

All England Official Transcripts (1997-2008)

Jolley v Carmel Ltd

[2000] Lexis Citation 2085

(Transcript: Smith Bernal)

Sale of land - Contract - Implied term - Circumstances in which term should be implied - Term that obligation should be performed in reasonable time - Whether term should be implied - Whether term breached

COURT OF APPEAL (CIVIL DIVISION)

OTTON, ROBERT WALKER LJ, WATERHOUSE J

21 JULY 2000

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N Berragan for the Appellant

P Smith QC for the Respondent

Halliwell Landau, Manchester; Gorna & Co, Manchester

OTTON LJ

1. I will ask Lord Justice Robert Walker to give the first judgment.

ROBERT WALKER LJ

2. This is an appeal from an order made on 7 June 2000 by Mr Kim Lewison QC, sitting as a Deputy Judge of the Chancery Division of the High Court. The appeal is made with the permission of the deputy judge limited to specific grounds of appeal. The appeal has not been formally expedited but it has, through the medium of the short-warned list, been brought on very quickly.

3. The deputy judge's order dismissed the claim by Mr Leslie Jolley, the claimant below and the appellant in this court, for a declaration that a contract dated 7 August 1998 for the sale of land to Carmel Limited, the defendant below and the respondent in this court, had been rescinded as a result of a decision taken by Mr Jolley and communicated to Carmel

Limited in either June or November 1999. The effective communication is pleaded in the alternative, but the details are not relevant for present purposes. The particulars of claim also ask for consequential relief in the form of an order for vacation of the registration of an estate contract as a class C(iv) land charge.

4. The hearing before the deputy judge took five days with considerable cross-examination on disputed issues of fact. That was despite the fact that the issue which the deputy judge had to decide was essentially the same as that on this appeal, that is as to the correct construction of the contract. The explanation of the length of hearing, which implies no criticism whatever of the deputy judge, is that he had to hear a great deal of evidence as to the commercial context of the contract and what surrounding circumstances were known or reasonably available to the parties when they entered into it. That evidence was of great importance to the deputy judge's conclusions as to what terms should be implied into the contract in order to give it business efficacy. There is no appeal against the conclusions reached by the deputy judge as to what terms had to be implied into the contract.

5. In addition the judge had heard and considered (as was necessary in case he was wrong in his primary conclusion) expert evidence as to what would have been a reasonable period (viewed objectively and as the date of the contract) for obtaining planning permission at the requisite time. That is a further reason for the length of the hearing on what was fundamentally a question of construction of a short, but not well drafted, contract for the sale of land.

6. In these circumstances I can summarise the material facts more shortly than the findings of fact which occupy most of the 17 pages of the deputy judge's conspicuously clear, thorough and careful judgment.

7. Mr Jolley was the owner of a derelict and isolated building close to the sand dunes at Lytham St Annes, Lancashire. It was formerly a convalescent home, but has not been occupied for 25 years. The building and its grounds were in land designated as green belt and also immediately adjacent to a dune system designated as a site of special scientific interest.

8. By a contract dated 7 August 1998 (I deliberately omit matter which was relevant only as matrix of fact which is no longer in issue) Mr Jolley agreed to sell the property to Carmel Limited. The crucial clause in the contract was in the following terms:

"Completion Date

The Buyer shall within three calendar months of the date hereof lodge an application with Fylde Borough Council for detailed planning consent for the erection on the Property of a new residential development and associated landscaping. The Completion Date shall be 28 days after satisfactory detailed planning permission for a minimum of 16 residential units within the curtilage of the Property together with approval for associated landscaping has been granted to the Buyer. If such application for detailed planning permission and associated landscaping is not lodged within three calendar months from the date of this Agreement then the Completion Date shall be 17 weeks from the date hereof. Alternatively, completion shall take place 28 days from the Buyer serving Notice on the Seller of the Buyer's wish to complete regardless of the situation at that time in respect of the said planning application."

9. The deputy judge commented that the contract was deficient in four respects:

(1) It imposed no express obligation on the buyer to pursue his application.

(2) In particular it made no provision for any appeal against a refusal of planning permission.

(3) It did not specify a date by which planning permission must be obtained.

(4) It did not specify a longstop date for completion or determination of the contract (a point which may be no more than a restatement of the last point).

10. The deputy judge considered various submissions about implied terms, but as there is no appeal on this point I can go straight to his conclusion. He said:

"... there was an implied term that the buyer would use reasonable efforts to obtain planning permission within a reasonable time."

