

[2017] UKFTT 0887 (PC)

REC/2006/0026

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A RECTIFICATION REFERENCE

BETWEEN

(1) BLACKBURN WITH DARWEN BOROUGH COUNCIL : Applicants

And

(2) ZAHUR WAGHAT, Respondent

Property Address: Land and Buildings on the North West side of Oakenhurst Road and land on the north side of Wensley Road

Title Numbers: LA895277

Made by: Professor Robert M. Abbey sitting as a Tribunal Judge at The Manchester Civil Justice Centre 1 Bridge Street West Manchester M60 9DJ on 6th November 2017

Applicants Representation: Ms Katrina Yates of Counsel

Respondents Representation: In person

ORDER

IT IS ORDERED THAT:

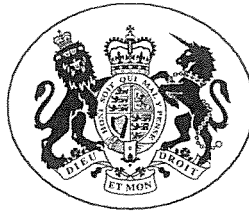
1. The Applicants have established their claim for rectification of a transfer dated 26th March 2009 so that it be altered to give effect to this Order by the substitution of the TP1 transfer and plan attached for the original but erroneous TR1 initially submitted for registration.

Dated this 14th day of November 2017

Prof. Robert M. Abbey

BY ORDER OF THE TRIBUNAL





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DECISION

KEYWORDS – (1) Application by rectification of a transfer and thereby for alteration of the register – objection to application for rectification - HELD — rectification of a transfer ordered.

Cases referred to

Whiteside v Whiteside [1950] Ch 65

Thomas Bates and Sons v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505

Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR

C v D [2012] 1 WLR

Weeds v Blaney [1978] 2 EGLR 84 (CA)

Bashir v Ali [2011] EWCA Civ 707 (CA)

Arnold v Britton [2015] UKSC 36

THE APPLICATION

1. On 28th June 2016 the Applicants made an application pursuant to Section 108(2) of the Land Registration Act 2002 for the rectification of a Transfer to correct an alleged mistake. The transfer was dated 26th March 2009 and was made between the Applicant of the one part and the Respondent of the other part, ("the disputed transfer"). The transfer was made pursuant to the terms of an auction contract dated 26 February 2009 and made between the same parties ("the auction contract"). The effect of the registration of the disputed transfer has been the transfer to the Respondent all of the land registered at the land registry under title number LA895277. In their application the Applicants say this was in error in that it departed from the common intention of the parties which was only to transfer one part of land registered under title number LA895277 being the land on the north side of Wensley Road Blackburn, ("The Arthur Street garages") and not the Land and Buildings on the north west side of Oakenhurst Road, ("the Oakenhurst Road land"). Accordingly the Applicants seek rectification of the disputed transfer.
2. Despite attempts at alternate dispute resolution it was not possible for the matter to be resolved by negotiation and consequently the dispute was referred to the Tribunal pursuant to s. 108(2) of the Land Registration Act 2002. The matter now falls to me to determine. At the hearing the Applicants attended with one witness and were represented by Katrina Yates of Counsel. The Respondent attended the hearing and represented himself.

SUMMARY OF THE APPLICANTS' CASE

3. The Applicants' case is that they only ever intended to auction off the Arthur Street garages and that a mistake caused the Oakenhurst Road land to be transferred to the Respondent. In support of this assertion they filed a witness statement of Michael

James Green who is a senior solicitor admitted as a Barrister and Solicitor in the High Court of New Zealand and who is employed by the Applicants in their legal department. He has worked for the Applicants since 2004. He was the supervising solicitor for the Applicants at the time of the disputed transfer. He was cross-examined by the Respondent.

