Neutral Citation Number: [2023] EWHC 2019 (Comm)

Case No: LM-2022-000079

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2023

Before :

His Honour Judge Bird sitting as a Judge of this Court

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Between :

JAMIE DANIEL RISHOVER	**Claimant**
- and –	
(1) JASON MARC RISHOVER **(2) HERONSLEA LIMITED**	**Defendants**

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Mr Joseph Sullivan (instructed by **Rosenblatt**) for the **Claimant**
Mr David Nicholls (instructed by **Solomon Taylor and Shaw**) for the **Defendants**

Hearing dates: 10 July 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

His Honour Judge Bird :

1. The Claimant and first Defendant are brothers. They carried on a property development partnership with Mr James Craig. There were a number of development projects. For the purposes of this judgment, two are of interest, one at Cowley Hill and one at Hendon.

2. The Cowley project was a joint venture between Mr Craig and the Claimant. They agreed to share in the profits equally. Each held 50% of the issued shares in the capital of a special purpose vehicle ("SPV") incorporated for that purpose. The aim was to develop 58 dwellings.

3. The Hendon project was a joint venture between the first Defendant and Mr Craig. The first Defendant was to receive two-thirds of the profits and Mr Craig one-third. Each held shares in those proportions in a SPV.

4. In 2018, Mr Craig fell out with the first Defendant. The partners agreed to a division of partnership assets (in effect the various development projects). They entered into a formally drawn up Heads of Agreement. At the time, both the Hendon project and the Cowley project were in their early stages. The Heads of Agreement included the following terms:

    i) If the Hendon project "*for whatever reason*" did not proceed to exchange of contracts (I understand this to mean in respect of a sale by the SPV to a third party) the first Defendant would receive half of the Claimant's share in the Cowley SPV (so that he would thereby acquire a right to 25% of the profits of that project). At the same time he would become liable for 25% of the costs of that project.

    ii) If the Cowley project "for whatever reason" did not proceed to exchange of contracts, the Claimant would receive half of the Claimant's shareholding in the Hendon SPV (so that he would acquire a right to one-third of the profits in the Hendon project). He would become responsible for one-third of the costs of that project.

5. A further agreement ("the Settlement Agreement") was executed on 19 June 2019 when the Claimant and the first Defendant fell out. The agreement bound all three partners. By clause 21.1 the parties agreed to act, at all times, in the best interest of the Partnership Projects (including Hendon and Cowley) and to "promote the success" of the projects.

6. Schedule 1 to the agreement sets out what is to become of the various partnership projects. It is an amended and updated form of the Heads of Agreement. At clause 1.2.5 the schedule provides that the partners will "*continue to work to the best of their abilities at all times to promote the best interests and success of the Partnership and will use all reasonable endeavours to achieve this*".

7. By now, the Hendon project had a buyer. The schedule records an agreement that, in respect of the Hendon project, the parties will proceed to "exchange contracts with the current buyer". The sale completed on 28 July 2021. The schedule (unlike the Heads of Agreement) does not provide for what would happen if the Hendon project did not proceed to exchange. The parties clearly had a degree of confidence that exchange would take place.

8. In the event that the Cowley project "for whatever reason" did not proceed to exchange, the same terms set out in the Heads of Agreement would apply. It is common ground that profits made on the Hendon project would be retained in the relevant SPV until such time as the Cowley project completed.

9. The Cowley project has not proceeded to exchange. It appears to have been a relatively complex development involving a housing development and the development of a primary school on a separate application as a precondition. Outline planning permission for the project was granted on 11 October 2018. At a later planning committee meeting held on 16 July 2020 the final grant of planning permission was deferred. The terms of the section 106 agreement could not be agreed, and it is suggested that the project has in effect floundered. The Claimant pleads that the Cowley project will not now proceed to exchange. The first Defendant initially admitted that fact but has now (with the consent of the Claimant and with the Court's approval) withdrawn the admission. The first Defendant's present case is that he does not admit that the project will not proceed to completion. In other words the Defendant has no positive case to advance one way or the other as to whether the project will proceed, or it will not.

