Case No: N/K

Neutral Citation Number: [2008] EWHC 2457 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 3 October 2008

BEFORE:

THE HONOURABLE MR JUSTICE MORGAN

- - - - - - - - - - - - - - - - - - -

BETWEEN:

CHANTRY ESTATES (SOUTH EAST) LIMITED	Claimant
- and -	
ANDERSON AND ANOTHER	Defendants

- - - - - - - - - - - - - - - - - - -

MR RICHARD MORGAN (Instructed by England Palmer) appeared on behalf of the Claimant
MR ANDERSON Litigant in Person
MRS ANDERSON Litigant in Person

- - - - - - - - - - - - - - - - - - -

Approved Judgment

Wordwave International, a Merrill Communications Company
PO Box 1336, Kingston-Upon-Thames KT1 1QT
Tel No: 020 8974 7305 Fax No: 020 8974 7301
Email Address: Tape@merrillcorp.com
(Official Shorthand Writers to the Court)

No of Folios in transcript - 57
No of words in transcript - 4,123

MR JUSTICE MORGAN:

1. This is an application for summary judgment under Rule 24 of the Civil Procedure Rules. The Claimant is Chantry Estates (South East) Limited and the Defendants are Mr and Mrs Anderson.

2. The brief details of the claim referred to in the claim form seek as the primary head of relief, specific performance of a contract in writing made between the Claimant and the Defendants on 26 September 2006, for the sale by the Defendants to the Claimant of a freehold property known as 63 London Road, Camberley, Surrey, that being a registered title. The claim also seeks damages for breach of contract in addition to or in lieu of specific performance, or at common law, and then further and alternative relief of a conventional kind. The Claimant has issued an application notice seeking an order pursuant to Rule 24, as I have said, for specific performance of the contract, alternatively, for case management directions.

3. The application is supported by a witness statement of Robert Horne of 9 September 2008, and in accordance with directions given by the Master in this case, Mr and Mrs Anderson have submitted evidence in the form of statements, perhaps not strictly witness statements, but certainly written material, which I have been able to digest and that series of statements is supported by various draft documents and correspondence, which has been drawn to my attention.

4. In reply to Mr Anderson's statement there is a second witness statement of Mr Horne dated 2 October 2008, and that exhibits a considerable amount of material. All of these documents have been exchanged in a short timescale. The Master, when this case was before him, ordered that the documents be exchanged within a short timescale. It is open to argument whether Mr Anderson was in time or whether he was a little bit out of time. It is also said by Mr Anderson that Mr Horne's second witness statement is out of time. However, the facts are not unduly complicated. I will be making assumptions in Mr Anderson's favour, this being a Part 24 application rather than the trial, and I think the fair thing to do is to take into account all the material in considering whether this is a case for summary judgment, or not.

5. The starting point must be the written agreement entered into by the parties on 26 September 2006. This is between Mr and Mrs Anderson, described as the intending seller, and Chantry, described as the intending buyer. It essentially gives Chantry an option to buy Mr and Mrs Anderson's property, 63 London Road, Camberley, Surrey. I think it is right to say, and I expect Mr Anderson would submit, that this agreement is the kind of agreement which is drawn up by a developer, as intending buyer. It is favourable to the buyer in a number of respects. First of all the payment for the option is £1. It is not an option which required any very substantial consideration. The grant of an option, of course, does not oblige the buyer to buy, but gives the buyer the right to buy. The position of a seller under such agreement is such that, the seller is seriously concerned and interested

in how long the option period will run, because during that period the buyer has rights and the seller is subject to a fetter on his or her freedom to sell.

6. The other noticeable thing about this option agreement is that, with a very limited exception in Clause 19 of it, the agreement does not impose anything very much by way of obligation on the intending buyer. Option agreements, of course, come in different shapes and sizes and certainly one has seen option agreements where the buyer is placed under extensive obligations as to seeking planning permission, proceeding to progress an application for planning permission, appealing a refusal of planning permission, if counsel of a certain seniority gives advice that the planning appeal would have a better than evens prospect of success, and so on. Such provisions or indeed anything remotely resembling such provisions are entirely absent from this agreement.

