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

NCN: [2022] EWHC 3336 (Ch)

ON APPEAL FROM THE ORDER OF DISTRICT JUDGE LAMPKIN
MADE ON 11 JANUARY 2022

Case No. CH-2022-LIV-000002

Courtroom No. 28

35 Vernon Street
Liverpool
L2 2BX

Tuesday, 11th October 2022

Before:
THE HONOURABLE MR JUSTICE FANCOURT
VICE-CHANCELLOR OF THE COUNTY OF PALATINE OF LANCASTER

B E T W E E N:

FSV FREEHOLDERS LIMITED

and

SGL1 LIMITED

MR F ASGHAR appeared on behalf of the Applicant
MR P BYRNE appeared on behalf of the Respondent

JUDGMENT
(Approved)

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MR JUSTICE FANCOURT:

1. This is an appeal by FSV Freeholders Limited ("FSV") against an order of District Judge Lampkin made on 11 January 2022, by which he declared that Fox Street Village Limited, acting by its administrators, complied with the provisions of section 5 of the Landlord and Tenant Act 1987 in its disposition of the freehold title of blocks A to E, 30 Fox Street, Liverpool L3 3BQ to the respondent "SGL1"), and that FSV must pay the costs of the respondent.

2. The Part 8 claim concerned allegations made by FSV that in selling those blocks the administrators had failed to comply with the requirements of section 5 of the 1987 Act, and that accordingly SGL1 held the freeholds subject to the rights of FSV, pursuant to notices served under the 1987 Act subsequently. SGL1 acquired the freeholds pursuant to a contract made with the administrators on 12 June 2020, which was completed by transfer on 25 November 2020.

3. Section 5 notices had been served by the administrator's solicitors on qualifying tenants in the blocks on 11 February 2020, specifying 27 April 2020 as the date for giving notice of acceptance of the offers to sell to the tenants. One set of notices was served in respect of block A, offering to sell the freehold for £350,000, and another set of notices for blocks B, C, and E together, offering to sell those freeholds for £1,050,000. Block D, it is agreed, was not subject to the pre-emption provisions in Part 1 of the 1987 Act, and it was eventually sold to SGL1 for an extra £200,000. It is not contended by FSV that more than 50% of the qualifying tenants in the blocks in either case accepted the offer to purchase within the time specified, and accordingly the issues raised in the evidence served in response to the claim are about the validity of the section 5 notices.

4. The District Judge was unimpressed by the points that were raised in the evidence of Mr Samuel Ip, the director of FSV. He considered that the complaints made were "gripes" as to the procedure that the sellers had used. In a short and direct ex tempore judgment, the District Judge briefly dismissed all the points that had been raised and considered there was no reason to give directions so that any of them could be investigated further with the benefit of disclosure and evidence, as FSV had submitted was the appropriate course on the first hearing of the Part 8 claim. The notices of the hearing had designated it as being for directions or disposal, depending on how the matters were dealt with at the hearing.

5. There were various issues raised before the District Judge, only some of which were pursued on this appeal by Mr Asghar on behalf of FSV. The issues raised were:
    1. That FSV had failed to adduce evidence that the administrators had reached the stage of proposing to sell the freeholds to the SGL1 when they served the section 5 notice.
    2. Whether the right qualifying tenants were sent notices.
    3. Whether the notices were validly served on the qualifying tenants.
    4. Whether it was correct to serve only two sets of notices for the 4 blocks in the way that I have described.

5. Whether the correct requisite majority of “qualifying tenants” had been identified, having regard to rules about who was and who was not a qualifying tenant.

6. The District Judge considered the answer to all these points was contained in the witness statement of a Ms Jeanvie, the solicitor who had prepared and sent out the section 5 notices on behalf of the administrators. She explained in summary in her witness statement what she had done. The District Judge found her evidence to be full and thorough, that it carried a great deal of weight and was categoric evidence, as he put it, of the conveyance, by which I think he meant that the requirements of the 1987 Act had been observed correctly. He considered there was sufficient evidence to deal with the claim as a disposal hearing and proceeded to do so. He felt that the argument that the matters Mr Ip raised required further investigation was just a fishing expedition, and there was no real prospect of anything being found on an investigation that could amount to a defence to the claim.

