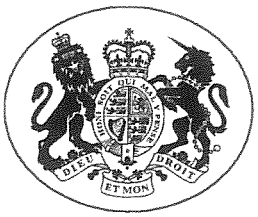


[2018] UKFTT 0726 (PC)

PROPERTY CHAMBER
FIRST - TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF/2017/1015

BETWEEN

Mr JONATHAN RICHARD ANSON

APPLICANT

and

Mr NEIL JOHNSON

RESPONDENT

Property Address: 2a Birmingham Road, Alvechurch, Birmingham B48 7TA

Title Number: HW66145

Before: **Dr Anthony Verduyn sitting as Judge of the Property Chamber of the First-tier Tribunal**

Sitting at: **Birmingham Employment Tribunals, Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU**

On: 5th October 2018

Applicant represented by Mr John Brennan of Counsel instructed by Gateley plc, solicitors

Respondents represented by Mr Alexander Barnfield of Counsel instructed by the Wilkes Partnership, solicitors

DECISION

1. Mr Jonathan Anson, the Applicant, is the registered proprietor of 2a Birmingham Road, Alvechurch, Birmingham B48 7TA, registered title number HW66145 ("**the Property**"). The Property is commercial premises long used as a commercial garage. On 15th September 2014 Mr Neil Johnson, the Respondent, applied for a unilateral notice to be placed on the registered title to the Property claiming an interest therein under an option to purchase contained in an agreement executed on 18th June 2014. On 3rd August 2017 Mr Anson applied to cancel the notice on the basis that no binding option was in fact agreed and executed. Mr Johnson asserted in answer that the option subsisted and had been exercised and he wished to complete the purchase. The parties being unable to resolve matters between themselves, the application was referred to this Tribunal on 30th October 2017. The parties are in agreement that the central issue is what took place in respect of execution of the disputed option agreement at a meeting of the parties at Mr Anson's place of business on 18th June 2014. I am grateful for the helpful Skeleton Arguments received in advance of the hearing from Counsel for each party, and for the submissions made in closing.

2. The Property is and was at all material times registered to Mr Anson in his capacity as sole trustee of the Sigma Industries Limited Pension Scheme ("**the Scheme**"). Mr Johnson began working from the Property in 2011, when a tenancy at will arranged by him was entered into by Astondene Limited. In February 2014 Alvechurch Garage Limited became the tenant, but occupation by Mr Johnson was unchanged. The change in tenant was the result of changed working arrangements of Mr Johnson and is not material because, whatever the former arrangements, to all intents and purposes Alvechurch Garage Limited was Mr Johnson's company. Relations between the parties were generally good, but there were issues about the tenancy and an option for Mr Johnson to purchase the Property. In respect of the tenancy, Mr Anson's evidence is that he was pressing Mr Johnson to enter into a formal lease, whilst Mr Johnson was resistant and produced a tenancy at will for his company. This contained a highly unusual clause at 3.3, the effect of which was to convert it into a tenancy for a term of 10 years if neither party had entered into a formal lease 6 months from execution on 1st February 2014. Mr Anson

has no recollection of this term being discussed at all, or him even being aware of it, but he does not dispute that he signed the tenancy at will. Mr Johnson explains matters in terms of his desire to protect his intended investment in new ramps and MOT facilities; both of which required planning permission. He accepts that he was the author of the provision. In respect of purchase of the Property by Mr Johnson, Mr Anson did indicate that the Scheme may have been willing to sell it to him if a price could be agreed. Mr Johnson recalls Mr Anson's view being that the Property could be worth about £250,000, although Mr Anson disputes such recollection. Mr Anson accepts that Mr Johnson pursued an option to purchase, but by his own account he made excuses about getting a valuation and then never actioned this. He understood Mr Johnson to have applied for planning permission to enhance the garage, whilst Mr Johnson denies that his intended investment proceeded that far. His account is that he was keen to obtain an enforceable option to purchase before planning permission enhanced the value of the Property. Furthermore, for Mr Johnson an option would support funding by borrowing and avoid circumstances in which he understood Mr Anson to have refused an extended lease to previous tenants when they had obtained planning permission for a MOT bay; a matter Mr Anson denies. Finally, Mr Johnson completes the picture prior to the disputed meeting by adding that in May 2014 he discovered that McCarthy & Stone Retirement Lifestyles Limited ("**McCarthy & Stone**") was interested in incorporating the Property in an adjacent proposed development. He agrees he pressed Mr Anson for an option all the more, although he asserts this was not in any way as oppressive as Mr Anson claims, and price and terms were agreed before a meeting of 18th June 2014 to formalise matters. Agreement of price is strongly disputed by Mr Anson.

