



Neutral Citation Number: [2024] EWHC 401 (KB)

Case No: KA-2023-HBM-000041

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY

ON APPEAL FROM THE COUNTY COURT AT NOTTINGHAM
H15YJ983 & H16YJ302

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 26/02/2024

Before :

THE HON. MR JUSTICE BOURNE

Between :

CO MAYO ESTATES LIMITED

Claimant/Respondent

- and -

HIDDEN GEM LIMITED

Defendant/Applicant

Daniel Black (instructed by Co Mayo Estates Legal Department) for the **Claimant**

Richard Alford (instructed by JMP Solicitors) for the **Defendant**

Hearing date: 29 January 2024

Approved Judgment

This judgment was handed down remotely at 10:30am on 26 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE BOURNE

The Hon. Mr Justice Bourne:

Introduction

1. This is an appeal from a decision of HH Judge Jonathan Owen at Nottingham County Court on 19 June 2023, giving judgment for the Claimant and dismissing the Defendant's counterclaim.
2. The Claimant/Respondent, a company registered in Ireland, sold 3 plots of land known as plots G, I and L, opposite Clay Pightles, Stoke Row Road, Kingswood, Henley on Thames at an online auction run by Barnard Marcus Auctions on 9 September 2020.
3. The Defendant/Appellant, a company registered in England and Wales, is a small family company owned by a medical GP, Dr Raman Prabu, and his wife and children. Other than the land with which this case is concerned, its only possession is land consisting of seven parking spaces.
4. The Defendant was the winning bidder for the 3 plots and thereby agreed to buy them. It completed the purchase of plot G at a total cost of £26,539. The contract of sale obliged it to pay a deposit of £6,000 for each of plots I and L but it paid only £2,000 for each plot. The Claimant claimed the unpaid balance of the deposits, totalling £8,000. By its Defence and Counterclaim the Defendant sought to rescind the contract for misrepresentation and to recover the sums already paid, plus sums incurred for professional advice, making a total counterclaim of £33,859.

The misrepresentation issue

5. The alleged misrepresentation was contained in the sale particulars published by Barnard Marcus which formed an "auction pack" for the sale. The material parts were summarised as follows by the Judge below:

"10. The Defendant relies upon the advertising materials which form part of the auction pack for the sale of the premises. Any reader of this judgment needs to consider carefully that centrally important document. I am going to read out parts of it now:-

(a) It is headed, "Lot 73-75. Freehold land opposite Clay Pightles, Stoke Row Road, Kingswood, Henley-on-Thames, RG9 5NU". (b) It says in red: "TO BE OFFERED AS SEPARATE LOTS". (c) It further says:- "Three freehold parcels of land. Each plot with road frontage and potential. Situated opposite residential dwelling. Full vacant possession. Location: These plots are situated off the south side of Stoke Row Road with frontage to Stoke Row Road and lying within the area of Stoke Row forming part of Kingswood. This is a particularly popular commuter belt location with Henley-on-Thames lying to the east with the commercial centre of Reading to the south. The area is well served by local facilities with Reading town centre providing a comprehensive range of shopping and recreational pursuits. Local bus routes serve the

surrounding area while other transport links may be found at Reading with fast rail connections to London and also the M4 motorway lying to the south.

Description: The plots provide the opportunity to buy a substantial yet manageable parcel of land in this locality with each plot benefiting from road frontage along its northern boundary to Stoke Row Road. Currently each plot is mainly woodland with a variety of species but clearly offers a number of opportunities for a purchaser to consider alternative uses or even development of each plot, subject to the necessary consents. Buyers are deemed to rely solely on their own enquiries with regard to any development potential that may exist but are invited to utilise the computer generated image shown in these particulars as an idea to take forward pre-application planning advice with the local authority.”

11. Various details are then given in respect of the size of the plots which are not material to this judgment. There are also instructions given with regard to viewing the plot, which are again not material to this case, and a plan showing the approximate location of these plots.