7. As such, the agreement is very one-sided and I will now refer to some of its terms. Clause 1 contains definitions. Challenge period means three calendar months after the date of the written planning permission or appeal decision. Completion date is defined to be 18 weeks after the exercise of the option. Option payment is £1. That is to be deducted from the purchase price payable on the completion date. The critical definition for present purposes is option period. That is a lengthy definition, but I will read only the material part of it. It reads:

> "The expiration of six months from the date hereof provided that if at that date the local planning authority has resolved to issue a planning permission subject to completion of the planning agreement, then the option period shall be extended to the expiry of the challenge period and provided further, that if a written planning permission has been issued then the challenge period subsequent to the expiry of the option period, then the option period is extended until the expiry of the challenge period." (Quote not checked)

And then the part which is of particular relevance:

> "And provided further that, in the event of the intending buyer having lodged an appeal or appeals against a refusal of planning permission or on the grounds of non-determination or the grant of permission on terms which are unacceptable to the intending buyer, then the option period shall be extended to the expiry of the challenge period in respect of the last appeal lodged immediately prior to the expiry of the option period." (Quote not checked)

And then there is a further proviso, which refers to a further possible extension of time if the circumstances were that there was an appeal i.e. a statutory appeal to the High Court under the Town and Country Planning Act 1990. It can be seen at once that the option period is not a fixed period of six months, nor is it a fixed period of six months plus a fixed period of three months. It can be seen at once that there is scope through the operation of the provisos for the option period to be extended and there is no cut off date provided as to a last date by which the option is exercised. That is subject to a minor qualification in that, the definition also contains a

provision that the option period shall not exceed the perpetuity period permitted by law, which on my understanding is a period of 21 years.

8. Continuing with the definitions in Clause 1, the property is the freehold property at 63 London Road, Camberley. The purchase price is £875,000 subject to the provisions of Clause 20, in fact, it means to refer to Clause 19. By Clause 2 of the agreement, in consideration of the option payment, the intending buyer, Chantry, is given the option of purchasing the property at the purchase price for an estate in fee simple in possession and free from encumbrances. By Clause 3 it is provided that exercise of the option is to be effected by notice given in writing by Chantry or its solicitors to the Andersons at any time during the option period. Clause 4 provides for a payment of the deposit on exercise of the option. Clause 5 provides for completion on the completion date, which as I have already stated, is 18 weeks after the exercise of the option. Clause 8 provides that vacant possession shall be given and taken on completion. Clause 12 contains certain obligations on the part of the Andersons. That Clause relates to the part that the Andersons should or should not play in the planning process. I draw attention to that, because there is not much by way of provision on the other side, whereby the intending buyer is placed under obligations as to the planning process. That is subject to the exception to which I now turn in Clause 19. Clause 19 is headed "Purchase price" and is in these terms:

> "The intending buyer shall as soon as reasonably practicable after the date hereon re-submit planning application reference 2004/1193 for the provisions (*sic)* of *intra alia* (*sic)* 20 apartments together with underground parking. In the event that such application is refused the intending buyer shall submit a further planning application for *inear alia (sic)* apartments with solely over ground parking (the development) and if such application generates a planning permission for the development, then the purchase price shall be increased to £925,000." (Quote not checked)

9. The case for Chantry is straightforward. They refer to the express terms of the agreement. They put in evidence the planning history and they rely in particular upon a planning application, which was for, in substance, 20 residential flats on number 63 and the adjoining property number 61 London Road, together with underground parking to serve those flats. The planning application form was submitted on 16 October 2006, although the planning authority for Surrey Heath did not accept that the application was in proper form until around 11 December 2006. Surrey Heath did not decide that planning application promptly, but did in due course give a decision notice on 9 March 2007, refusing the application. On or about 21 March 2007, Chantry, the applicant for planning permission, appealed to the Planning Inspectorate against a refusal of planning consent. I interject at this point that, it will be remembered that the six month part of the defined option period was due to expire on 26 March 2007, and therefore, it is of some importance to Chantry's case to establish that the planning appeal was effectively made before 26 March 2007. As to that, the

provisions as to the bringing of a planning appeal are governed by s.78 of the Town and Country Planning Act 1990, to be read together with the Town and Country Planning General Development Procedure Order 1995, as amended, and in particular Article 23 of that order. Further, in relation to service of an appeal of this kind, the matter appears to me to be governed by a combination of s.329 of the Town and Country Planning Act 1990 and s.7 of the Interpretation Act 1978.

10. The evidence I have as to the way in which this planning appeal was served on the Planning Inspectorate is that, the planning appeal of 21 March 2007, was sent by post to the Planning Inspectorate, therefore, it is deemed served in the ordinary course of post unless the contrary is proven and that deeming provision will mean that the planning appeal was in time so that it was served and effective prior to the end of the six month period at the end of 26 March 2007.