11. He went on to hold, citing the decision of the House of Lords in *Hick v Raymond & Reid* [1893] AC 22, that what was a reasonable time should depend on the circumstances which actually existed. He concluded:

"... that the buyer would not be in breach of the implied term so long as any delay in obtaining planning permission was attributable to causes beyond its control, and so long as it had not acted negligently or unreasonably."

12. The deputy judge also held that there was an implied term that Mr Jolley would do nothing to hinder the grant of planning permission. That led to Carmel Limited recovering nominal damages on its counterclaim, but I need not go further into that aspect of the matter.

13. The deputy judge held that Carmel Limited had not acted negligently or unreasonably and there is no appeal against that finding. It is not therefore necessary to describe in detail the stages, described by the deputy judge as scheme 1A, scheme 1B and scheme 2, through which planning applications passed between 12 October 1998 (when the first planning application was made) and the events of this year during which scheme 2 was approved by the local planning authority on 23 February 2000 but was then called in by the Secretary of State (leading to a public inquiry which was due to be held last month unless the hearing has been postponed).

14. Mr Peter Smith QC for Carmel Limited, upon whom we have not found it necessary to call, sought to put before the court a witness statement bringing the position up to date. It has not been necessary for us to look at that statement in order to dispose of the appeal.

15. In these circumstances, the principal issue (and it may be the determinative issue on this appeal) is whether the deputy judge was correct in his view that the essential issue was whether Carmel Limited was in breach of its implied obligation to use reasonable efforts to obtain planning permission within a reasonable time, not being responsible for delays not occasioned by negligent or unreasonable conduct on its part, or whether the judge should have reached the same conclusion as Cross J did, when considering a comparable but different contract, in *Re Longlands Farm* [1968] 3 All ER 552, 20 P&CR 25. I do not put the issue as to whether the deputy judge should have followed that decision, since it is quite clear that a decision of the court on the meaning of the particular written contract creates no precedent unless, as very rarely happens, both the language of the contracts and relevant matrices of fact are identical. The fact that the decision of Cross J has been referred to with approval by the House of Lords in *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209 does not, therefore, carry any particular binding force.

16. *Re Longlands Farm* was similar to the present case in that it involved a badly drafted contract for the sale of land depending on the obtaining of planning permission. The contract took the form of a letter to the seller, a Hampshire farmer, from an authorised representative of the buyer, a company engaged in property development. I will set out the letter in full:

"Dear Mr Alford - As discussed with you my company is agreeable to the purchase from you for the entirety of your land measuring approximately fifty-seven (57) acres and known as Longlands Farm Long Common, Botley, Hants for the purchase price of one hundred and fourteen thousand pounds (£114,000). Such purchase to be subject to my Company obtaining Planning Permission to its entire satisfaction for the development of this land and to questions of Title being to our approval. The purchase will be completed within eight weeks of these conditions being satisfied. Yours respectfully, for Superior Developments, Limited. R McDougall, Estate Manager."

17. Typewritten under that was:

"I agree and accept the above terms and acknowledge receipt of the sum of £5 (five pounds) in consideration of my holding the property for you."

18. A copy of that letter had been signed by each side. Cross J had to decide whether this document amounted to the grant of an option or a conditional contract. He held that it was a conditional contract despite the £5 which had changed hands. As a conditional contract, it resembled the contract in this case in that completion was tied to the grant of planning permission but no time limit was set for planning permission to be obtained. Cross J cited the decision of the Privy Council in *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, [1959] 3 All ER 910 and concluded that that planning permission satisfactory to the buyer had to be obtained within a reasonable time. At page 556 Cross J put it like this in a passage on which the appellant strongly relies:

"So, treating this document as a conditional contract - the purchasers, that is to say, the defendants, were given a reasonable time in which to procure planning permission to their satisfaction. If they were unable to procure planning permission to their satisfaction within a reasonable time, then the contract never became an absolutely binding contract and the plaintiff was entitled to treat it as at an end, and to have the registration discharged.

Two other points seem to be clear, first that the reasonableness of the time must be determined as at the date of the contract and that what is reasonable must be judged by an objective test applicable to both parties, and does not simply mean what is reasonable from the point of view of the defendants."