12. There are four photographs, two of which appear to show an area of established woodland and two photographs which are obviously computer generated images showing residential properties, or an artist’s or computer’s depiction of residential dwellings, in a wooded area. The two “CGI” images both say “Indicative CGI only (STPP)”. It is not in dispute that “STPP” is an acronym for “subject to planning permission.”

6. In the Defence and Counterclaim the Defendant’s case of misrepresentation was pleaded as follows:

“PARTICULARS OF MISREPRESENTATION

The Claimant represented that Plot L, together with Plots I and G which the Defendant also purchased at the auction, had a real possibility of use for residential development. In fact, all 3 plots are protected ‘ancient woodland’ which had been wooded continuously since 1600 AD and there was at 9/20 or after simply no prospect at all of any permission for development ever being granted. The plots are (save, perhaps, to an ancient woodland enthusiast) valueless and useless. The representation was made by:

(a) Putting CGI pictures of possible houses to be built on the plots (see p4 of the bundle attached to the particulars of Claim).

(b) Referring to ‘potential’ and facilities which future residential occupiers could enjoy (see p4 again).”

7. The Claimant denied that the sale particulars contained any representation, alternatively any representation of fact, alternatively any false representation of fact. It also denied that the Defendant had relied on any misrepresentation or that any misrepresentation induced the making of the contract of sale.

The law

8. There is little if any disagreement between the parties as to the relevant law, and no issue is taken with the trial Judge's self-direction as to the law. On the issues relevant to this appeal, that direction was by reference to propositions from the 34th edition of Chitty on Contracts, namely:
 - i. The meaning of a representation depends on how the words would be understood by a reasonable person in the factual context.
 - ii. Although the traditional view is that a misrepresentation must be a false statement of fact, nevertheless a statement of opinion may be a misrepresentation if the maker does not in fact hold the opinion stated.
 - iii. A statement of opinion may also amount to an implied representation that the maker has reasonable grounds for his opinion.

9. The third of those propositions was stated by reference to *Brown v Raphael* [1958] Ch 636. There, the particulars of sale of an absolute reversion in a trust fund expectant on the death of an annuitant stated that estate duty would be payable on the death of the annuitant, "who is believed to have no aggregable estate". That statement, if true, would have increased the value of the reversion. It was held that the vendor's solicitors honestly believed it to be true but had no reasonable grounds for this belief. The Court of Appeal held that as the vendor had been in a far stronger position than the purchaser to ascertain the facts, there must be implied a further representation that the former had reasonable grounds for his belief. But otherwise, according to the passage cited from Chitty, "an opinion expressed in good faith is not to be held to be a misrepresentation merely because it turns out to be incorrect".

The findings of fact

10. At the trial, evidence was given for the Claimant by a director of Barnard Marcus and by a conveyancing paralegal who worked for the Claimant, and for the Defendant by Dr Prabu. The Judge found all 3 witnesses of fact to be honest and truthful. There was also a report together with answers to questions put under CPR Part 35 by an expert witness in the field of planning.

11. Judge Owen made the following findings of fact which are not now challenged:
 - i. There is and was no prospect of the land being deemed acceptable for residential development. It consisted of ancient woodland, in an area of outstanding natural beauty, with many trees which are subject to a tree preservation order.
 - ii. After entering into the contract, the Defendant sought formal pre-application planning advice and was advised that even a temporary structure, such as a shepherd's hut or a caravan, would not be permitted.
 - iii. The site would probably be deemed unsuitable for any commercial development unless very limited and small in scale and requiring no buildings, services or parking.
 - iv. There were some potential uses of the land such as camping, foraging and various leisure activities.

- v. It had been open to each of the parties to make enquiries as to the planning and development potential and status of the land before deciding what to do with it.
- vi. The Claimant did not undertake local searches in relation to the land. The Judge was not satisfied that the Claimant knew that there was no realistic residential development potential, or only very limited commercial development opportunity.
- vii. Dr Prabu had read the auction documentation and believed subjectively that it represented that there was a realistic potential for residential development.
- viii. If, contrary to the Judge's finding, such a representation could be inferred from the sale particulars, then the representation was material, it induced the making of the contract and the Defendant relied upon it in entering into the contract.
- ix. The auction documentation was available on the Barnard Marcus website for about 2 weeks before the auction. Dr Prabu downloaded it over the 24 hours or so preceding the auction and had time to digest and consider that material before the Defendant entered into the transaction.