11. Accordingly, Chantry submits that the option period was extended and that option period would have come to an end on the expiry of the challenge period in respect of that planning appeal. The challenge period, it will be remembered, is three months from the date of the appeal decision. In fact, there never has been an appeal decision in relation to that appeal, because on 13 May 2008, or possibly the day before, the appeal was withdrawn. Chantry do not need to rely upon the period extending past 13 May, because they rely on the fact that, on 2 May 2008, they gave notice under the option agreement exercising the option and, they say, imposing on the Andersons an obligation to convey 18 weeks thereafter. So that is the case for Chantry.

12. Mr and Mrs Anderson see things very differently. To summarise the points being made by Mr Anderson in his statement, he draws my attention to negotiations which took place between the parties prior to the entering into the agreement in September 2006. He refers to earlier agreements which had lapsed; the option periods ran out in the earlier cases. He also stresses to me background circumstances whereby time was very pressing from the Andersons' point of view in 2006, and they were very keen indeed for matters to proceed quickly to a successful grant of planning permission and the purchase by Chantry of the property. I have read what Mr Anderson has written and I have also heard him describe orally these events and I believe I understand how he wishes to put the case. He does not, I think, say that there was any contractual promise entered into by Chantry, which is in conflict with the written agreement that Mr and Mrs Anderson signed. Rather, he stresses the expectations and the hopes, he would say wholly well founded, as to the matter proceeding quickly. And so, in those circumstances I am not able to see in the material before me, that there is any collateral contract which is to be put alongside the written agreement, nor that there is any rectifiable mistake in the written agreement nor indeed that there was any misrepresentation as to the legal effect of the agreement nor an *estoppel*, which would prevent Chantry relying upon the contractual terms.

13. Mr Anderson, however, has drawn attention to some of the features of the planning history relating to the planning application, which I have described as having been initiated on 16 October 2006. First of all, he says the agreement was made on 26 September 2006, yet the application did not go in for a further few weeks on 16 October 2006. Secondly, he says, and surprisingly and disturbingly, when Chantry put in the application they did not get it right and they did not put in the necessary supporting material until a time in December leading to the planning authority accepting the application as effective on or about 11 December 2006. Third, Mr Anderson says that Chantry did not appeal the non-determination of that application as they waited for a decision. When the decision came it was a refusal on 9 March 2007. Then Chantry did act promptly by bringing the appeal on 21 March, but of course, that was to serve their self-interest by keeping the option period alive. They made that appeal before 26 March 2007. The option period having, therefore, gone past 26 March 2007, Mr Anderson points to what he says, is a wholly remarkable history thereafter.

14. I have read the documents, which Chantry have supplied. I need not take them in detail letter by letter. It is right to say that Chantry asked the Planning Inspectorate to put the appeal into abeyance. The Planning Inspectorate initially concurred, but later when the Planning Inspectorate wrote saying that putting the appeal into abeyance was not, in their view, appropriate, Chantry were most pressing that the appeal should be put into abeyance. Chantry put forward arguments as to why that was so, because of a particular point relating to the special protection area status of land which included the appealed land.

15. The upshot of the various applications and communications from Chantry was that the planning appealed was indeed allowed to drift and indeed, it was still undetermined by 2 May 2008, and it was in the event, only withdrawn on 12 or 13 May 2008. Just by way of background, but perhaps no more, Chantry made three other applications. They did comply with Clause 19 of the agreement by making an alternative application for residential development with surface car parking. That ended in a refusal, but it is not said that they were in any way in breach of Clause 19.

16. Chantry also applied for alternative types of development. One was for a 72 unit residential care home. That application was made on 25 January 2007, and was refused on 5 April 2007. Chantry appealed but the appeal was later withdrawn. Finally, and more successfully, on 14 September 2007, Chantry applied for a 58 unit residential care home and that obtained a favourable decision granting consent on 29 April 2008. So it can be seen that on 2 May 2008, when Chantry exercised the option of purchase they had in the bag the planning permission of 29 April 2008. The planning appeal for the 20 flat scheme with underground parking had served its purpose. It had kept the option period alive, it had allowed Chantry to get an alternative development permitted and at that point the 20 flat scheme appeal could be and was withdrawn.

17. Mr Anderson says it simply cannot be right that Chantry can behave that way, can keep the option period alive and then when they get a valid permission for something quite different from the subject of the appeal they can then exercise the option and take the land from him and his wife. Mr Anderson is not content with submitting that the history and chronology is disturbing. He goes a great deal further and he alleges bad faith on the part of Chantry. Indeed, he submits to me that the statements made by Chantry were knowingly made in bad faith and amounted to a form of deceit or lie or abuse of the planning system, and I suppose he would say, of the contractual rights of Chantry.