10. In these circumstances (because the Cowley project has not proceeded to exchange) the Claimant pleads a right to one-third of the profits made on the Hendon project. The parties have agreed that that sum amounts to £1,499,850.

11. The first Defendant denies the Claimant's right to the profit share for the reasons set Out at paragraph 24 of the Amended Defence:

    i) The first Defendant is not in breach of the Settlement Agreement. The obligation set out at clause 21.1 of the Settlement Agreement to use all reasonable endeavours to achieve the best interests and success of the Cowley project was a condition precedent "that had to be performed before the first Defendant was liable for the consequences of the [Cowley] project not proceeding to exchange" (Paragraph 18 of the Defence).

    ii) If the first Defendant is in breach of the Settlement Agreement, that breach "has been occasioned by the Claimant's own breaches" and so the claim cannot be brought (Paragraph 24(b) of the Defence).

    iii) If the first Defendant is in breach and the Claimant does not need to rely on his own breach, then the first Defendant has a set-off by reason of the Claimant's breaches (Paragraph 14 of the Defence).

12. The Claimant issued an application for summary judgment on 22 March 2023 on the ground that the defences advanced against the claim for the Hendon profit share had

no real prospect of success. The evidence in support notes that the application involves 3 issues of contractual interpretation:

i) Whether there were conditions precedent to the First Defendant's liability as pleaded by the First Defendant at paragraph 18 of the Defence.

ii) Whether the Claimant is prevented from suing the First Defendant by reason of the matters pleaded in paragraph 24(b) of the Defence.

iii) Whether the Claimant owed the First Defendant contractual duties as contended for in paragraph 14 of the Defence.

13. There was no disagreement between the parties as to the correct approach to be adopted. I take the law from paragraph 19 of the Claimant's skeleton argument which is adopted by the first Defendant at paragraph 16 of his.

14. Is there a condition precedent to be fulfilled before the obligation to share the Hendon profits arises?

15. I accept that this is a matter of construction. Coulson J (as he then was) noted in *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Limited* that:

> "*It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of that event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered*."

16. The starting point must be the precise words chosen by the parties to reflect their bargain. I have been unable to find anything in those express words that would elevate the general obligations set out in the Settlement Agreement to a condition precedent. That conclusion is not an end of the matter because the meaning of the contract is not always the same as the meaning of the words used. I have considered paragraphs 16 to 24 of the judgment of Vos MR in *Britvic plc v Britvic Pensions Limited* [2021] ICR 1648.

17. Bearing in mind that the agreement is a formal legal document, prepared by skilled and specialist legal draftsman (see paragraph 22 of *Britvic*) I can see no basis on which I could conclude that the first Defendant has any reasonable prospect of persuading a Judge at trial that there is any condition in the contract precedent to the obligation to share profits. In particular there is nothing in the background or context as it would be understood by an informed bystander to suggest that the agreement should be read in that way. There is no suggestion of error, and the absence of a condition precedent does not contravene what might be regarded as commercial common sense.

18. Further there are very strong indicators that there was no objective intention to make payment of the relevant profit share subject to a condition precedent. If the contract had the meaning for which the first Defendant contends it would be riven with uncertainties. A power imbalance would result in which the paying party would have the last word on whether a payment was due. The imprecise nature of the apparently

precedent obligations mean that it would be an easy matter for the paying party to raise the spectre of non-fulfilment and so (at least) delay payment. Uncertainty and imbalance are the very things that a dissolution agreement should aim to avoid. In my judgment the absence of a condition precedent is entirely in accordance with commercial common sense.