19. In that case the defendants, the property developers, had for 3.5 years done nothing at all about applying for planning permission and Cross J had no difficulty in concluding that the contract was at an end. Although *Re Longlands Farm* does have some resemblance to the present case, there were also important differences. *Re Longlands Farm* was, as its title suggests, a form of summary procedure by originating summons for the vacation of a land charge as the only relief sought in the proceedings. It was heard and decided in a single day, probably on short and uncontroversial affidavit evidence. The judge was not therefore asked to explore the surrounding circumstances or to make any finding about implied obligations (as opposed to the simple question of what, if any, time limit should be implied).

20. The deputy judge regarded it as important that there was, by contrast, an implied obligation in the contract which he had to consider. In my view he was right to do so. He said in his handed down judgment:

"In this case, as in *Longland's Farm*, the contract does specify a completion date, but ties it to the obtaining of planning permission. However, Cross J appears to me to have treated the case as one in which no completion date was specified, and therefore applied the principle that the condition had to be satisfied (if at all) within a reasonable time. As a broad generality, I do not find difficulty with this principle. However, a different analysis is possible. If, as I have held, there was an implied obligation on the part of the

buyer to take reasonable steps to obtain planning permission, it might be said that for as long as the buyer continued to perform that obligation, time for satisfaction of the condition was still running. This would, in my judgment, be closer to what the parties expressly agreed than the imposition on them of some arbitrary time limit."

21. Mr Berragan, for the appellant, has submitted that the deputy judge was bound to follow *Re Longlands Farm* because it was approved by Lord Slynn, with whom Lord Noland and Lord Hope agreed, in the *Total Gas* case. I have already indicated that this is not, in my view, a case in which precedent provides the answer, except so far as precedent provides general principles, for instance, that a commercial contract should be construed in a realistic and practical way, and so as to achieve as much certainty as possible.

22. In my view the deputy judge was right to regard his construction as more commercially realistic and practical. If the parties had wanted certainty above all, they could simply have achieved it by specifying, as Cross J pointed out in *Re Longlands Farm*, at page 556, by specifying a longstop date. But any future date chosen and specified at the time of the contract when the planning position was in so much doubt might, as events unfolded, have operated in an arbitrary or unfair way which could not have been predicted and which would not have been wished by the parties at the time when they made their contract. As the judge put it, at that time it was not open to the parties to do more than make an educated guess.

23. I find nothing in the *Total Gas* case to persuade me that that was a wrong approach. The facts of *Total Gas* were complicated, concerning as they did three identical contracts for the large scale purchase of gas from the Trent field to be extracted over a period which might have been of about 14 years' duration (see the commercial context as described in the speech of Lord Slynn [1998] 2 Lloyd's Rep at pages 211-211). As gas from numerous sectors of that part of the North Sea came ashore at the same terminal at Bacton, Norfolk, it was necessary for Arco and the other two sellers to become a party to the allocation agreement between the terminal owners and all the companies which sent gas from that part of the North Sea to the terminal. The accession of Arco and the other two sellers to the allocation agreement had not been effected by the first delivery date as fixed under each of the contracts.

24. The *Total Gas* case differed from *Re Longlands Farm* and the present case not only in its complexity, but also, and more particularly, because there was a fixed first delivery date which was central to the scheme agreed by the parties (see what Lord Slynn said on that point at page 216). The scheme of what was agreed by the parties related to an enterprise involving investment on the largest scale imaginable. That was the context in which Lord Slynn (p 217), Lord Steyn (p 222) and Lord Hutton (p 228) spoke of the need for commercial certainty.

25. Mr Berragan has politely criticised the judge for having "run together" the contingent condition to be found in the contract as to obtaining planning permission and the promissory condition which the judge found implied for Carmel Limited to use reasonable efforts. In my view the judge was right to see those two as matters which ought to run together. That made the best commercial sense.

26. For these reasons, which are essentially the same as those of the deputy judge in his admirable judgment, I would dismiss this appeal. It is not therefore necessary or appropriate to consider the other grounds of appeal (which related to what would be a reasonable period), since that arises only if the judge was wrong in preferring to look at reasonable efforts as events unfolded rather than at a reasonable period to be assessed in a period of doubt at the inception of the contract. Nor is it necessary to consider the other point on which, had the appellant succeeded on the first point, we would have been asked to extend the permitted grounds of appeal.

SIR RONALD WATERHOUSE

27. I agree.

OTTON LJ

28. I also agree.

Appeal dismissed.