18. If the matter turned on questions of fact, then the matter would have to go to trial. But it seems to me that the resolution of this dispute does not turn on matters of fact of the kind that Mr Anderson suggests are relevant here. I put to Mr Anderson that, if he were to succeed on this summary judgment application it would have to be for one of two reasons. It would either have to be because the words of the contract do not, in the events which have happened, give Chantry the rights that they have claimed or alternatively, that the words of the contract are not the last word and that something else, for example, an implied term into the contract controls or limits Chantry's freedom of movement.

19. Starting with the words of the contract, Mr Anderson did not attempt to say that the words of the contract, so far as expressed terms are concerned, prevent Chantry successfully putting forward the case they put forward. However, he has majored on the planning history in relation to the 20 flat scheme and, formulating his case or what might conceivably be his case in legal language, he might be taken to be saying one of two things. The first thing that he might be saying is that there is, albeit not expressed, an implied obligation on Chantry to proceed with an application for planning consent and any appropriate appeal with all proper speed or with due expedition, or an implied term could be along the lines of a term, to use best endeavours or reasonable endeavours or some endeavours to obtain planning consent. If there were to be an implied term of that sort and if the planning application, which was the subject of such an implied term, was the 20 flat residential scheme rather than some other planning application, then there could be, I can see, an arguable issue of fact as to whether Chantry did or did not comply with that implied term. If at a trial such an implied term were found and if Chantry were found to have been in breach of it, then it might be said that Chantry could not take advantage of their own breach to extend the option period and exercise the option as late as they did.

20. Another way in which Mr Anderson might contend that there is some control or limitation on the extension provisions of the option period is to say that, although they appear to be unlimited and indefinite and possibly lasting for 21 years, to give the contract business efficacy one has to imply a limitation so that the extension only operates in the event that Chantry used reasonable endeavours or best endeavours or applied with all proper speed or something of that sort.

21. So the question is do Mr and Mrs Anderson have an arguable case for the implication of some curb or fetter of that kind? I remind myself that this is an application for summary judgment. It is not essential for me to resolve this matter by ruling one way or the other whether there is an implied limitation. What I have to do under Rule 24.2 is to consider whether the Defendants have a real prospect of successfully defending the claim or issue or whether there is some other compelling reason why the case should be disposed of at a trial.

22. Having reminded myself that this is an application for summary judgment and having identified, I hope sufficiently clearly, the issues which Mr Anderson would wish to raise both as to law and as to fact, I am satisfied that there is no reasonable prospect of Mr and Mrs Anderson succeeding at a trial. I am satisfied in particular that there is no reasonable prospect of a court at trial implying an obligation or a limitation of the kind which I have identified. I say that for a number of reasons. The test as to the implication of terms is very well known and I need not state it at length. It has to be necessary to make the contract work. This contract works perfectly well as a contractual instrument having regard to its express terms.

23. What might be said about the contract is that it is not entirely even-handed. It is one that favours the buyer. There are no obligations expressly imposed on the buyer, apart from the limited obligations in Clause 19. Other option agreements that one has seen are very different. There is no final cut off date written in, apart from the 21 year perpetuity period. But I am not able to say that the contract fails to work and a term must be implied to make it work. If I were to imply a term I would be producing for the parties a different contract, a contract in particular that Chantry did not enter into and that is not the function of the court implying a term. It is also right that this is a formal document with some amount of particularity about it, which should discourage me from writing in terms that the parties themselves chose not to insert. It is also not helpful to the implied term argument that there is Clause 19, which sets out some obligations as to planning. And I think finally, in relation to the implied term, there is this consideration that, if the parties had sat down and tried to draft express words to impose an obligation of some kind on Chantry or a limitation of some kind on Chantry there is really a great range of words and phrases that might have been used, some more onerous on Chantry, some less onerous, some greater in terms of limitation, some less so by way of limitation. The court is not here to re-write the contract and select from an *à la carte* menu of possibilities the one which the court thinks might have been more even-handed for the parties to have agreed.

24. For those reasons, which I have given in some detail, because of the very careful and forceful points made by Mr and Mrs Anderson and, because some of the facts of this case are a little disturbing, I nonetheless come to the clear conclusion that as a matter of law Chantry are right in their claim and it is a proper case for summary judgment.
