

UPPER TRIBUNAL (LANDS CHAMBER)



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**Location: Royal Courts of Justice,
London, WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***LAND REGISTRATION – CONTRACTS – what constitutes exchange of contracts –
necessity for delivery – constructive possession of documents***

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

BETWEEN:

MR HAFIZ MOHAMMAD ASLAM

Appellant

-and-

MR ABDUL REHMAN

Respondent

**Re: 189 Walton Road,
Woking,
GU21 5DX**

Judge Elizabeth Cooke

Heard on: 12 September 2022

Decision Date:

Mr David Gilchrist for the appellant, instructed by DWF Law LLP
Mr Andrew Butler KC for the respondent, instructed by Mackrell Turner Garrett

The following cases are referred to in this decision:

Commission for New Towns v Cooper [1995] Ch 259

Domb v Isoz [1980] Ch 548

INTRODUCTION

1. This is Mr Aslam's appeal from a decision of the First-tier Tribunal ("the FTT"), which found that on 14 September 2018 he entered into a contract to sell his property, 189 Walton Road, Woking, to the respondent Mr Rehman.
2. The proceedings in the FTT arose from Mr Aslam's application to HM Land Registry to cancel the unilateral notice entered by Mr Rehman on the register of title to the property to protect the contract. Mr Rehman objected and so the matter was referred to the FTT pursuant to section 73 of the Land Registration Act 2002. Before the FTT it was for Mr Rehman to prove the existence of the contract, and so he was the applicant and Mr Aslam was the respondent – which is why, for the avoidance of confusion, I am going to refer to the parties by name. Mr Rehman succeeded; the FTT found that contracts were exchanged on 14 September 2018, that the agreement was not a sham, and that Mr Aslam did not sign the contract as a result of misrepresentation or undue influence.
3. Mr Aslam has permission to appeal on one issue, namely that the FTT made an error of law in finding that contracts were exchanged on 14 September 2018 on the basis that the facts found by the FTT could not as a matter of law justify that conclusion.
4. Mr Aslam was represented in the appeal by Mr David Gilchrist, and Mr Rehman by Mr Andrew Butler KC, and I am grateful to them both.
5. I begin by setting out the facts found by the FTT.

The factual background

6. Mr Aslam came to the United Kingdom in 1993. He has some knowledge of English but is not fluent and is more comfortable speaking Punjabi in a formal setting. He has had experience in buying and selling properties since at least 2001. However, because of his lack of fluency he placed great trust in his friend Mr Rehman, who gave evidence that he helped members of the Pakistani community by writing letters for them.
7. In 2009 Mr Aslam purchased 189 Walton Road for £160,000. There was some dispute about the source of the purchase price; the judge rejected Mr Rehman's contention that he contributed half of it. However, the judge accepted the validity of a declaration of trust dated 1 August 2013 whose effect was that the property is held by Mr Aslam on trust for himself and Mr Rehman in equal shares.
8. In 2017 Mr Rehman offered to sell 13 Eve Road, another property in Woking, to Mr Aslam for £215,000. In order to buy it, Mr Aslam obtained a bridging loan on the security of 189 Walton Road. He paid £214,850 to Mr Rehman. The property was never transferred to him, and it does not seem that there was a contract for sale. The FTT's judgment hints at the existence of a dispute as to the title to that property but it appears that the evidence before it did not provide any explanation for the failure to effect the sale despite the payment.