3. The rival accounts of the meeting that took place at Mr Anson's offices on 18th June 2014 are starkly different.

4. Mr Anson in his statement of case asserts that the attendance of Mr Johnson at his office was without an appointment. He had with him two copies of a document headed "Option Agreement", culled from the internet. Mr Johnson told him that his planning application for the Property would be struck out if he could not produce an executed option agreement to the planning officer. Mr Anson protested that no price was agreed and he insisted that "Subject to Contract" be added before he signed. Mr Anson was acting to protect his

position and to ensure the document could not be enforced. In his witness statement, Mr Anson enlarged on the discussion of the recorded price of £300,000 to say that Mr Johnson had stated the price was irrelevant to the planning officer. Clause 2 of the option agreement, relating to Mr Anson's liabilities in default, was struck through and initialled and dated. Initialling and dating was applied to the "Subject to Contract" addition. Mr Michael Croft, a machine operator, was fetched by Mr Anson and he witnessed the signatures. Each party kept a copy and Mr Johnson left immediately after signature. Mr Anson exhibited his copy to his Statement of Case, with "Subject to Contract" clear in the top right-hand corner, initialled by both parties and dated. Mr Anson stated that if "Subject to Contract" had been deleted by agreement, he would have struck it through and initialled the deletion as well as the original manuscript addition. He did not do so, because there was no such agreement.

5. Mr Johnson states in his Statement of Case that there was an appointment arranged at about 3.30pm at Mr Anson's convenience. He attended with two copies of the agreement, and clause 2 was struck out and "Subject to Contract" added at the insistence of Mr Anson. He was unsure as to these amendments and when Mr Anson left to fetch Mr Croft, he went outside and telephoned Mr Ian Williamson, his solicitor. He was advised that striking out clause 2 did not matter, but adding "Subject to Contract" did matter and was inappropriate. He returned to the office and told Mr Anson of the advice he had received. Mr Anson agreed to delete "Subject to Contract". The document was signed and he struck through "Subject to Contract" on his copy and asked Mr Anson to initial the deletion. This was done and he left it for him to make the deletion on his copy. Mr Johnson left with his copy of the agreement, which he too exhibits. "Subject to Contract" is initialled by each party once and dated, as in Mr Anson's copy, but struck through with two parallel lines.

6. The next day, Mr Anson emailed his solicitor, and a copy appears in the hearing bundle at page 94. The relevant part reads: "Next thing. My present tenant wishes to have an option to purchase the above so that he can develop the area after planning [...] He offered £300,000, which may be a good price but I will get it valued." He later referred to McCarthy & Stone buying adjacent land. He later accepted in evidence that at that time he did not know that McCarthy & Stone were interested in the Property.

7. Mr Anson asserts that Mr Johnson continued to pester him to agree a new and binding form of option agreement for the sale of the freehold of the Property. The Wilkes Partnership prepared a much longer form of option agreement. One dated 4th July 2014 is in the hearing bundle and provided for £1,000 by way of deposit and a purchase price of £330,000. Mr Anson says this was produced after a chance meeting at a petrol station when he told Mr Johnson he was seeking a valuation. Mr Anson then discovered that the value of the Property with interest from McCarthy & Stone would be much greater than as a garage, and he suspected that this was behind pressure from Mr Johnson for a binding option agreement. On 8th September 2014 the offer was increased to £380,000, but Mr Anson had now changed his mind on selling and no agreement was executed. A week later the application was made for a unilateral notice, but Mr Anson states this did not come to his attention at the time because an old address appeared on the registered title. A notice purporting to exercise the option appears in the hearing bundle, dated 14th October 2014. There is also confirmation that this was served on Mr Anson. There followed infrequent correspondence between solicitors in 2015 and 2016. The company tenancy was terminated in 2017 under the provisions of Part II of the Landlord and Tenant Act 1954. The parties dispute whether there were periods of sustained rent arrears. An agreement was reached for sale and purchase at £352,000 in 2017 but Mr Johnson was unable to exchange contracts in accordance with an extended deadline, following which the current application was made to cancel the unilateral notice, which was known to Mr Anson, even on his case, from 2016.

