the market and later to enter into the Agreement and that disclosure is required.

83. I propose to approach the issues that arise in the following order:

(1) Did the Agreement contain a section 122(2) statement and if not is the agreement void, voidable or otherwise unenforceable?

(2) Is the claimant entitled to an order for rectification of the Agreement?

(3) Was there a failure to comply with section 119(1) and if so is the Agreement void, voidable or otherwise unenforceable?

(4) Is the claimant entitled to rely on section 42 Companies Act 2006 and, if so, what is the effect of the section?

(5) Is this a suitable case for judgment under Part 24?

Section 122(2)

84. The claimant's case as it is pleaded in relation to section 122(2) is not entirely easy to follow. It seems to me that it is not open to the claimant to assert that the Agreement contained a form of words that were sufficient to amount to a statement for the purposes of the sub-section. It is the claimant's case that, absent rectification, the Agreement did not contain a statement. Although it is unnecessary to consider whether the transfer was incorporated by reference for these purposes, partial compliance with section 122(2) may be relevant to the issue of construction. The question of incorporation by reference does not involve any disputed issues of fact. It is itself a short issue of construction to which the answer is clear. The Agreement prescribes the form of the transfer and annexes it in draft form as is required by paragraph 9. The 2011 Act requires the contract to state the three items in section 122(a), (b) and (c). Although, ideally, they are best stated together in a form that is readily identifiable as a statement under the 2011 Act, I can see no reason why the information the contract must state cannot be set out in separate parts of the contract. For the purposes of compliance with the section, it suffices if the contract contains the information in a form that can be understood on a careful reading of it. By parity of reasoning, since the transfer is an integral part of the Agreement by virtue of paragraph 9, information stated in the draft transfer is to be regarded as being stated in the Agreement.

85. It is unnecessary to consider whether the wording of the certificate in the transfer could satisfy section 122(2) although I consider the claimant would have very real difficulty showing that the certificate was sufficient to satisfy sub-section 122(2)(c).

86. The principal issue for the court is purely one of statutory construction. It is suitable to be dealt with under Part 24 because there are no material facts in dispute. The

language of section 122 is unequivocal; the Agreement "must" make the three statements that are set out in section 122(2). Adopting the approach to construction explained by Lord Steyn in *R v Soneji*, the question for the court is whether Parliament can fairly be taken to have intended total invalidity. In this regard, the decision in *Bayoumi* is of no assistance as the point did not arise for consideration.

87. It seems to me that the starting point is to consider how the statement fits into the statutory regime and the information that is to be provided. It seems to me that section 122 can fairly be regarded as subsidiary to the principal requirements of Part 7 of the 2011 Act. It is more in the nature of statutory machinery than a requirement that has importance in its own right. It was rightly described in the White Paper as a 'flagging procedure' for the benefit of the purchaser. It is not there to provide direct protection to the charity albeit that compliance will have the salutary effect of making it more likely that the charity will comply with section 117(2) and the requirements that are specified in section 119(1).

88. The importance of the statement can be gauged by comparing it with the certificate under section 122(3). In that case the Act provides protection for the purchaser in two different ways. If the certificate is contained in the transfer, section 122(4) states that the facts in the certificate are conclusively presumed to be accurate and the purchaser need make no enquiry about them. If the certificate is not included in the transfer, under section 122(5) and (6) a purchaser in good faith acquiring an interest for money or money's worth the disposition is valid whether or not the trustees had power to effect the disposition and whether or not they have complied with sections 117 to 121. There are no comparable provisions relating to the statement, despite it being a requirement of the Act that it is included in the transfer.

89. I conclude as a matter of construction that Parliament cannot have intended that the failure to include the statement in the contract would lead to the contract being invalid (whether by being void, voidable or unenforceable). Such an outcome would be disproportionate to the role played by the statement in the statutory regime.

Rectification

90. In light of this conclusion it is strictly unnecessary to deal with the claimant's case on rectification. I can say, however, that were it to be necessary to consider it, I would hold that the defendant has a real prospect of defending that part of the claim. There are two points of importance:

    (1) The claimant's evidence comes nowhere near to meeting the standard that is required for rectification, variously described as being "convincing proof" or more trenchantly as "strong irrefragable evidence".

    (2) There is no basis for the parties having shared an express common intention to include the section 122(2) statement. The claimant's case is that neither side considered the requirements of the section.