4. In January 2009 it was decided by the Applicants to proceed to auction. Conduct of the disposal was via a locum legal executive, Ms Hazel Satloka. (She did not give evidence to the Tribunal and no witness statement from her was filed either.) Mr Green confirmed that she progressed the transaction “with minimal supervision.” Ms Satloka drafted and sent the proposed form of contract to the auctioneers, Pugh and Company, together with other necessary documents including official copies of all the titles involved. The Arthur Street garages had not been used by the Applicants for some years and given that this property was not being used and did not benefit the Applicants a decision was made to sell. I was shown a copy of the delegated decision report approved by the Director of Legal Services which refers to this decision. In this delegated powers decision form the subject property is described as “Arthur Street garage site” and described as vacant premises. A comment is made that “The Arthur Street garage was formally used as an Ambulance Depot. The premises has “(sic)” been vacant for many years and is a poor state of repair, suffering from damp penetration.”
5. The auction particulars included information as to location of the premises to be placed into the auction along with a description of the nature of the land and approximate dimensions. There was also a coloured plan of the premises to be auctioned. I was able to see a copy of the auction particulars and these were entitled “Arthur Street Garages Blackburn Lancashire BB2 1QD. The location was said to be at the junction of Arthur Street and Wensley Road and was described as a vacant detached garage block with associated car parking amounting to approximately 0.2 hectares. The plan showed The Arthur Street garages and not the Oakenhurst Road land.
6. The Respondent was the successful bidder at the day of the auction and therefore both parties entered into the form of contract drafted by Ms Satloka and I was shown a

copy of the executed disputed contract. The agreement is dated 26th February 2009 and made between the parties. It then commences at clause 1 by providing that “The Council will sell and the Purchaser will purchase All that Freehold land and property contained within 11 title numbers which are listed below:- The first is LA895277 which is the area coloured pink on Plan 1”. The disputed contract then goes on to list other properties. At the end of clause 1 it provided that “All of which are known as Arthur Street Land Garages Blackburn the area shown pink and Blue on Plan 1 and shown edged red on the Plan 2 annexed hereto (“The Property”)”. I asked the Respondent if he had signed the disputed contract with the plan attached and he replied that he had done. I was able to see copies of these two plans. It is important to note that the plans showed The Arthur Street garages and not the Oakenhurst Road land.

7. After the disputed contract was put in place on 9 March 2009 the Respondent’s solicitors Roebucks provided a form of draft transfer for approval accompanied by some standard requisitions on title. They had drafted the transfer using land registry standard form TR1, a form utilised for transfer of the whole of titles, (rather than a TP1 that the registry require for transfers of part). By a letter dated 12 March 2009 Ms Satloka approved the form of transfer and replied to the requisitions on title. On 26 March 2009 the disputed transfer was completed. (I asked Mr Green if the Oakenhurst Road land included two commercial units and he confirmed that it did. Both produce a rental income. Notwithstanding this there was no mention of or request for any authorities to pay future rent to be made available from the Applicants on completion. The point here being that if the Respondent truly thought he was buying the Oakenhurst Road land this would have been an important completion requirement so that he could collect rent from the tenants in the future.)
8. Mr Green then notes in his witness statement that the Applicants heard nothing from the Respondent for almost 7 years until they received a letter from Roebucks dated 19th January 2016. In that letter they assert that the Respondent was the freeholder of the Oakenhurst Road land and was entitled to the rents emanating from that property. Mr Green says that on reviewing the contents of the Roebuck letter it became clear to him that a mistake had been made regarding the disputed transfer and that it had

erroneously included the whole of the land in LA895277 rather than just the Arthur Street garages.

9. Mr Green says that he believes that Ms Satloka had made a genuine mistake because the delegated powers document mentioned above only authorised the sale of the Arthur Street garages and this was the property that was to be auctioned and was mentioned as such in the auction particulars and was set out in the contract plans. There was no record of any authorisation by the Applicants for the sale of the Oakenhurst Road land and as such there was no intention of disposing of it and that the transfer of it was a clear mistake. Furthermore Mr Green points out that the Oakenhurst Road land is used for the purposes of a community centre neighbourhood learning centre two tenanted commercial units, (a pharmacy and a chemist), and a public pay car park. During all the years since the making of the disputed contract the Oakenhurst Road land has been used for community based purposes with tenants occupying the two commercial units and the car park being used by the public.
10. If it had been intended to sell the Oakenhurst Road land the Applicants would have had to go through a formal procedure which it had not. When disposing of this kind of land the Applicants have to go through a multistep process set out in the Council's constitution. This would have involved inter alia public consultation. This has not taken place. He says there was clearly no intention to sell this land and thus the disputed transfer was made in error and has caused the Applicants significant detriment having been deprived of this land primarily used for community purposes.

SUMMARY OF THE RESPONDENTS' CASE

11. The Respondent's case is that the auction outcome was correctly dealt with by the transfer of the two premises and that he was entitled to the whole of the land in title number LA895277. The Respondent asserts that the Applicants cannot plead common mistake as this was an auction sale and not a private sale and as such there were no pre- contract negotiations and consequently neither party could have known the other parties true intentions. The Respondent believes that there was no error in the execution of the TR1 deed as it followed the Common Auction Conditions (CAC) and the terms of the disputed contract. Furthermore because the Respondent's successful bid was for £104,000, substantially more than the guide price of £40,000 to £50,000 he

says that this rebuts the Applicants' claim that they have not been paid for the Oakenhurst Road land.

12. Referring to the disputed contract the Respondent highlights the wording where it says that the Applicants shall sell All that freehold land and property in the eleven titles. This he says makes it clear that the Applicants were required by the terms of the disputed contract to sell all of the titles set out in the agreement. The Respondent also highlights the fact that the council sold with full title guarantee where there is a presumption that the whole of a registered title is being disposed of.

13. The Respondent also asserts that this dispute has arisen as a direct result of negligence on the part of the Applicant in the way the disputed contract and disputed transfer were dealt with and that consequently he should not suffer any loss arising from that act of negligence. They were in his view obliged to sell the whole of the title. The Applicants' own legal department should have made their own enquiries and checks and should have ensured the titles reflected what they wanted to sell before they entered the lot to auction. By failing to do so and entering the lot in its unseparated state, then allowing a competitive bidding process to be undertaken they have sold all the named titles in full (including LA895277) under the hammer. The Applicants had failed to separate the title before they came to auction and also failed to exclude the Oakenhurst Road land and property via the special conditions of the disputed contract which meant that the bidding was for everything in this title.

THE LAW and FINDINGS OF FACT

14. Thus, having regard to the evidence and the details of the witness statements set out above, I have come to the following conclusions. It is clear to me that an error was made when the plan was drawn up and attached to the disputed transfer. Section 108(2) of the Land Registration Act 2002 provides as follows:

"108 Jurisdiction

(1) The First-tier Tribunal has the following functions—

(a) determining matters referred to it under section 73(7), and

(b) determining appeals under paragraph 4 of Schedule 5.

(2) Also, the First-tier Tribunal may, on application, make any order which the High Court could make for the rectification or setting aside of a document which—

(a) effects a qualifying disposition of a registered estate or charge,

(b) is a contract to make such a disposition, or

(c) effects a transfer of an interest which is the subject of a notice in the register.

(3) For the purposes of subsection (2)(a), a qualifying disposition is—

(a) a registrable disposition, or

(b) a disposition which creates an interest which may be the subject of a notice in the register.

(4) The general law about the effect of an order of the High Court for the rectification or setting aside of a document shall apply to an order under this section.”

15. Accordingly, the jurisdiction which I am exercising is the same as the equitable jurisdiction of the High Court, and the same principles apply. It has been said that rectification is a discretionary remedy “which must be cautiously watched and jealously guarded” – *Whiteside v Whiteside* [1950] Ch 65 at page 71 per Evershed M.R. Although the civil standard of proof applies, a court will require very cogent evidence of the mistake before acceding to a claim to rectify.

16. Since the alleged intention of the parties contradicts the written instrument, the evidence in support of the claim must be sufficient to contradict the inherent probability that the written instrument truly represents the parties’ intentions since it is a document signed by them – see *Thomas Bates and Sons v Wyndham’s (Lingerie) Ltd* [1981] 1 WLR 505 at 521. That is why, in most cases, a claim to rectify a document ought to be resolved at a hearing where oral evidence can be heard and the party claiming rectification can be questioned as to the circumstances of the mistake. Having heard just such evidence and having had the opportunity of questioning the witnesses I am in no doubt that an error was made and that this is an error that deserves to be rectified by reason of this jurisdiction.

17. It is clear to me that this is a common mistake case that turns completely on the proper construction of what the parties agreed to buy and to sell. The parties plainly have not been able to resolve what the contract provided as to the proper identification of the parcel of land that the Applicants offered for sale and the Respondent agreed to buy.
18. Part of my task is to consider the true meaning and effect of the disputed contract. I can be guided in this by the principles in the leading case on the interpretation of contracts *Arnold v Britton* [2015] UKSC 36. Lord Neuberger set out the principles in these terms :-

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"....

That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

19. In the light of this guidance I can now look at the complete wording of the disputed contract to glean what a reasonable reader would take as to the nature and purpose of the agreement. However, in this dispute much turns on the inclusion of plans in the disputed contract. What effect do they have when linked to the wording of the disputed contract? Guidance on this is forthcoming from the latest edition of "*The Interpretation of Contracts*" by Lord Justice of Appeal Sir Kim Lewison (6th Edition) at 11.07, where he says that is a question of construction whether the plan controls the verbal description or vice versa. However, where there is a plan that clearly defines and delineates the land to be transferred, (and not described as being merely "for identification purposes only") then the plan will prevail. This is helpful and relevant guidance in the context of this dispute.

20. The Respondent has asserted that to have excluded the Oakenhurst Road land the Applicants should have separated the title into two parts before the auction. Alternatively he says the Applicants should have stipulated in special conditions the exact nature of their desired disposal. This is because he quotes CAC 1.1 that provides that the lot is to be described in the special conditions. Regrettably the Applicants failed to draft any special conditions. Consequently the Respondent seeks to rely upon the fact that the disputed contract said that the seller sells with full title guarantee which means that this was to be a sale of the whole of the registered title.

21. Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1WLR at 912H stated that the principles governing the identifying of the subject matter of an agreement are as follows:-

The principles may be summarised as follows:

(1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

(2) *The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

22. Thus the meaning needs to relate to what a reasonable person would have understood having relevant background knowledge. The "matrix of facts" that assists the reasonable person includes absolutely anything as more particularly described by Lord Hoffman.

23. Furthermore, an agreement must be interpreted as a whole. It was said in *C v D* [2012] 1 WLR that

“There is a general principle of construction that a document which falls to be construed should be read as a whole and its separate parts should be so construed, if that is possible, as to bring rational sense and consistency to that whole.”

24. In effect this judicial guidance is to require the disputed agreement to be construed as a whole but in the light of the matrix of fact as defined by Lord Hoffman.
25. This being so I turned first to the disputed contract and noted that there was a complete absence of special conditions and as such there was a failure to define the lot in this way. Notwithstanding the absence of special conditions the disputed agreement did define the property to be sold in such a way that a reasonable person would come to the inescapable conclusion that just the Arthur Street garages were being sold and not the Oakenhurst land. This is because the disputed contract stipulated that in clause one “The Council will sell and the Purchaser will purchase All that Freehold land and property contained within 11 title numbers which are listed below:- The first is LA895277 which is the area coloured pink on Plan 1”, (my underlining). The disputed contract then goes on to list other properties. At the end of clause one it provided that “All of which are known as Arthur Street Land Garages Blackburn the area shown pink and Blue on Plan 1 and shown edged red on the Plan 2 annexed hereto (“The Property”)”, (again my underlining.) Looking, as you must, at the contract as a whole, it seems to me that a reasonable person would see the two plans and would immediately understand the extent of the property being sold namely just the Arthur Street garages.
26. Where a seller intends to sell a part of a registered title that seller will if good conveyancing practice is adopted ensure that a scale plan is attached to the agreement for sale. It is therefore a common and expected provision in a conveyancing contract that it utilise a plan to assist with the definition of the property to be sold. In the disputed contract there was not one but two such plans clearly showing what was to be sold and by implication what was not for sale in relation to title number LA895277. The Respondent suggested that the Applicant should have split off the two titles before going to auction. However, this kind of change is rare when proposing a sale of

part. This is because the registry accommodates for such arrangements by way of their transfer form TP1. In these circumstances it is standard conveyancing practice to sell a part of a title and complete the sale by way of TP1.

27. The Respondent seeks to rely heavily upon the phrase “all that freehold land....” But he must also take into account the phrases at the end of the clause where these words appear namely in relation to the defining of the property to be sold by reference to two plans. Furthermore these plans are not said to be for identification purposes only. They are to be relied upon when seeking to understand what is to be the subject property of the disputed contract. The reasonable person would need to appreciate the impact of the whole of the agreement including the whole of clause 1. By doing so it seems to me that the only conclusion a reasonable person would make is that the Oakenhurst Road land was not included in the sale.

28. The Respondent suggested that because the issue affecting the disputed contract and transfer arose from an allegation of negligence on the part of a party working for the Applicants then the Applicants could not have the benefit of rectification. In fact it is the case that there is no bar to rectification if the mistake was as a result of negligence or carelessness. This was clearly confirmed in *Weeds v Blaney* [1978] 2 EGLR 84 (CA). The tribunal/court does not concern itself with fault in a claim for rectification so carelessness or negligence on the part of the Applicant/claimant, the Respondent/the defendant or any legal advisers who were instructed to draw up the defective document cannot be used as a defence.

29. The Respondent sought to rely heavily upon the decision the case of *Bashir v Ali* [2011] EWCA Civ 707 (CA) which he said was very much on similar terms to the circumstances of this dispute. However, this case did not preclude a claim for rectification where there was an auction contract. Lord Justice Etherton in this case writes at 34

“I agree with the Deputy Judge that the wording of the auction catalogue, its associated documentation and the Memorandum, as well as commercial reality, make it impossible to interpret the contract as one for the sale of only part of the freehold of the Property. Quite simply, all those documents point to a sale of the entire registered title and not just part of it.”

30. If you compare that view to the position in this dispute I think a reasonable person would take the totally opposite view. The wording of the auction particulars, the associated documentation, (such as the local authority search result available at the auction referring to the garages only), and the disputed contract itself (with the two plans attached) make it impossible to interpret the contract as one for the sale of the whole of the freehold in LA895277. To paraphrase quite simply all those documents point to a sale of just a part of the registered title and not the whole of it.
31. Finally in relation to full title guarantee it is the case that when land is disposed of by way of conveyance, transfer or lease, certain covenants for title on the part of the seller may be implied into the document effecting the disposition. Section 2(3) of the Law of Property (Miscellaneous Provisions) Act 1994) states that “*where the title to the interest is registered, it shall be presumed that the disposition is of the whole of that interest*”. However it is important to appreciate that this presumption is rebuttable and as stated earlier in the Act “*subject to the terms of the instrument*”. In these circumstances it seems to me that the presumption has for all the reasons set out above been rebutted by the terms of the instrument.

THE DECISION

32. For all these reasons I find for the Applicants. I believe on the evidence before me that their application for rectification of the disputed transfer should be allowed, so that the Applicants can be registered as the proprietors of all of the Oakenhurst land and I will so order. The effect of the order will be to require the TR1 to be redrawn and resubmitted to the registry on form TP1. The TR1 simply did not give effect to the common intention manifested by the disputed contract. It was in the wrong form (TR1 when land registry Rules require such a transfer of part to be in form TP1) and it failed to delineate the Arthur Street garages in accordance with plans 1 and 2 in the disputed contract. I will therefore order that the transfer be rectified in the manner described at paragraph 22A of the Applicants’ amended statement of case and in the TP1 form set out in the trial bundle at pages 35 to 41 with the plan attached.
33. At the hearing Counsel for the Applicants mentioned the question of costs. I suggested this could be considered after the issue of this decision. Normally costs follow the

event. However, in this dispute the Respondent is in some ways forced to be involved through an error made by the Applicants. Having noted this if a party wishes to make an application for costs they should do so in writing within 28 days of the date of this decision. The application should be filed and served upon the other party and the Tribunal. Thereafter the other party will have 28 days from the receipt of the application to file and serve their observations/comments on the application. Thereafter I will consider any such costs application.

Dated this 14th day of November 2017

Prof. Robert M. Abney

BY ORDER OF THE TRIBUNAL