12. The Judge also found that the Claimant was not in a stronger or better position than the Defendant to know the facts about the planning position, which could have been ascertained by either party from the local planning authority. That finding is disputed on this appeal.

The parties' submissions

13. Richard Alford, representing the Defendant on its appeal (but not at trial), emphasized the need to assess what the statements in the auction particulars would have meant to a reasonable purchaser at the time of the sale. A reasonable purchaser, at an auction, might not be sophisticated or experienced in property matters.
14. In this case such a purchaser was presented with the cumulative effect of:
 - i. the land being divided into plots, itself suggestive of their being used for development;
 - ii. the reference to "potential";
 - iii. the reference to road frontage, which would be advantageous for residential development;
 - iv. the presence of a nearby residential dwelling, again suggestive of similar development on the land;
 - v. the commuter belt location and access to local facilities and transport which would be of value to residential occupiers;
 - vi. the assertion that the land "clearly offers a number of opportunities for a purchaser to consider alternative uses or even development of each plot";
 - vii. the CGI images of modern houses on the land; and
 - viii. the suggestion that a buyer would use those images to obtain "pre-application planning advice".
15. The Defendant's primary case is that these particulars contained an implied representation of fact, namely that there was a realistic possibility of permission being

granted for residential development. Mr Alford contended that this was a matter of fact rather than opinion, asking rhetorically what opinion could be distilled from the factual matters listed above.

16. As a fallback, he submitted that if the particulars did contain a mere representation of opinion as to the possibility of development, then there must be implied a further representation that the Claimant had reasonable grounds for holding that opinion. That submission depended on overturning the Judge's finding that the Claimant did not have any knowledge which was not readily available to the Defendant. The contrary, he submitted, was an unavoidable inference in all the circumstances.
17. Mr Alford submitted that the effect of any relevant representation was not weakened or removed by the sentence beginning "Buyers are deemed to rely solely on their own enquiries" quoted above. That sentence did not mean that everything said up to that point could be disregarded. It meant simply that the Claimant gave no warranty that planning permission would be granted and did not undermine the implied representation that planning permission was a realistic possibility. Indeed, the wording of that sentence, including the legalistic word "deemed", would mean nothing to a lay purchaser.
18. In support of that submission, he argued that the sentence similarly could not have been effective if relied upon as an exclusion clause to prevent liability arising for misrepresentation. He relied on *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 for the proposition that a clause in which a party merely acknowledges that it has not relied on a representation, as opposed to a clause by which a party agrees that it will not assert such reliance in any dispute, is insufficient to exclude liability.
19. Mr Alford therefore criticised the Judge for attaching importance to the fact that either party could have inquired into the planning position. That, he submitted, would mean that a vendor in this situation could say anything about the land and escape liability for its effect on the representee. Instead, he contended, if a vendor "talks up" a property e.g. by choosing to include unnecessary CGI images and statements about potential, then it is legally bound to state the true position. Even if, as the Judge said, there were some limited potential uses of the land, the true position was contrary to what the sale particulars suggested.
20. In conclusion, Mr Alford submitted that this Court should rule (1) that there was a misrepresentation and (2) that its effect was not negated by the "deemed to rely" sentence.
21. In response, Daniel Black, who represented the Claimant on the appeal (but also not at the trial), contended that that two-stage approach was inappropriate and that, instead, the sale documentation must be interpreted as a whole. Read as a whole, including the "deemed to rely" sentence, it did not represent that there was a "real possibility" (the phrase used in the pleadings, rather than "realistic possibility") of permission being granted for development. Moreover, the documentation also included the auctioneers' terms and conditions (which the Judge found to be incorporated into the sale contract)

as well as the sale particulars, and these stated that bidders were deemed to have made the necessary searches and enquiries.