Section 119(1)

91. Unlike in *Bayoumi*, the claimant's trustees obtained a valuation report from an accredited valuer prior to exchanging contracts and obtained express advice that the

value of the property was £7.5 million. The sale price was some £500,000 in excess of that sum.

92. The defendant's case is twofold. First, that the claimant failed to comply with at least one the requirements of section 119(1). Secondly, the evidence the claimant has chosen to provide gives rise to issues that ought to be tested at a trial. In particular, there is an issue of fact about whether the trustees complied with section 119(1)(c) by considering the report and deciding they were satisfied that the terms on which the disposition is proposed are the best that can reasonably be obtained for the charity.

93. At one point the defendant took a number of points about the surveyor's report and relied upon what are said to be defects in its presentation. However, Mr Meuli's primary focus was on the provisions of section 119(1). The report from Cushman & Wakefield was recognisably a report expressly prepared for the purposes of Part 7 of the 2011 Act and it is not open to the defendant, in my judgment, to assert that a failure in the report to deal with specific items of information that are specified in the 1993 Regulations prevents the report from qualifying as a report for the purposes of section 119. But I accept, of course, there might be such a degree of non-compliance such that the report cannot properly be characterised as such. That point does not arise here.

94. As I have already remarked, the requirements of section 119 are opaque in certain respects, particularly with regard to the order in which the trustees should proceed. If they are broken down by reference to the verbs requiring the trustees to take certain actions, the trustees are required to 'obtain', 'consider', 'advertise' and 'decide'. The requirement to 'consider' the surveyor's report appears in both sub-section 119(1)(a) and (c); but there is a critical difference between the two and it is unlikely that the draftsman intended duplication. In section 119(1)(a) the requirement is to obtain and consider a report on the proposed disposition. There is a separate and distinct step to be taken under section 119(1)(c) to decide that the terms of the disposition are the best than can reasonably be obtained "having considered the surveyor's report". Section 119(1)(a) refers to obtaining a report on "the proposed disposition" and section 119(1)(c) to "the terms on which the disposition is proposed". It seems to me that this language clearly points to the requirements of section 119(1) being chronological. The sequence should generally be:

    (1) The trustees consider making a disposition of land which triggers a need to follow the requirements of section 119(1) (or seek an order from the court of the Commission).

    (2) A report from a surveyor is obtained in the specified form. At this stage the 'proposed disposition' might be a general wish to dispose of the land but it could equally be consideration of an unsolicited offer.

    (3) The report should advise on the period of advertising that is requisite and manner in which advertising is to take place; or advise that advertising is not in the best interests of the charity. The 1992 Regulations (1992 No. 2980) require the surveyor to provide advice about the manner of disposing of the property so that the terms on which it is disposed are the best that can reasonably be obtained.

(4) The report is considered by the trustees.

(5) The property is advertised, unless the surveyor has advised against it.

(6) An offer is made by a prospective purchaser.

(7) The trustees must make a decision about the terms of the disposition. These terms will normally be an offer that follows from the property having been marketed. In deciding whether the terms are the best that can reasonably be obtained the surveyor's report must be considered again. The trustees may have to obtain a supplement to the report obtained earlier but this depend upon the circumstances including the length of time between the report and the offer, whether the offer exceeds to value placed on the property by the surveyor and the way the original advice is framed.

95. It is entirely clear that section 119(1)(b) requires the trustees to advertise the proposed disposition "for such period and in such manner as is advised in the surveyor's report" unless the report advises that advertising is not in the best interests of the charity. It is easy to see that in the case of charity land, the normal approach should be to market the land in an open way and advertising is one way this can be achieved. If the requirement is to be dispensed with it must be consequent upon advice from the surveyor in the (or a) report. In this case, the property was not advertised and the report does not provide the requisite advice to obviate that requirement. Indeed, it could not do so because the report was obtained after the property had been marketed and the defendant's offer accepted.

96. There is an issue between the parties about the marketing advice provided in the report. The report states that the property had been marketed for a period of 3-4 months prior to the report. Plainly this cannot be right because the claimant's evidence is that targeted marketing campaign was commenced on 9 November 2017 (the relevant part of the report is dated 3 or 4 January 2017). And confusingly the report says Cushman & Wakefield would "not envisage a marketing period of longer than 6 months" when, by the date of the report, an offer had been accepted.

97. There is no doubt, therefore, that the trustees failed to advertise the property for sale on the basis of advice obtained from the surveyor or, alternatively, failed to obtain advice enabling them to dispense with this requirement.

98. What are the consequences of the failure to advertise the property? There are a number of general points to be made:

(1) Although in practice charities will normally, indeed almost invariably, operate using sections 117(2) and section 119, their provisions must be construed in the overall context of the 2011 Act and in particular the default provision in section 117(1) which prohibits the disposal of land without an order from the court or the Commission.

(2) The provisions of section 119(1) may be seen as being in a different class to the provisions in section 122 concerning statements and certificates.

(3) The requirements of section 119(1), although not easy to interpret at a practical level, are not complicated; the trustees must obtain and consider a report, advertise, and decide they are satisfied having considered the report.

(4) The decision in Bayoumi suggests that a failure to comply with the statutory requirements leads to the trustees being without the power to effect a valid disposal.

99. However, the usual chronology of a property disposal may not apply; and it would be strange if having missed out a step, which then proves to be pointless that the trustees have to start all over again. It will happen sometimes that an offer to acquire the land comes before the trustees have thought about disposal, such as when a developer makes an unsolicited offer.

100. I consider that the decision in *Bayoumi* can properly be distinguished because in that case the trustees had made no effort at all to comply with the statutory requirements. It may be right on those facts to see the issue as one of vires. Absent any compliance with the statutory requirements, the default provisions apply and if there is no order from the court or the Commission, the charity is not entitled to dispose of the land. There is a clear statutory bar.

101. In this case there has been partial compliance with section 119(1). A report was obtained, albeit that terms had been agreed in principle before it was produced. It seems to me that the principal legal issue for the court is whether, as a matter of statutory construction, the failure to advertise, or to obtain prospective advice that advertising was contrary to the best interests of the charity, has the consequence that the Agreement is void, voidable or unenforceable. Can Parliament fairly be taken to have intended that consequence in every case regardless of the circumstances? Despite the careful control on the disposal of land by charities that is imposed by the 2011 Act, and earlier legislation, I do not consider that Parliament can have intended this invariable outcome. It seems to me that the requirements of section 119(1) ought to be interpreted in light of the overriding test that emerges from section 119(1)(c), namely that the terms of the disposition are the best that can reasonably be obtained for the charity. If the charity is able to demonstrate that advertising would have made no difference, a failure to advertise, and a failure to obtain advice about the need for advertising, should not impugn the transaction. Equally, the regime in Part 7 of the 2011 Act cannot have been intended to be so unforgiving that even if the trustees can be, and are, satisfied that the disposal achieves the best price reasonably obtainable, the transaction is unenforceable because a report was obtained later than envisaged by section 119(1). However, the charity must be able to provide cogent evidence dealing with these points.

Section 42 Companies Act 2006

102. I do not consider it is open to the claimant to rely on this provision in light of the fact it does not form part of the claimant's pleaded case.

CPR 24.2

103. I have already made observations about the claimant's evidence and noted that the absence of evidence from one of the trustees is not fatal. However, in my judgment it

falls some way short of being sufficient to discharge the burden that lies on the claimant on an application for summary judgment because:

(1) There is no evidence about the trustees' initial decision to put the property on the market and there is no evidence about what instructions were given to the agents or their advice.

(2) There is no evidence about why the proposed disposition was not advertised.

(3) There is only minimal evidence about the steps that were taken to market the property and how thorough the exercise was.

(4) There is no evidence that the absence of advertising made no difference to the sale terms. The court is invited to infer that this is so, but this is not satisfactory. It would have been open to the claimant to have obtained evidence on this point from Cushman & Wakefield. Indeed, it is a matter they should have considered in their report. Instead they incorrectly record that the property had been marketed for 3- 4 months.

(5) The claimant's evidence about compliance with section 119(1)(c) is inadequate. Mr Payton's evidence is that it is obvious that the directors were satisfied on this point because the price that was offered was considerably above Cushman & Wakefield's valuation figure. What is missing, however, is evidence from at least one director saying in terms what it was they considered and what was their reasoning that led them to be satisfied with the offer.

(6) The minutes of the meeting are unsatisfactory not least because they only refer to the supplemental report being considered and they do not record that the directors were satisfied that the terms were the best that could reasonably be obtained for the claimant.

Conclusion

104. This is not a suitable case for summary judgment. There needs to be an investigation at a trial about the process of marketing the property and the decision making process of the directors. Disclosure will be required. In those circumstances, I will dismiss the claimant's application and consider giving directions for trial, as well as dealing with consequential issues, when this judgment is handed down.