7. The District Judge did not give any reasons in relation to any of the challenges raised by Mr Ip as to why there neither was nor could be any prospect of the challenges succeeding. Ms Jeanvie’s witness statement was relatively short, only two closely typed pages, and did not provide great detail about, for example, how the qualifying tenants were identified, or why it was considered that blocks B, C, and E should be treated as one building for the purposes of the Act. He did not explain why Ms Jeanvie’s evidence answered the issues raised, or why any of the issues could not succeed.

8. Although full allowance must be given for the fact that it was an ex tempore judgment delivered under pressure of time at the end of a short and compressed hearing, I do not consider that the judgment was adequate in providing reasons for a decision to treat the first hearing of the claim as a disposal hearing and reject summarily all the defences raised. The requirements of a judicial decision that involves assessment of evidence, set out by Males LJ in *Simetra Global Assets v ikon Finance* [2019] EWCA Civ 1413 and are well known. I agree with FSV that the decision did not meet those requirements sufficiently. It was primarily for that reason that I gave permission to appeal, but also because, on a brief perusal on the papers, it appeared to me that there might be something in one or more of the points that had been raised that did indeed justify directions being given for a later trial of such issues.

9. Apart from the inadequacy or lack of reasons given, there are four further grounds of appeal, which I can summarise as follows:
    1. There was no sufficient evidence before the District Judge touching upon the issues raised that could have enabled him to decide the issues summarily against FSV.
    2. The District Judge was wrong to treat the evidence in defence of the claim as totally without merit, and to use that characterisation in relation to a defence to a Part 8 claim.
    3. The District Judge applied the wrong test in considering whether the section 5 notices were valid, in that he asked whether there was evidence that the administrators “intended” to sell the freeholds to the respondents, not whether they “proposed” to do so, and accordingly his

conclusion that it was “blindingly obvious” that they intended to do so is unsafe.

4. The District Judge wrongly treated the burden as being on FSV to disprove the respondents’ claim, not on the respondents to prove their claim by sufficient evidence.

10. I will take the last ground first because it has a bearing on the other principal grounds. On a first hearing of a Part 8 claim, the Court is entitled to consider whether the claim can be disposed of there and then, in accordance with the overriding objective, rather than give directions for a later trial. In so doing, the Court is properly looking to see whether there is an issue raised, by way of defence or otherwise, that requires or justifies directions being given, rather than in effect judgment being given summarily for the claimant. It is of course true that the evidence filed in support of a Part 8 claim must prove the claim; and that where evidence is filed that taken at face value appears to prove the claim sufficiently, the Court will, in practice, consider whether any of the points raised in defence is such as to give rise to a real issue for further investigation or argument. That means that the Court will, in some cases, focus as much on the defences raised as on the extent of the evidence in support of the claim.

11. Where, as in this type of claim, there are complex issues of compliance with statutory requirements, it would be burdensome for a claimant, in filing evidence in support of their claim, to have to anticipate every possible challenge that might be raised by any defendant and cover it by detailed evidence before knowing if any such challenge will be raised. More generalised evidence of compliance will therefore be sufficient, at least in the first instance. For example, before knowing if any issue was going to be raised on the correct addressing and posting of notices to tenants, it would not be expected that evidence would be filed about how each of more than 200 letters containing notices were prepared, addressed, and placed in the post.

12. In my view, there is therefore nothing objectionable in principle in the Court looking to see whether the defendant has sufficiently raised a triable issue. If nothing of any substance is raised, the Court is likely to consider the claim sufficiently proved by the generalised evidence in support of it. However, if a matter of some potential significance is raised, the Court may then find the evidence of the claimant to be insufficient at that stage, and give directions for further examination of the issue at a later date.

13. The District Judge therefore did not err in principle by looking to see if there was any point of substance that was raised by FSV, rather than examine whether every i had been dotted and t crossed in the claimant’s evidence. Where the District Judge might have gone wrong, which is where the other grounds of appeal come in, is in considering the weight of the matter raised by FSV in comparison with the generalised evidence that the claimant had filed.