9. Be that as it may, Mr Aslam defaulted on the bridging loan. As a result the lender appointed receivers and 189 Walton Road was put up for sale at an auction that was to take place on 8 October 2018 with a guide price of £200,000 - £210,000.
10. Mr Aslam turned to Mr Rehman for advice. The two met on 14 September 2018; Mr Rehman provided a contract in duplicate for the sale by Mr Aslam to Mr Rehman of 189 Walton Road; his evidence was that the contract and transfer were drawn up by Campbell Courtney & Cooney, solicitors. The FTT found that at the meeting on 14 September 2018 Mr Aslam and Mr Rehman each signed his own part. The two parts are now dated 14 September 2018 but the FTT made no finding as to when the two parts were dated. The contract provided for a price of £400,000, for completion to be on 16 November 2018 and for a deposit of 10% to be paid on exchange. Mr Aslam also signed a transfer of the property to Mr Rehman in Form TR1 (the standard Land Registry format), which remains undated.
11. As an aside, I observe that the price in the contract is puzzling. Mr Rehman gave evidence to the FTT that he would only have to pay half because he already held a 50% share in the property. That does not explain why the contract and transfer were drawn up to provide for a price of £400,000. Nor is there any explanation as to why Mr Rehman would be prepared to pay half that sum, a sum equivalent to the guide price at auction, when he was already joint owner of the property.
12. The focus of the appeal is on the status of the two counterpart contracts; Mr Rehman's case before the FTT and on the appeal is that contracts were exchanged on 14 September 2018 so that a contract came into being. Mr Aslam's is that they were not and therefore that there is no contract between him and Mr Rehman. The judge found that contracts were exchanged, in terms that I examine below. He also found that no deposit was ever paid.
13. To jump ahead for a moment, Mr Rehman then drafted letters which Mr Aslam signed, addressed to the bridging lender and its solicitors, stating that the property had been sold and should be withdrawn from the auction. The solicitors for the lender were not impressed and declined to withdraw it. Mr Aslam then borrowed enough money from a Mr Akhtar, on the security of a legal charge over 189 Walton Road, to redeem the bridging loan mortgage and so 189 Walton Road was saved.
14. Reverting now to the dealings between the parties, on 20 September 2018 Mr Aslam and Mr Rehman met with Lyndsay Sait & Turner solicitors. There is no attendance note of that meeting and no evidence from the solicitors, but their invoice was produced to the FTT. It was addressed to Mr Aslam and indicates that the firm acted for Mr Aslam in the mortgage to Mr Akhtar, but it also says "For ... receiving Contract documentation showing sale of property to Mr Abdul Rehman in the sum of £400,000 with completion on 16 November 2018." The FTT found that Mr Rehman "played an active part" in the discussion at the meeting.

The legal analysis: was there a contract?

15. The price in the contract and transfer are, as I said, puzzling; but the motives of the parties are irrelevant to the appeal. Nor is the Tribunal concerned with the fact that Mr Aslam told

the bridging lender that a contract had come into being, nor with whether or not he believed at that stage that there was a contract. The single issue in the appeal is: did the judge's findings of fact justify his conclusion that exchange took place on 14 September 2018?

16. In *Commission for New Towns v Cooper* [1995] Ch 259 Stuart-Smith LJ analysed in six steps the meaning of the familiar expression "exchange of contracts", at p. 285 C ff. He explained that each party has identical contracts, or "parts" of the contract, and each signs his own part. He went on:
 - “4. At the time of execution neither party is bound by the terms of the document which he has executed, it being their mutual intention that neither will be bound until the executed parts are exchanged.
 5. The act of exchange is a formal delivery by each party of its part into the actual or constructive possession of the other with the intention that the parties will become actually bound when exchange occurs, but not before.
 6. The manner of exchange may be agreed and determined by the parties. The traditional method was by mutual exchange across the table...”
17. It is important to note that delivery is a formal act and each party must deliver his part.
18. *Domb v Isoz* [1980] Ch 548 was about telephone exchange by solicitors. In a typical case the parties are separately represented, and each signs his part of the contract and leaves it with his solicitor. In a simple case the solicitors will speak on the telephone, having been authorised by their clients to exchange, and will agree that contracts are now exchanged, recording the date and time. Delivery is not a physical handing over of the document, but is comprised in the fact that from that point on each holds their own client's part of the contract to the other's order; each will then physically send or take their own client's part to the other client's solicitor. In a slightly more complicated scenario one solicitor, say the seller's, may hold both parts before exchange, his own client's part for his own client and the buyer's part to the order of the buyer's solicitor; that is what happened in *Domb v Isoz* where the buyer's solicitor sent his client's signed part of the contract to the seller's before exchange. Delivery has not yet taken place. Again exchange can take place by telephone, and delivery is a constructive event which takes place when the two solicitors agree on the telephone that contracts are exchanged. From then on the seller's solicitor holds his own client's part to the order of the buyer's solicitor and will send or take it to him.
19. The appeal in *Domb v Isoz* arose because the judge at first instance was not satisfied that such a procedure was sufficient to effect exchange, but the Court of Appeal confirmed that it was.
20. Reverting to the present appeal, having made his findings of fact the judge in the FTT continued under a heading "Legal issues" and said this at paragraph 69, which I quote in full (substituting the names of the parties for the roles in the FTT):

“On the facts as the Tribunal has found them Mr Aslam signed his part of the agreement at the request of Mr Rehman and immediately handed it to Mr Rehman on 14 September 2018. There is no evidence that Mr Rehman handed his copy or offered to deliver his copy to Mr Aslam, as counsel points out. However, in my judgement the trust reposed in Mr Rehman by Mr Aslam at this point meant that Mr Rehman was acting as Mr Aslam’s agent in respect of the impending sale of 189 Walton Road. As I have found, it was Mr Rehman who arranged the appointment with Lynsey Sait and Turner and told them about the agreement to sell 189 Walton Road. Mr Rehman took the lead at the interview but Mr Aslam was named as the client in the invoice. In this sense there was a delivery to Mr Aslam’s agent and this is sufficient to mean there was an exchange. As Buckley LJ said in *Domb v Isoz* [1980] Ch 548 at 577 when discussing an exchange of contracts by telephone: ‘such possession need not be actual or physical possession. Possession by an agent of the party or of his solicitor in such circumstances that the party or solicitor in question has control over the document and can at any time procure its physical possession will in my opinion suffice. In such a case possession of the agent is the possession of the principal.’”