19. Does the Claimant need to rely on his own wrong (set out at paragraph 22(b) of the Defence) to bring the claim?

20. The first Defendant (at paragraph 40 of his skeleton argument) suggests that the question is this: has the Claimant (and has Mr Craig) failed to comply with their contractual obligations to progress the Cowley project to exchange? I do not accept that is the right question.

21. The real question, for the purpose of this hearing, in my judgment is this: does the agreement allow for the Claimant to receive a share of the Hendon project even if he is in breach of his contractual obligations? If the answer to this is yes, the issue of breach is irrelevant.

22. I was referred to *Petroplus Marketing AG v Shell Trading International Ltd* [2009] 2 All ER (Comm). I am satisfied for the reasons set out in that decision (and for the reasons rehearsed at paragraph 7.113 of Lewison on the Interpretation of Contracts) that the issue is again one of contractual construction. In that case the claimant argued that the price of oil sold to the defendant was to be calculated by reference to the date of delivery. The defendant denied that and asserted that, because delivery was late and by the time of delivery the price of oil had increased, the claimant would be relying on its own failure to deliver on time if the price was calculated by reference to delivery.

23. Andrew Smith J accepted the seller's arguments:

> "…. [the contract] *established a machinery for Petroplus to be paid the invoiced amount notwithstanding that Shell contend that they are in breach of their contractual obligations. The machinery would be ineffective, and the contractual intention behind it frustrated, if Shell were permitted to withhold payment by challenging the calculation of the price by reference to the bill of lading quantity on the grounds of short delivery, or, as here, by challenging the calculation by reference to the bill of lading date on the grounds that it resulted from breach of contract on Petroplus' part*."

24. The Claimant relies on the express contractual provision that the right to share in the Hendon profits arises if the Cowley project does not proceed to completion "*for whatever reason*". The first Defendant invites me to distinguish *Petroplus* on the basis that the present case is concerned with something akin to a proprietary right in shares rather than a mere price payable.

25. I am unable to accept the first Defendant's argument on this point. The facts of the present case seem to me to be closely comparable to those of *Petroplus*. Here the parties have agreed how the profits from partnership assets (projects) will be divided post dissolution and have carefully considered what will happen if the Cowley project

failed. That carefully considered agreement would be frustrated if the first Defendant was "*permitted to withhold payment*".

26. In my view the words "for whatever reason" make it impossible to interpret the agreement in a way that prevents one party from relying on his own wrong. Considering the points raised in ***Britvic*** I cannot see that there is any basis on which those words (within a formally drafted agreement) could be read so as to exclude reliance on breach. In my judgment, commercial common sense is served by this interpretation because it ensures that an agreed share of profit is released quickly and efficiently without the risk of any delay whilst issues of breach are investigated. It is particularly sensible to avoid that risk where (as here) the obligations said to have been breached are general in scope (see paragraph 28 below). If there are issues about breach, they might be pursued separately.

27. There is therefore no need to reach any conclusion about the fact of breach or causation.

28. Whether or not contractual duties are owed by the Claimant to the first Defendant is raised by the first Defendant as the first point I should deal with. I am prepared to accept that contractual duties may be owed in the terms set out at paragraph 14 of the amended Defence and counterclaim, namely:

    i) to act at all times in the best interests of the Cowley project.

    ii) to act in accordance with promoting the success of the Cowley project.

    iii) to use all reasonable endeavours to achieve the best interests and success of the Partnership, which included the best interests and success of the Cowley project.

    iv) as far as their obligations in relation to the Cowley project were unclear or required agreement, to use their best endeavours to reach agreement in the best interest of maximising the value of the Partnership

29. In my judgment the fact that these duties may be owed does not prevent the entry of summary of judgment on the part of the claim in respect of which it is sought. I am not satisfied that any right of set-off arises. The words "for any reason" in my view (as explained at paragraph 25 above) operate as a separation between the profit sharing arrangement and any claim for damages (no matter how speculative) that might arise.

30. It follows that summary judgment will be entered for the Claimant.