Neutral Citation Number: [2020] EWHC 302 (Ch)

Case No: PT-2019-BRS-000109

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 18/02/2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

PERSIMMON HOMES LIMITED	**Claimant**
- and -	
COUNTRY WEDDINGS (CARDIFF) LIMITED	**Defendant**

- -
- -

Edwin Johnson QC (instructed by **Walker Morris LLP**) for the **Claimant**
Benjamin Faulkner (instructed by **Burges Salmon LLP**) for the **Defendant**

Hearing date: 12 February 2020

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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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HHJ Paul Matthews :

Introduction

1. This is my judgment on the application by notice dated 14 January 2020 by the claimant for summary judgment under CPR Part 24. The application is made in a claim begun by claim form under Part 8 of the CPR issued on 29 November 2019. The claim itself is for declaratory relief under section 84(2) of the Law of Property Act 1925 in relation to a restrictive covenant which the defendant says binds land of the claimant, on which the claimant, a well-known housebuilder, wishes to construct a pumping station intended to serve a housing development which it intends to build nearby. (There is no suggestion that the restrictive covenant applies to the development site itself.) The claimant says that the restrictive covenant does not bind the pumping station land and seeks a declaration to that effect.

2. The claim having been issued under CPR Part 8 was supported by a witness statement dated 25 November 2019 from Daryl Jones, Head of Land and Planning at the claimant. The defendant produced a formal written response to the claim dated 24 December 2019 although the Part 8 procedure does not so require, and also a witness statement dated 24 December 2019 from Jamie Stuart Williams, a director of the defendant. At the same time, the defendant filed an acknowledgement of service indicating an intention to defend. The application for summary judgment is supported by a second witness statement of Daryl Jones.

The restrictive covenant

3. The restrictive covenant with which this case is concerned was included in a conveyance dated 8 November 1983 May between Kenneth Johns as vendors and Eileen Edwards as purchaser. Unusually, and most unfortunately, no copy of this conveyance has so far come to light. The parties have to date therefore relied on the version of the covenant itself reproduced in the charges section of the land register for the claimant's land. (Although the land the subject of the conveyance and therefore of the restrictive covenant now forms part of the larger area of the claimant's land, and is now registered under a single title, it was originally registered under a separate title. As will be seen below, the entry on the register makes clear that the burden of the covenant applies only to this original part of the land.)

4. Entry 15 in that part of the register reads as follows:

> "A Conveyance of the land edged and numbered 8 in blue on the title plan dated 8 November 1983 made between (1) Kenneth Merlin David Johns (Vendor) and (2) Eileen Gladys Anne Edwards (Purchaser) contains the following covenants: –
>
> 'The Purchaser hereby covenants with the Vendor for the benefit of Pencoed Farm and each and every part thereof: –
>
> To erect and at all times thereafter to maintain and keep in good repair upon each boundary of the property shown on the said plan with an inward facing "T" mark a stockproof fence comprised of sheep netting topped with barbed wire to a height of approximately 4 foot.

> To pay on demand to the Vendor one third of the cost incurred by the Vendor in repairing and maintaining and re-surfacing the driveway.
>
> Not without first obtaining the prior consent of the Vendor to reduce in height the hedge on Pencoed Farm the approximate position which is shown coloured yellow on the said plan provided that for avoidance of doubt no consent shall be required to cut down any branches of the said hedge hanging over the property if this can be done without reducing the height of the said hedge
>
> Not without first obtaining the prior written consent of the Vendor (which consent shall not be unreasonably withheld) to construct or place any buildings or erections upon the property."

5. Although, as I have said, no copy of the conveyance itself is available for this hearing, a copy has been located of a conveyance dated 9 November 1983 by the same vendor to different purchasers of land (Mr and Mrs Jenkins) also adjacent to the pumping station land. This conveyance contains covenants which are similarly worded, and the claimant seeks to rely on this conveyance to shed light on the terms of the missing conveyance dated 8 November 1983. I shall come back to the significance of this in due course.

The defendant and its business

6. The defendant is the successor in title to Kenneth Johns, the vendor in the conveyances of 8 and 9 November 1983, in respect of a property adjacent to the pumping station land, currently known as Pencoed House. There is some evidence that this property is also known as Pencoed Farm. Mr Johns sold this land to a Mr and Mrs Thorne on 26 August 1999, and they sold it to the defendant in 2004. Kenneth Johns in fact died on 10 November 2011. The defendant occupies the land for the purpose of carrying on the business of a country wedding venue.

7. As one might imagine, and particularly bearing in mind the defendant's name, this business depends to a considerable extent on the beauty and tranquillity of the setting in which it is carried on. It is concerned that the development proposed by the claimant will affect its business. In its capacity as proprietor of Pencoed House it claims to be able to enforce the purchaser's covenant in the conveyance of 8 November 1983

> "Not without first obtaining the prior written consent of the Vendor (which consent shall not be unreasonably withheld) to construct or place any buildings or erections upon the property."

The contentions

8. The claimant challenges the defendant's ability to enforce the covenant against building on the property without consent. It says, first, that the defendant has not proved that the land it now owns and occupies (Pencoed *House*) is part of the land intended to be benefited by the covenant (stated to be Pencoed *Farm*). Secondly, it says that because Kenneth Johns has died, and it is no longer possible to obtain his consent, the covenant no longer has any effect in law. Thirdly, it says, without prejudice to its earlier contentions, that if the defendant *is* entitled to enforce the

covenant, it has asked the defendant for consent, but this has been unreasonably withheld. However, for the purposes of this application for summary judgment, the only matter which is raised before me now is the second contention. (Formerly, I understand that the first contention was also the subject of this application, but that position has recently changed.)

9. The second contention breaks down into two issues. First, does the reference to "the Vendor" in the covenant refer only to Mr Johns, or does it also refer to his successors in title? Second, if the reference is to Mr Johns alone, what is the effect of his death? In particular, does it enlarge the covenant from a qualified to an absolute covenant, or does it discharge the covenant altogether? Essentially these are questions of construction of the conveyance. What did the parties mean by the words they used?

10. Both Mr Johnson QC (for the claimant) and Mr Faulkner (for the defendant) treated me to full arguments about the construction of the relevant covenant, and took me through a number of relevant cases, including *Churchill v Temple* [2010] EWHC 3369 (Ch), which itself fully reviewed the cases then available. They also referred me to other cases without necessarily taking me through them, including *Crest Nicholson Residential (South) Ltd v McAllister* [2003] 1 All ER 46, *Arnold v Britton* [2015] AC 1619, SC, and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, SC. As a result, I was satisfied that this question is not straightforward, and that there are serious arguments both ways. In particular, each side was at pains to illustrate what it considered to be the absurdities that would result from the construction of the other side being adopted. This is very much the process that a judge would expect to see at the trial of such a claim as this.

Summary judgment

11. However, this is not the trial of the claim. It is an application for summary judgment. It is well-known that the court on such an application is not to conduct a mini-trial, or indeed any kind of trial. As Lord Hope put it in an often cited passage in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1:

> "95. … The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord

> Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

12. However, a particular subset of summary judgment cases deals with those where the critical issue is one of construction, whether of a contract, a conveyance or a statute. The present case was argued by the claimant to be such a case. Accordingly, I was pressed by Mr Johnson QC with the decision of the Court of Appeal in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725. That was a case where the claimant brought a claim in debt against the defendant under an agreement entered into in March 1990. The *defendant* then applied for reverse summary judgment, on the basis that a subsequent agreement of June 2002 operated to extinguish the claimant's claim. The judge at first instance had invited the parties to agree that he should decide the question whether the agreement of June 2002 extinguished the claim as a preliminary issue, but each side for its own reasons did not wish this to happen. The judge accordingly held that it was for him to decide only whether the claimant had a real prospect of succeeding on its claim despite the agreement of June 2002, and dismissed the application on the basis that it had such a prospect.

13. The Court of Appeal allowed the defendant's appeal. Moore-Bick LJ (with whom Ward and Buxton LJJ agreed), said:

> "12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.
>
> 13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
>
> 14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case

> should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

The rival positions on this application

14. In the present case, the claimant submits that, although no copy of the 1983 conveyance is available, sufficient evidence and other information is available for the court to be able on this application to decide the questions of construction which arise in this case, and which would arise in precisely the same form if the matter went to trial. Mr Johnson QC says that there is no real prospect of any further or better evidence becoming available at trial, so the court might as well decide the question of construction now.

15. The defendant's stance on this application is more nuanced. Its primary position is that if the question of construction were to be decided now, it would be decided in favour of the defendant and therefore the claimant's application should be dismissed on its merits. However, if the court were in the present state of the evidence to be inclined to agree with the claimant, then the application should be dismissed on the basis that further evidence may be available in due course before the trial.

16. With respect, however, I do not think that the defendant's bifurcated position stands up to scrutiny. If the court considers that it is in as good a position as the court would be at trial to carry out the construction exercise which is required, then it should carry it out. That is in effect what the *ICI* case requires. If, on the other hand, it considers that it is not in that position, then it should not attempt the construction exercise at all, because that is likely only to muddy the waters when it comes to the trial. The court's decision on the construction of a document in a state of incomplete information is not only not decisive, but positively unhelpful.

This case

17. So I turn to consider whether it is appropriate for the court to deal with this application on the basis set out by the Court of Appeal in *ICI Chemicals & Polymers Ltd*. The nub of the decision lies in two points made by Moore-Bick LJ. The first is:

> "… if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

The second is:

> "Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome."

18. One important difference between this case and the *ICI* case is that here the relevant document (the conveyance) is not available. We only have an official reproduction of the terms of the covenant in the charges section of the land register. At the hearing, no

one suggested that this was inaccurate, and in the absence of any evidence that the covenant was in different terms, I proceed on the basis that we at least have that. However, we do not have anything else, including any definition clauses that there may have been and any other provisions which would bear on the question of construction, in particular whether the term "vendor" was to include his successors in title, and what was to happen on his death. This is quite a significant difference. The second of the two extracts from the judgment of Moore-Bick LJ is concerned with the possible need for evidence of the surrounding circumstances affecting construction of a document. It is plainly much more significant if the document itself is missing.

The claimant's view

19. The claimant's response is to say that, first, if no copy of the conveyance is available now, nearly 40 years after it was made, it is not very likely that a copy will be found before trial, and hence the court today is in no worse position than the court would be at trial. Second, the claimant says that considerable assistance can be gained from the conveyance made by the vendors Mr Johns to Mr Mrs Jenkins of adjacent land on the following day, 9 November 1983, of which a copy is available.

20. As to the first of these points, the evidence as to what efforts have been made to locate relevant documents, and in particular the conveyance with which we are concerned, is very limited. The first witness statement of Daryl Jones makes clear the absence of the conveyance, but says nothing about any efforts made to find that or any other documents. The first witness statement of Jamie Williams and the second witness statement of Daryl Jones do not refer to this subject at all. There are limited and inconclusive references in the inter-solicitor correspondence, but each side has been, if I may say so, rather coy about whether any enquiries have been made, and if so what they are.

The defendant's view

21. The defendant says that, to the extent that the claimant relies on the conveyance to Mr and Mrs Jenkins of 9 November 1983, it will be necessary to investigate its background and also to investigate whether there are any other relevant conveyances. In addition, the defendant needs the opportunity to make enquiries of Mr and Mrs Thorne, the defendant's predecessors in title, who bought the land from Mr Johns in 1999, their solicitors, and the solicitors who acted for the defendant's directors and shareholders when the land was bought by the defendant in 2004. No satisfactory explanation was given to me as to why these enquiries had not already been carried out in the six months or so between the opening correspondence in this matter and the issue of the claim form, or, if they had been carried out, the extent of those enquiries and what they had so far shown.

Assessment

22. I bear in mind the second point made by Moore-Bick LJ and cited by me at [17] above. Nevertheless, the primary problem here is the absence of the conveyance itself, rendering the adduction of secondary evidence of much greater importance than it would otherwise be. Moreover, I accept that, if this matter were to go to trial, there is at least the possibility that further relevant evidence would come to light, partly from the process of disclosure, and partly from the interviewing and following up of

potential witnesses. Indeed, I would go so far as to say, based on my own experience as a litigation solicitor and now as a judge, that I think it improbable that *no* further relevant evidence will be found.

23. Such relevant evidence might include, for example, evidence as to Mr Johns' health in 1983 (because this would be part of the context in which he would reserve powers to himself or perhaps wish them to be available to his successors) and as to what was his retained land in 1983 (relevant to the question of what land could be benefited by the covenant). It is also possible that a copy of the missing conveyance may turn up, though of course it cannot be said that this is more probable than not.

24. I also bear in mind that the application for summary judgment comes from the claimant, and it is therefore for the *claimant* to satisfy me that the case is suitable for such an application. In my judgment, this includes satisfying me, in accordance with the *dicta* of Moore-Bick LJ, that I have

> "all the evidence necessary for the proper determination of the question".

The conveyance of 9 November 1983

25. In this connection the claimant presses me with the conveyance from Mr Johns to Mr and Mrs Jenkins of 9 November 1983. There can be no doubt that this in itself has at least potential relevance, if only because it is part of the factual matrix in which the conveyance of the day before was made. Given the proximity in time, and the fact that Mr Johns was a party to both of these conveyances, as well as the similarity in language between the covenant with which I am concerned (as set out in the land register) and the equivalent covenant in the conveyance of 9 November 1983, the claimant seeks to persuade me to go further, and in effect to construe the covenant in the land register by reference to the conveyance of 9 November 1983. So, for example, the claimant asks me to accept that the definition of "vendor" in the former is the same as the definition in the latter.

26. I do not think it would be right for me to do this. Each of the two conveyances is the product of a bargain between Mr Johns on the one hand and entirely separate purchasers on the other, of two different pieces of land, albeit adjacent to each other. Each of the two purchasers may have had completely different motives for purchasing, and completely different ideas of what they wished to do with their new property. Such differences may well have been reflected in the bargains which they made and the terms of the conveyances. The fact that some parts of the conveyances may have been similar or even the same does not mean that they all were, or that expressions used in the one must mean the same as they do in the other.

27. Wise judges have often warned against trying to construe a document by reference to a decision of an earlier court on a similar document. Thus, in *Midland Bank plc v Cox McQueen* [1999] PNLR 593, CA, Mummery LJ said (at 605E-F):

> "As has been repeatedly remarked, every document must be construed according to its particular terms and in its unique setting. Detailed comparisons of one document with another and of one precedent with another do not usually help the court to reach a decision on construction. Indeed, that exercise occupies a disproportionate amount of valuable time which would be better spent on the

> arguments that really count: those which focus on the precise terms of the relevant documents and the illuminating environment of the transaction."

28. If that is so in construing one document by reference to the decision on another, it must equally be so in considering the value of the conveyance of 9 November 1983 as an aid to construction of the conveyance of the day before. Accordingly, in my judgment the later conveyance, although interesting, and obviously part of the factual matrix in which the conveyance of the day before was made, does not to any significant extent make up for the absence of the conveyance with which I am concerned.

29. Overall, I am simply not satisfied that I have all the information which I will need in order to construe this covenant in its context. I do not have the conveyance itself, and I have virtually no information about the factual matrix in which it was entered into. At least some of this information, as well as possibly a copy of the conveyance, or even just a draft, may become available by the time the matter goes to trial.

30. During the argument, Mr Johnson QC criticised such an approach as pure speculation and (although he did not use this word) Micawberism. I disagree. Very few enquiries appear to have been made for relevant information up to now. So far from leaving no stone unturned, it does not seem that very many stones have so far been turned over at all. The respondent to a summary judgment application is entitled to a fair dispute resolution process, and this must involve proceeding to give summary judgment (and so depriving that respondent of disclosure and other usual trial processes) only where it is fair to do so.

Conclusion

31. I accept fully that the court should not shirk its duty to deal with an application for summary judgment by construing a document which will shortcut the litigation process and result in a judgment for one party or the other. But, as the Court of Appeal rightly observed in the *ICI* case, this can only be done if the court is satisfied that it has all the information which it needs and that it will be in as good a position as the trial judge would be in due course. For the reasons which I have given above, I am not so satisfied, and accordingly dismiss this application.