8. Whilst Mr Johnson does not dispute the chronology of events set out by Mr Anson, he does dispute their interpretation. He says he entered into an option agreement with McCarthy & Stone on 11th July 2014, which would have secured for him a windfall, but no such agreement was adduced in evidence. He sought the unilateral notice to protect his position and disputes that this would not have come to the attention of Mr Anson, because Namulas Pension Trustees Limited were then also on the title and may be expected to keep him informed. The revised option agreements, he asserts, were mere revisions to a concluded agreement and reflected the detailed terms sought by McCarthy & Stone. He states that Mr Anson knew of the latter's involvement by September 2014 and he had visited the Property, telling Mr Johnson's staff that they would lose their jobs as a result of development. Mr Johnson sees McCarthy & Stone involvement as the real reason that Mr Anson sought to avoid the option agreement he had signed. He also observes that Mr

Anson's solicitors on 27th April 2016 took issue with the option agreement, not on the basis that it was "Subject to Contract", but on the basis that Mr Anson's signature was insufficient on its own as trustee (a point later agreed not to be a good one and not pursued before me accordingly). Negotiations thereafter were the result of Mr Anson's refusal to honour the option agreement, rather than as a result of any doubt as to validity on the part of Mr Johnson.

9. At the hearing the calling of witnesses was reversed to accommodate the video link with Mr Johnson. Mr Johnson, although plainly in ill-health and in need of his oxygen mask, was plainly lucid and at times a forceful character. For example, he was adamant in his denial of amending the Tenancy At Will without alerting Mr Anson to its effect in creating a term of years. He maintained the accuracy of his statement of case. It became clear under cross-examination that McCarthy & Stone had negotiated with Mr Johnson prior to the 18th June 2014 meeting in the belief that he had already obtained a binding option on the Property. He did not disabuse them of this notion, but he was absolutely insistent that this was not the reason for him seeking the meeting on 18th June 2014. He stated he could not remember when McCarthy & Stone first wanted to see the option he held. He was questioned about the lack of detail in respect of when he says the terms contained in the option agreement were resolved, without any very clear or satisfactory answer, and about why he did not have solicitors negotiate, since he had already instructed the Wilkes Partnership in matters and knew Mr Anson had instructed solicitors regarding the tenancy at will. He stated he considered such instruction was unnecessary when he and Mr Anson could deal direct. He wanted matters signed off because Mr Anson was elusive and a formal agreement was required for his planning application. He was adamant that he and McCarthy & Stone were too far apart on the value of the Property for a prospective sale to them to be an incentive at the meeting. Concerning the meeting, he denied any suggestion that the price was irrelevant to him or that "Subject to Contract" was added to protect Mr Anson on price. Once this was added and clause 2 deleted, Mr Johnson says that Mr Anson left the office and he "popped out" on the pretext of having a quick cigarette, but the real reason was to speak to his solicitor Mr Williamson on the telephone about the implications of what had been amended. His account then diverged from his statement, because his oral evidence was that the option agreement was signed and witnessed unamended, and then Clause 2 and Subject to Contract were dealt with, and in a manner reflecting the advice he had received from Mr Williamson. He later retracted

this to the extent that he then asserted that amendment had been made before the witness arrived. After that he became vague as to the precise sequence of events. What he was clear about, was that Mr Anson agreed to strike through "Subject to Contract" as soon as its import as described by Mr Williamson was explained to him: the option agreement *was* the contract. When it was observed that this was not in his witness statement, there was a pause from Mr Johnson before he emphatically asserted its truth nonetheless. He then accepted that "Subject to Contract" must have been written in before it was agreed to be deleted on his case.