22. Mr Black submitted that if this material was to be scrutinised for any representation, it was to be interpreted cautiously. He cited the summary of the relevant principles by Christopher Clarke J in *Raffeisen Zentralbank Osterreich v Royal Bank of Scotland* 2010 EWHC 1392 (Comm) at [85]:

“The essential question is whether in all the circumstances it has been impliedly represented by the defendant that there exists some state of facts different from the truth. In evaluating the effect of what was said a helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it: *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672, at 683 (per Colman J). Further, if the claim is under s 2(1) of the Misrepresentation Act 1967, it is necessary to heed the warning of Rix J that because of the broad measure of damages currently available in the light of *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297: “where there is room for an exercise of judgement, a misrepresentation should not be too easily found”: *Avon Insurance Plc v Swire Fraser Limited* [2000] 1 All ER (Comm) 573 at [200].”

23. According to Mr Black, the documentation, read as a whole, stated in effect that the Claimant did not know whether the land had any development potential but that a purchaser could consider different uses, subject to planning permission, and that purchasers could seek advice from the local planning authority. All of that was true.

Discussion

24. I am not persuaded that there was any error in the Judge’s findings of fact. Although Mr Alford submitted that the Claimant in fact was in a stronger position than the Defendant to make enquiries of the local planning authority, I see no basis on which the Judge’s finding should be disturbed. The Claimant therefore did not have any relevant knowledge or any relevant source of knowledge about the planning status of the land which were not readily available to the Defendant.
25. That was a key finding. At first glance, it might be thought that publishing sale particulars which referred to development potential and included CGI images of houses which in fact could not be built on this land was reckless, if not shabby. But, having heard evidence from the Claimant’s director, the Judge was not persuaded that any opinion was not honestly held. That finding was and is fatal to the Defendant’s case in relation to any representation of opinion. If what the Claimant said about the land contained an implied representation of opinion about any potential for development, then the only fact impliedly represented was that that opinion was honestly held.
26. I have also concluded that the Defendant cannot succeed in relation to any representation of fact, for two reasons.

27. First, I agree with the Judge about the meaning of the sale particulars, read as a whole. The key words, in my judgment, are “a number of opportunities for a purchaser to consider alternative uses or even development of each plot, subject to the necessary consents”, which are immediately followed by the “deemed to rely solely on their own enquiries” sentence. The phrase “alternative uses” is entirely vague. The word “development” is heavily qualified by “even”, and then qualified again by the express statement of the requirement for the “necessary consents”. In the next sentence the word “deemed” was not well chosen, but the clear meaning of the sentence is that the vendor is not making any representations about development potential, and the reference to development potential is again heavily qualified by the word “any”, meaning that there may be none.
28. The only factor leaning the other way is the CGI images, which at best encouraged unwise speculation. But they were marked “STPP” and the advertisement went on to explain that their proposed use was as a subject for pre-application planning advice, rather than for a planning application. They may have contributed to an implied representation of opinion that there could be some purpose in seeking such advice but on the Judge’s findings, that representation was not contrary to the Claimant’s true state of mind.
29. The *First Tower* point does not materially assist the Defendant. In the passage at [94], Leggatt LJ merely questioned the effectiveness of the wording in question and he also noted that the Court of Appeal in *Springwell Navigation Corpn v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 CLC 705 had taken a different view. And in the present case, the question is not what the parties agreed. It is the quite different question of what was the reasonable meaning of the auction particulars, read as a whole.
30. The second reason why the case based on a representation of fact cannot succeed is that even if the alleged implied representation had been made, it would have been too vague to have any legal consequences. What was a “real” or “realistic” possibility of use for residential development? It seems to me that the question of whether the land was usable for any residential development at all was a binary question. To say that it was, or that it was not, would have been a representation of fact with an ascertainable meaning. But in my judgment, to say merely that it might have been, would not.

Conclusion

31. For all of the foregoing reasons I am not persuaded that the Judge made any error, and the appeal will be dismissed.