Case No: B2/2016/4375

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ROYAL COURTS OF JUSTICE

Neutral Citation No. [2017] EWCA Civ 2362

The Royal Courts of Justice
Strand, London, WC2A 2LL

30 November 2017

Before:

LORD JUSTICE ARDEN
LORD JUSTICE LEWISON
LORD JUSTICE BEATSON

- -

Between:

MAHMUT & ANR

Appellant

- v –

JONES & ORS

Respondent

- -

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Ulick Staunton (instructed by Bowling & Co) appeared on behalf of the **Appellant**

Anthony Radevsky (instructed by **(Monro Wright & Wasbrough LLP)** appeared on behalf of the **Respondent**

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Judgment

(As Approved)

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LORD JUSTICE LEWISON:

1. Part 1 of the Landlord & Tenant Act 1987 ("the Act") gives tenants of flats a right of first refusal where their landlord wishes to dispose of his revisionary interest. The process is initiated when the landlord proposes to make a relevant disposal. He must give the tenant notice of the terms on which the disposal is to take place and must offer to enter into a contract with the tenant on those terms. The tenants then have two months in which to accept the offer.

2. The landlord in our case, Guarantee Property Company Ltd, gave such a notice on 15 November 2011 to Ms Jones and the other tenants of flats 28 Red Lion Street. But before the two-month period had expired the landlord completed the sale to Messrs Mahmut. One of the Messrs Mahmut was the tenant of a commercial unit on the ground floor of the building. In such a case section 12B of the Act enables the tenants to serve a purchase notice on the new reversioner. The purchase notice is a notice requiring the new reversioner to dispose of the interest he acquired to the tenants or their nominee on the same terms as those on which he acquired that interest.

3. The tenants in this case gave such a notice to Messrs Mahmut on 25 June 2013. Although section 12B is not as clear as section 12A or section 12C, which relate to different kinds of disposal, the effect of section 12B is that if a purchase notice is served on the new reversioner he has an obligation to comply with it. This was common ground both below and before us. On 25 June 2013 the tenants gave a purchase notice to Messrs Mahmut. The Act does not lay down any particular procedure or timeframe applicable to compliance with a purchase notice.

4. However, section 19 provides:

> "(1) The court may on the application of any person interested make an order requiring any person who has made default in complying with any duty imposed on him by any provision of his part to make good the default within such time as is specified in the order.
>
> (2) An application shall not be made under sub-section 1 unless (a) a notice has been previously served on the person in question requiring him to make good the default and (b) more than 14 days had elapsed since the date of service of that notice without his having done so.
>
> (3) The restriction imposed by section 1(1) may be imposed by an injunction granted by the court."

5. In our case, having received no response to the purchase notice the tenants' solicitors wrote to Messrs Mahmut on 19 July 2013. The letter said that if agreement could not be reached the tenants would seek an order that the property be sold to them on the

same terms as the original purchase. It went on to say that if Messrs Mahmut did not reply within 14 days the tenants would issue proceedings.

6. Although the letter was not expressed to be a notice given under section 19 (2) it did what that sub-section required; and no point has ever been taken about the form of the letter. Having heard no more from Messrs Mahmut, the tenants applied to the county court on 19 August 2013 for an order requiring Messrs Mahmut to comply with the purchase notice. On 29 October 2013 District Judge Lightman made an order, the relevant parts of which read:

"It is ordered that:

> "1. The defendant shall forthwith dispose to the claimants all their interest in the freehold of 28 Red Lion Street … upon the terms on which the property was purchased by the defendants from Guarantee Property Company … namely a purchase price of £505,000 with deposit £50,500 and otherwise on the same terms as set out in the agreement … and transfer … and provided that good title can be made to the property.
>
> 2. That if a good title can be made the claimants be at liberty to prepare a transfer of the property upon the terms set out in paragraph 1 above, such transfer to be served on the defendants on or before 4pm on 5 December 2013.
>
> 3. The defendant shall duly execute and deliver to the claimants' solicitors the executed transfer no later than 4pm on 19 December 2013 … in default of the defendants executing and delivering the transfer to the claimants by 4pm on 19 December 2013, subject to the claimants payment of the completion monies less the costs referred to below into court and taking all such necessary steps to effect completion a District Judge of the Central London County Court shall be at liberty to sign and execute the transfer on behalf of the defendants."

7. I omit paragraph 4. Paragraph 5 read:

> "The parties have liberty to apply for the purpose of carrying into effect this order"

Section 17 of the Act provides so far as relevant:

> "(3) Where a period of three months beginning with the date of service of the notice under section 12A, 12B or 12C on the purchaser has expired (a) without any binding contract having been entered into between the purchaser and the nominated person and (b) without there having been made any application in connection with the notice to the court or to the appropriate tribunal the purchaser may serve on the nominated person a notice stating that the notice and anything done in pursuance of it is to be treated as not having been served or done.
>
> (4) Where any such application as is mentioned in sub-section (3) (b) was made within the period of three months referred to in that sub-section but (a) a period of two months beginning with a date of the determination of that application has expired (b) no binding contracts has been entered into between the purchaser and the nominated person and (c) no other such application as is mentioned in sub-section (3) (b) is pending the purchaser may serve on the nominated person a notice stating that any notice served on him under section 12A, 12B or 12C and anything done in pursuance of any such notice is to be treated as not having been served or done.
>
> (5) Where the purchaser serves a notice in accordance with sub-section (1),(3) or (4) this Part shall cease to have effect in relation to him in connection with the original disposal".

8. The tenants' application to the county court was made within the period of three months following the service of the purchase notice under section 12B. The tenants' solicitors served a draft transfer on Messrs Mahmut solicitors on 3 December 2013 in compliance with the order. However, Messrs Mahmut did not execute or deliver the transfer by 19 December. Two months from District Judge Lightman's order expired on 29 December by which time Messrs Mahmut were in breach of the order.

9. On 2 January 2014 Messrs Mahmut's solicitors said that they held an executed transfer but they did not send it to the tenants or their solicitors. On 2 April 2014, their solicitors gave notice under section 17 (4). The question raised on this appeal is whether that notice was effective to discharge Messrs Mahmut from any obligation to comply with the court order and to relieve them from any further obligation to transfer the freehold to the tenants.

10. Both District Judge Lightman and His Honour Judge Gerald held that it did not. There is one procedural point I should mention, Judge Gerald thought that he was dealing with an application for permission to appeal unaware that Judge Dight had in fact intended to grant permission to appeal on the papers. Thus, although Judge Gerald's judgment refuses permission to appeal, I have treated it as dismissing the appeal itself. However, nothing turns on that as any potential jurisdictional problem has been cured by an interim appeal to Mrs Justice Asplin in which she amended Judge Gerald's order to grant permission to appeal from District Judge Lightman and

refused permission to appeal to this court. Lord Justice Henderson subsequently granted permission for this second appeal.

11. It is right to say, as Mr Staunton for the appellants pointed out, that the time periods in the Act do not dovetail precisely together. Under section 12B the tenants' basic right is to take a transfer of the reversion in question on the same terms as those on which the new reversioner acquired it. Sometimes it might not be clear what those terms were: for example, whether the reversion was part of a portfolio sale. In other cases things might have happened to the property since the original disposal which have affected its value.

12. In that kind of case the FTT, or in Wales the LVT, has jurisdiction to deal with such questions. That is why section 17(3)(b) refers both to application to the court and also to the appropriate tribunal. If matters need to be and have been determined by the FTT machinery is still needed to compel a recalcitrant reversioner to comply with his obligations. So, section 17(4)(c) envisages that a second or subsequent application either to the court or to the FTT might need to be made.

13. I accept, as Mr Staunton submitted, that an application under section 19 is an application on the kind contemplated by section 17. But the main thrust of these provisions is, in my judgment, that the Act contemplates two ways in which the tenants' rights might be vindicated: either by the parties voluntarily entering into a contract following the establishment of the tenants' rights or by the court making an order. Thus, the scheme of the Act is that the court's order requiring the reversioner to comply with his obligations is the equivalent of a contract voluntarily made.

14. Once parties have entered into a contract the enforcement of that contract in case of default is via the court; usually by an action called specific performance. Once the court has made an order for specific performance it is the provisions of the order rather than the terms of the contract that govern the way in which the contract is to be carried into execution. Megarry V-C explained the position with his usual clarity in *Singh v Nazeer* [1979] Ch 474 (in a passage subsequently approved by the House of Lords in *Johnson v Agnew* [1980] AC 367) which is worth citation at some length:

> "Third, it seems plain that in ordinary circumstances the machinery provisions of a contract for the sale of land are intended to govern the carrying out of the contract between the parties out of court, and are not directed to carrying it out when an order for specific performance has been made. That order is made, of course, by reference to the rights of the parties under the contract; but, when made, it is the provisions of the order and not of the contract which regulate how the contract is to be carried out. Provisions in the contract as to the deduction of title, the preparation and delivery of the conveyance, the mode and date of completion and many other matters must all, it seems to me, yield to any directions on these matters which are given in or under the order for specific performance. Mr. Ritchie attempted to drive a wedge

between compliance with contractual obligations and compliance with the order for specific performance, emphasising that a failure to comply with the order was not a breach of contract but was a contempt of court, and so on. I think that this approach is ill-founded. It gives little or no weight to the consideration that the order of the court is not independent of the contract, but is the court's order as to how that contract is to be carried out, replacing the mode in which it should have been carried out had no order been made. In my judgment, where, as in this case, an order for specific performance contains not only the declaratory part but also the consequential directions (I adopt the terminology of Hasham v Zenab [1960] AC 316), those consequential directions regulate the performance of the contract so long as they stand and are not varied by the court. If those consequential directions are not complied with, then the court may make an appropriate order in respect of the default, that default being a breach not so much of the still subsisting contract as of the order of the court as to how that contract is to be carried out: see Griffiths v Vezey [1906] 1 Ch 796.

That brings me to the fourth point, namely, whether a completion notice served under the contract after the order for specific performance has been made is valid and effective; and that, of course, is the point that I have to decide on this motion. Mr. Ritchie was constrained to admit that if his contention that the notice was valid and effective was sound, it would have been open to either party to serve a completion notice the day after the order for specific performance had been made, and that this notice would have been equally valid and effective. If the vendor had served the notice, it would have been effective unless within the stipulated 28 days the purchaser had achieved the virtual impossibility of producing a bill of costs, having it taxed, and carrying through (however dilatory the vendor) all the stages of the consequential directions in the order. If emphasis is needed, let it be supposed that an order for specific performance in this form had been made on July 31 or December 21 in any year.

I do not think that this contention can possibly be right. First, as a matter of construction I do not consider that general condition 19 can be intended to operate in any case where a full decree of specific performance has been made. I can see nothing in it which suggests that the parties intend to contract that a notice under that condition is to supersede or transcend or vary or interfere with an order of the court for specific performance. The condition seems to me to be a useful and beneficial provision which is to apply in all normal cases where the parties are carrying out the contract out of court, but it is not intended to apply where the contract is being carried out under the directions of the court, and those directions are not compatible with the operation of the condition."

15. Thus on the facts of that case it was not open to one party to serve a completion notice on the other once the order for specific performance had been made. As Megarry V-C put it:

> "Just as other provisions of the contract were superseded by the consequential directions given by the court so I think this condition will be superseded by these directions. I hold the completion notice is bad".

16. It is of course true that an order made under section 19 is not an order for specific performance which could only be made where there is a binding contract in place, as Mr Staunton says. The order is enforcing non-consensual statutory rights. And as the judge observed at paragraph 11 the order made under section 19 was very similar to the sort of order that would have been made if there had been a binding contract which the court decided ought to be enforced by specific performance.

17. It would in my judgment be surprising if a reversioner had different entitlements to serve notice under section 17(4) following a court order requiring compliance with the obligations arising under the Landlord and Tenant Act 1987 depending on whether the court order was enforcing a contractual obligation or a statutory one. To hold otherwise would mean that a recalcitrant landlord who refused to enter into a contract was in a better position than a compliant one. In addition, section 19 (1) allows the court to specify such period as it thinks fit; which must mean that the court is in control of the timetable. In substance this was the judge's reason for dismissing the appeal against the decision of District Judge Lightman in paragraph 28 and I agree with him.

18. In addition, as *Johnson v Agnew* shows where the court has made an order for specific performance which does not result in an actual transfer of the property the party in whose favour the order was made may go back to the court for an order discharging the order for specific performance and an award of damages instead. He may do so without the need to begin a fresh action. The mere fact that the court has made an order for specific performance does not deprive the court of its future ability to enforce the contract; and in that sense the dispute between the parties has not been finally determined.

19. In addition, in this order, as I suspect in many others, there was an express liberty to apply for the purpose of working out the order. I would therefore hold that while District Judge Lightman's order of 29 October 2013 remained to be worked out the application had not been determined for the purposes of section 17. It would however have been open to Messrs Mahmut to have applied to the court to discharge the order if there had been culpable delay on the part of the tenants in complying with it.

20. I agree with Judge Gerald that the decision of Mr Justice Rimer in Boyle v Horsebay Ltd [2002] EWHC 970 (Ch) does not bear on the facts of this case since no order under section 19 had been made in that case. This was the judge's alternative reason for dismissing the appeal at paragraph 32 and again I agree with him.

21. Finally, by disobeying the mandatory order to execute the transfer and deliver it to the tenants by 4pm on 19 December 2013 Messrs Mahmut were in contempt of court. The tenants rely on the broad principle that as a general rule, it is unacceptable if a person could enforce a right to require property by deliberately doing something which was necessary to enforce that right but which was wrongful as between him and the person against whom he seeks to enforce it.

22. This is a broad principle of public policy which the court may apply to what is apparently a complete statutory code. It is not necessary for the wrong in question to amount to a crime. Where a conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision that must be considered in context and with regard to any nexus existing between the contract and the statutory purpose. See *Welling Hatfield Borough Council v The Secretary of State for Communities and Local Government* [2012] UKSC 15, [2011] 2 AC 304.

23. This court applied that principle in *Henley v Cohen* [2013] EWCA 480, [2013] L & TR 28 so as to disentitle a tenant from enfranchising under the Leasehold Reform Act 1967 which applies to long leases of dwelling houses where the residential accommodation in the property have been created in breach of covenant.

24. Mr Staunton pointed out that notice under section 17 (3) can be served where the reversioner has failed to comply with a statutory obligation to comply with section 12B. That he submitted is in itself a wrong. By the same token, he submitted, failure to comply with the court order should stand on the same footing.

25. However, the *Welling* case says that even if some wrongs give rise to statutory rights it is not necessary for all wrongs to stand on the same footing. In my judgment in the present case, the purpose of the Act will have been frustrated if by refusing to comply with the mandatory order of the court Messrs Mahmut can put themselves into a position in which they are entitled to give notice under 17 (4) whereas if they had complied with the order that ability would not have arisen. Accordingly, I consider that this principle of public policy applies on the fact of this case. For these reasons I would dismiss the appeal.

Lord Justice Beatson:

26. I agree with the order of Lord Justice Lewison.

Lady Justice Arden

27. I also agree.

ORDER: Appeal dismissed.