21. To clear off a couple of things: first, it was not the case that there was no evidence that Mr Rehman handed his copy or offered to deliver his part of the contract to Mr Aslam, nor did Mr Gilchrist say so to the FTT (as can be seen because closings were written). Mr Rehman gave evidence that he had given his part of the contract to Mr Aslam. The judge’s wording is inapt, but he clearly rejected that evidence when he found that each party signed his part of the contract and Mr Aslam gave his to Mr Rehman, who kept both.
22. Second, Mr Gilchrist on Mr Aslam’s behalf did not challenge the finding of agency in the appeal.
23. The judge’s reasoning appears therefore to be that Mr Rehman was Mr Aslam’s agent “in respect of the impending sale of 189 Walton Road” and that “in that sense there was a delivery to Mr Aslam’s agent and this is sufficient to mean there was an exchange.”
24. Mr Gilchrist argued that there are two difficulties with the analysis of the FTT in the present case. One is that there is no finding that formal delivery took place. There appears simply to be a finding that the fact of agency meant that there was delivery to Mr Aslam.
25. Mr Butler KC argued that it is not open to the Tribunal to disturb the FTT’s finding that there was an exchange of contracts. That was a finding of fact. The judge “has not lifted the veil”, as Mr Butler put it, from what happened during the meeting but he found that exchange took place and therefore delivery must have taken place even though the judge has not explained why he reached that conclusion.
26. That is the key difficulty with the finding that exchange has taken place: it is unexplained. Delivery is a formal act which the two parties must each carry out.
27. As to delivery by Mr Aslam, there is no finding of fact that when Mr Aslam handed his part of the contract to Mr Rehman his intention was to deliver it so as to exchange contracts; on

the facts as we have them it may well not have been his intention. His intention may have been to leave the undated half with Mr Rehman and authorise him to exchange contracts later; or it may have been to give his part of the contract to Mr Rehman but not to authorise exchange.

28. As to delivery by Mr Rehman, there is no explanation as to (a) why the fact of agency meant that Mr Rehman held his own part on Mr Aslam's behalf and (b) why that constituted delivery. Such a finding is in any case insufficient to amount to a finding that there has been delivery. The fact that A holds part of a contract to B's order need not happen as a result of delivery and does not mean that contracts have been exchanged, as we saw in *Domb v Isoz* (paragraph 18) above where the seller's solicitor held the buyer's part to the buyer's order before exchange took place.
29. Mr Gilchrist's second point is that there is no finding that Mr Rehman's authority as agent extended to authority to exchange contracts on Mr Aslam's behalf. I agree with Mr Butler KC that the judge did not say that Mr Rehman exchanged contracts on his behalf. Rather, he found that the two men exchanged contracts; but he did not explain how they did so or what it was that led him to find that they did so. There were simply insufficient facts found to lead the FTT to that conclusion; and what we are left with is a very good illustration of the reason why the law requires a formal delivery, whether physical, or attended by clear words that leave no-one in doubt that there has been an exchange.
30. Mr Butler KC argued that if there was no exchange on 14 September 2018 then exchange took place on 20 September 2018 at the offices of Lyndsay Sait & Turner, by virtue of Mr Rehman handing the contracts to the solicitor. I do not understand this submission. It was not part of Mr Rehman's case and it is not open to him to launch an alternative account of the facts on appeal; and it is not supported by – indeed it is contradicted by – Mr Rehman's own evidence. There is no evidence that Mr Aslam intended exchange to take place on that occasion. If the idea is that Mr Rehman effected exchange on behalf of them both, as Mr Aslam's agent, then there is no finding of fact that he had authority to do so. This alternative argument is without substance.
31. The FTT's decision that contracts were exchanged is therefore set aside on the basis both that it was inadequately explained and also that the facts found by the judge could not as a matter of law have justified a finding that exchange had taken place. I substitute the Tribunal's own decision that contracts were not exchanged, and will direct the registrar accordingly to respond to Mr Aslam's application as if Mr Rehman's objection had not been made.

Upper Tribunal Judge Elizabeth Cooke

21 September 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an

application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.