10. Mr Johnson was cross-examined regarding the content of his solicitor's attendance note drawn up on or very shortly after 19th June 2014. This referred to the call received by Williamson from Mr Johnson at about 4pm on 18th June 2014. Mr Williamson recorded that he was told that Mr Anson had signed the option agreement after deleting clause 2 and adding "Subject to Contract". When the effect of the latter was explained, Mr Johnson stated he would go back and see Mr Anson. The impression that it was later in the evening was a mistake of the solicitor, Mr Johnson said. Mr Johnson accepted that there was a chance meeting with Mr Anson at a petrol station soon afterwards, but he explained the valuation being intimated to be obtained by Mr Anson was to satisfy his solicitors, Gateley.

11. The attendance note goes on to reveal that Mr Johnson was unhappy at McCarthy & Stone seeing the date on the option agreement, giving the impression that this was because it was so recent and McCarthy & Stone had the false impression there was an older agreement. The note makes clear that Mr Johnson was keen to obtain planning permission for his garage before McCarthy & Stone made application for its retirement home. The attendance note also records the decision not to seek to register the option agreement, and Mr Johnson asserted that there was no need to. Mr Johnson could not convincing explain this or the reference in the attendance note to him being "hopeful" that a new agreement could be achieved within a few days. He also failed to explain the reference to moving "straight to contract", when he could have achieved this through exercising his option. He struggled also to answer why he subsequently offered £330,000, before finally stating that he wanted a new agreement to reflect closely the agreement sought by McCarthy & Stone and necessary for its planning proposals. He could not

explain why, in those circumstances, he had not disclosed the agreement with McCarthy & Stone to prove this contention. The gist of his evidence in relation to the increased off of £380,000, was that he was exasperated by Mr Anson's suggested amendments to a new option agreement. Mr Anson had sworn on his children's life that proposed revisions were final, only for him to seek more later. They had even shaken hands at one point. £380,000 was offered to finalise matters by letter dated 16th September 2014. In cross-examination, Mr Johnson could not explain why such promises by Mr Anson were not referred to in the letter. In any event, the offer was not accepted and in default, Mr Johnson sought to register the option agreement. When pressed on his 2017 offer of £352,000, in circumstances of a registered option agreement at £300,000, he explained that an agreement to pay more was to avoid litigation which, compared to purchase, would be difficult to fund. He did not get quite the time he needed and he could not secure funding in time, so the offer lapsed before exchange of contracts.

12. Mr Williamson, the solicitor engaged by Mr Johnson at the time of the June 2014 meeting was called to give evidence. He could not expand upon the terms of his attendance note, given the passage of time. The note was not verbatim, but reflected his understanding of what he had been told at the time by Mr Johnson. He had first been instructed by Mr Johnson on or about 11th June 2014 and quickly appraised the general situation: he understood that McCarthy & Stone were willing to pay substantially more than £300,000 for the Property, but that was the sum he understood was informally the agreed price between Mr Johnson, the source of his information, and Mr Anson. He considered that McCarthy & Stone were very likely to approach Mr Anson directly and doubted they would take an option on an option. The option agreement Mr Johnson obtained was, he considered, better than nothing, but needed improving upon and he understood the higher prices offered were to reflect the more detailed agreement required. He took the view that registration of the option agreement would reduce goodwill and impede the obtaining of a better form of agreement, so not initially pursued.

13. Mr Anson then gave evidence. He denied speaking to Mr Johnson's employees about development jeopardising their jobs, but could not explain why he had not dealt with this in his witness statement in reply to the accusation in Mr Johnson's statement of case. He admitted he was angry at non-payment of rent by Mr Johnson and this was a source of

tension between them. He denied he had appreciated the terms of the tenancy at will presented to him by Mr Johnson, but did not deny that he had signed the document. He insisted that he had wanted to grant a term of years, and that it was Mr Johnson who was being difficult about this. He also repeated his position, that he had never been notified of the registration of the option agreement in September 2014, notwithstanding that notice ought to have been given to Namulas Pension Trustees Limited and it would have contact details for him. As to the email correspondence of 27th April 2016, which only took a technical point on the signature of the option agreement, he described it as a "good question" why the "Subject to Contract" point was not raised in the letter. This point was weakened during the hearing, when a copy of a letter from Gateley solicitors dated 27th April 2015 emerged, where both the matter of the "draft" being "Subject to Contract" and the formalities of signing were referred to as reasons for it not binding Mr Anson.