14. The issues of challenge raised by FSV and the points now pursued do not include the questions of whether there was sufficient evidence that the right qualifying tenants were served and whether 90% of the qualifying tenants were validly served with notices. The issues relied on before me were whether the section 5 notices were invalid, because they were served in respect of the wrong blocks and because the eventual sale to the respondents

was not severed but was in the form of a single sale for an aggregate consideration of £1.6 million.

15. Taking first the question of whether the notices were correctly served for block A and for blocks B, C, and E together, the relevant statutory provisions are the following.

16. First, section 1(1) of the 1987 Act, which provides that a landlord shall not make a relevant disposal affecting any premises to which, at the time of the disposal, Part 1 of the Act applies, unless he has complied with the requirements of section 5 for notices to be served on qualifying tenants.

17. Section 1(2) provides that, with exceptions, Part 1 applies to premises if they consist of the whole or part of a building and contain two or more flats held by qualifying tenants.

18. Section 4(1) describes what are relevant disposals affecting premises to which Part 1 applies and says that they are disposals by the landlord of any estate or interest, legal or equitable, in any such premises.

19. Section 5(1) provides:

> "Where the landlord proposes to make a relevant disposal affecting premises to which this Part applies, he shall serve a notice under the section ("an offer notice") on the qualifying tenants of the flats contained in the premises…"

Subsection (2) requires an offer notice also to comply with section 5A where the proposed disposal is a contract to be completed by conveyance.

20. Section 5(3) provides:

> "Where a landlord proposes to effect a transaction involving the disposal of an estate or interest in more than one building, whether or not involving the same estate or interest, he shall, for the purpose of complying with this section, sever the transaction so as to deal with each building separately".

21. Section 5A(1) stipulates further requirements to be met in the case of a disposal by contract. Subsection (2) provides:

> "The notice must contain particulars of the principal terms of the disposal proposed by the landlord, including in particular:
> (a) the property or the estate or interest in that property to which the contract relates,
> (b) the principal terms of the contract (including the deposit and consideration required)".

22. The administrators were required to sever the proposed transaction with the respondents into separate "buildings", and they did so in the way that I have described. Argument was focused mainly on the three blocks that were treated as one "building", but there is a suggestion in the evidence that all five blocks may be "linked with communal area and common facilities". There is a plan attached to a prohibition notice served by the local authority which shows on the face of it that blocks A and B are separate blocks, and blocks C and E either adjacent or connected. A separate prohibition notice was served in relation to

block B and a single notice for block C and E together. On what basis, therefore, would blocks B, C, and E be treated as a single building under the Act?

23. In one case, *Long Acre Securities v Karet* [2005] Ch 61, a deputy judge held that owing to the sharing of grounds and appurtenances between a number of blocks of flats, they were properly to be treated as one building. That is not quite this case on the evidence: what is said is that there is a connection between blocks B and C, and I think this may have meant to say C and E, and that all three blocks share common services and facilities. These questions are very fact-sensitive. The judge in *Karet* considered that a number of factors may be relevant, including the plans of the buildings, underlying structural support for the blocks, lessees' rights to use appurtenant premises, connections at any levels, the dates of construction of the blocks, how the blocks are managed (i.e., whether together or separately), how the service charge is operated, and visual impressions. The only evidence on behalf of the respondents was that blocks B and C, though possibly meaning blocks C and E, interconnect, though no detail was provided, and that all three of the blocks covered by the second set of notices share services and plant.

24. I do not consider that it was possible or right to conclude, at an initial hearing, that there was no arguable issue that block B and also possibly each of blocks E and C were to be treated as separate buildings, in which case the administrators would have been obliged, as regards service of section 5 notices, to separate them out. The position in relation to block A is also not entirely clear. It may be that all four blocks amounted to a building because of the degree of sharing of the appurtenant property. There was sufficient raised on behalf of FSV in the evidence to suggest that treating blocks B, C and E as a single building was doubtful. That being so, in my judgment the District Judge was wrong to foreclose further consideration of that issue and wrong for that reason to grant the declaratory relief that he did at that stage.

25. The next ground of appeal is that the District Judge applied the wrong test by asking himself whether the administrators had formed an intention to sell the freeholds to SGL1, whereas the question is correctly whether they proposed to do so.

26. Paragraphs 18 and 19 of the judgment read as follows:

> "The issues in dispute, he says, is to whether the company FSVL who went into liquidation formed an intention to make a relevant disposal within the meaning of section 5, and referred to the case of *Mainwaring v Henry Smith's Charity Trustees* [1996] CA2 25, in which the landlord who proposed to make a disposal for the purpose of section 5 moved out of the zone of contemplation and into the valley of the decision".
>
> Accordingly, the claim was to prove that FSVL, or in reality the administrators, proposed to sell the freehold to the tenants was shown. I think that it is blindingly obvious and therefore not in my view a proper challenge to this conveyance that has any prospects of success."

27. Strictly, the District Judge was wrong to characterise the test as being one of formation of an intention to make a relevant disposal, as opposed to proposing to make the disposal, but he did refer to the correct authority, or at least a relevant authority, namely the *Mainwaring*

case. The District Judge was clearly wrong in paragraph 19 to characterise the issue as whether the administrators proposed to sell the freehold to the tenants, rather than SGL1, but that in my judgment was clearly a slip of the tongue, because the whole issue is as to the existence of a proposal to sell to the intended purchaser, namely SGL1, which then triggers the obligation to serve notices on the tenants.

28. Even if the District Judge got the test slightly wrong, it is unclear to me what significance that has. If by 11 February 2020 the administrators had formed the intention to sell, then they must have proposed to sell; the greater must include the lesser. The fact that a complex process of serving different sets of notices was gone through strongly suggests in itself that the professional office holders had at least a proposal to sell. It is not necessary for them to have had an intention to sell to the respondents specifically, only to sell on terms that were summarised in the notices.

29. At one stage, FSV's argument on paper appeared to be that the notices should have been served sooner, but if that were so the administrators might have been in breach of duty to give notices earlier but that does not invalidate the notices that were served. I find it wholly unarguable that the notices were served too soon, as FSV elsewhere contended in its written case. The picturesque language of moving out of the zone of contemplation into the valley of decision does not mean that the administrators must have made a decision, only that they proposed to sell on the terms set out in the notices. I consider it is clear that they did, and the District Judge was right in this regard. The contrary is not realistically arguable.

30. The next point is that the section 5 notices were invalid because they did not set out the terms of the transaction that was proposed, namely a sale of five blocks for £1.6 million, or alternatively that the eventual sale to the respondents was not valid in view of the terms of the section 5 notices which severed the transaction. This argument in my judgment is a wrong interpretation of the Act. Section 5A(2), which requires the terms of the proposed disposal to be summarised, is a requirement that is incorporated into section 5 of the Act, but section 5(3) requires the transaction to be severed for the purposes of the notices. That is how the Act works. If block A was one building, and blocks B, C, and E were another, the proposed transaction was correctly severed. It is not the case that if the offers to the lessees are not accepted, the landlord then has to sell on a severed basis to the proposed purchaser. It can proceed with the unsevered transaction. The section 5 notices do not have to contain the terms that the purchaser agreed but rather the severed terms that section 5.3 requires, which often require the consideration to be apportioned. There is in my judgment no arguable basis for contending that the notices were invalid on this ground.

31. The final ground of appeal is that the District Judge was wrong to characterise the defence as totally without merit. In view of what I have already concluded this must be so, and the recital to that effect in the order cannot stand. It clearly does not in any event have any implications under Practice Direction 3C of the Civil Procedure Rules because there was no claim issued or application made by FSV in the evidence in opposition to a claim brought by SGL1. Using those words might have had some significance as regards the basis on which costs should be assessed, though it does not appear that the District Judge assessed them on the indemnity basis. Use of the particular expression "totally without merit" is probably best confined to cases where it has some technical significance under practice direction 3C.

32. For the reasons that I have given, I therefore allow the appeal, but only to the extent of directing that there be tried the question of whether two sets of section 5 notices were correctly served, one for block A and one for blocks B, C, and E, on the basis there were two separate buildings for the purposes of the 1987 Act. I will therefore set aside the order made by the District Judge and give directions for the trial of that issue..

End of Judgment.

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.