14. Turning to the meeting of 18th June 2014, Mr Anson agreed now that there was an appointment, but insisted he still felt pestered and bullied. He maintained, however, that he signed for planning purposes only and "subject to contract". He knew enough to add the latter to the document, and he took exception to clause 2 on a quick read through. He wanted to obtain advice from Gateley and a valuation before being bound. He thought that Mr Johnson had mentioned talking with his own solicitor, but he adamantly denied agreeing to strike through "Subject to Contract" saying to do so would be "ludicrous". He accepted that he was served with the notice to exercise the option agreement in October 2014, but when asked why he did not respond, he replied that he was not sure what he was supposed to so. Indeed, he accepted that he had received "revised" options, but insisted that the option being revised was not binding. Each revision he believed was a proposal replacing a former one. Eventually, as referred to above, Gateley responded on behalf of Mr Anson to the notice on 27th April 2015 and issue was joined in general. Mr Anson could not explain the apparent delay and could not explain what happened, if anything, between these dates.

15. In this case, the determination of the Tribunal is dependent upon preferring either Mr Anson's or Mr Johnson's evidence. I am more than satisfied that Mr Williamson was an entirely truthful witness, but he was very much dependent upon what Mr Johnson told him, and as he recorded in his attendance note from 19th June 2014 or shortly thereafter.

He had no clear recollection at this remove of time and he is dependent upon his notes of what Mr Johnson said. His evidence is only as good as that of Mr Johnson. On the crucial point of whether the option agreement signed on 18th June 2014 was "Subject to Contract," I distinctly prefer the evidence of Mr Anson to that of Mr Johnson, taking account of the following matters.

16. Firstly, Mr Anson's evidence is clearly supported by the documents, such as they are. There are two versions of the disputed option agreement. They are identical in terms of printed matter, and Mr Anson's copy has "Subject to Contract" initialled and dated by the parties. The same applies to the deletion of Clause 2. Mr Johnson's copy has "Subject to Contract" struck through, but it is not double initialled by each party. Given the care of initialling and dating, I consider it more likely than not that if this had been deleted by mutual agreement, it would have been struck through with two sets of initials from the parties.

17. Secondly, the next day Mr Anson emailed his solicitors in terms consistent with him considering that he was not bound by what he signed. This consistency is lacking in Mr Johnson's actions. Mr Williamson recorded that the option agreement had been signed "Subject to Contract", but then records that the previous evening they had both initialled the words "Subject to Contract" being deleted. The document does not readily withstand that description of events. The words were initialled undeleted, and neither copy bears double initialling. It may seem odd that Mr Johnson would not be entirely straightforward in his account to Mr Williamson, but Mr Johnson admits to being economical with truth when it suits him: he did not disabuse McCarthy & Stone of its belief he already had a binding option on the Property prior to 18th June 2014 and he was keen to avoid disclosing the signed option agreement because of its date; and, he said that during the meeting with Mr Anson he was stepping out for a quick cigarette, when he intended to telephone his solicitor. Bearing in mind these two examples, I consider it entirely plausible that Mr Johnson added Clause 3.3 to the Tenancy at Will without drawing it to the attention of Mr Anson that it provided him with a ten-year lease. Mr Johnson could point to the term of years if he needed to, but could leave it unnoticed if that suited him better. This sort of activity reflected Mr Johnson's character and supports Mr Anson's case.

18. Thirdly, Mr Johnson's subsequent dealings with Mr Anson do not support his contention that he had Mr Anson bound by the option agreement. He increased his offer to £330,000 and then to £380,000 within months. Still later he was willing to pay £352,000. Whilst that latter figure may have taken account of the expense of litigation, the earlier figures are not so explicable and, quite frankly, appear entirely out of character for Mr Johnson. He appears to have been a man careful with his money; for example, in taking an internet version of an option agreement despite recently instructing Mr Williamson. I find that he was unlikely to resort to increased offers unless he felt he could not bind Mr Anson with what he had.

19. Fourthly, although Mr Anson took months it seems to respond to the notice purporting to exercise the option, when he did the point relating to "Subject to Contract" was taken. He could not explain the technical point about execution of the option agreement, but it seems to me entirely understandable in a dispute of this sort that his solicitor might take a seemingly conclusive technical point, to save the battle of oral evidence that has eventuated.

20. The documents, therefore, offer considerable support to Mr Anson and comparatively little to Mr Johnson.

21. Mr Anson's counsel asks rhetorically what use an option agreement would be marked "Subject to Contract" in planning matters, but the answer appears to be that such was all that Mr Anson would be willing to sign and, of course, I find that Mr Johnson struck through these very words on his copy, just not with the agreement of Mr Anson. Counsel similarly asks, why delete clause 2 if it did not bind? The answer to that appears equally simple, even as a gentleman's agreement, Mr Anson was unwilling to open himself to notional liability in circumstances of failure to complete. At the time, the document would have been relevant in future discussions. What is incredible, is the suggestion that Mr Anson would sign an option agreement without a valuation, which Mr Johnson insists that he did.

22. Mr Anson was also the better witness. He appeared somewhat diffident, which is consistent with his assertion that he felt bullied. He accepted some of the matters put to

him in cross-examination when appropriate, but was clear on the issue of "Subject to Contract" being undeleted. He appeared to me to be telling the truth when he said it would have been "ludicrous" in his view for any man of business to agree a price without a valuation and a contract with input from his solicitors, so he would not do this. He plainly was not easily convinced of entering into any option agreement with Mr Johnson in 2014, and that came though clearly in his evidence.

23. By contrast Mr Johnson came across as a strident and forceful character, even when in severe ill-health. Although delivered with determination, his explanations often lacked coherence; for example, he struggled to be consistent in his explanation of the sequence of events at the meeting, or in his explanation of the content of his own solicitor's attendance note from shortly after the events described. Events immediately after the meeting were not well recalled, and this inconsistent recollection suggests to me that he has tried to reconstruct events, consciously or unconsciously, for the meeting. In evidence, Mr Johnson said that Mr Anson had later sworn on his children's life that they had reached a final agreement and shaken hands, only to renege upon it, and this prompted his final offer of £380,000. That offer letter, drawn up personally by Mr Johnson, does not mention such details, and I have no hesitation in finding that the description of conduct on the part of Mr Anson is embellishment on Mr Johnson's part. Mr Anson did not come across as the sort of person who would swear on his children's life; rather I formed the impression from having seen him that he might be harassed by his tenant, but refuse to sign unless protected by a phrase like "Subject to Contract". He certainly did not come across as a man likely voluntarily to sign an option agreement without advice and, most importantly, without first obtaining a valuation.

24. Viewed in the round, I unhesitatingly prefer the case for the Applicant on the balance of probabilities and will allow the application accordingly.

25. In respect of costs from the date of the reference to the Tribunal on 30th October 2017, these should usually follow the event, meaning that the costs of the successful Applicant should be paid by the Respondent, unless some good reason can be given for doing otherwise. The Tribunal does not make orders in respect of costs incurred before the date of the reference. The Applicant should accordingly provide a schedule of the relevant

costs to the Tribunal and the Respondent within 21 days of the date of the Order in this case. The Respondent should provide any objection in principle to the award of costs, or any objection to any items comprising costs, or the scale of costs in general or individually by item, to the Tribunal and the Applicant within 21 days thereafter. Any reply by the Applicant to the Respondent's submissions should be made to the Tribunal and copied to the respondent within 7 days thereafter. The decision on costs will then be made on the papers.

ORDER

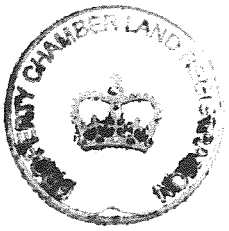
Upon the trial of this Reference

And upon hearing Counsel for the Applicant and for the Respondent

The Chief Land Registrar is directed to give effect to the Applicant's application in Form UN4 dated 1st August 2017 and cancel the unilateral notice dated 15th September 2014 on the registered title for 2a Birmingham Road, Alvechurch, Birmingham B48 7TA (title number HW66145) of which the Respondent is the beneficiary.

Dated this 19th October 2018

Anthony Verduyn



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL