Merciless application of section 2 1989 Act

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The harshness that can result from the application of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") is illustrated yet again by the Court of Appeal decision in Sukhlall v Bansoodeb [2013] EWHC 952 (Ch). There was no full trial because the claim was dismissed on a summary judgment application at Central London and this was upheld on appeal. A reading of the judgment of Arnold J. on appeal leaves a sense that that if the Claimant's story was correct then the law should have been able to find a means by which to ensure that her expectation was achieved and that at the very least there should have been a full trial to test the evidence.

1. Section 2 1989 Act – as is well known this section requires that all the terms of a contract for the sale or other disposition of land are incorporated in a single written contract or where contracts are exchanged in each ("the statutory requirement"). This section was introduced because the Law Commission considered that the operation of section 40 LPA 1925 resulted in a number of injustices (discussed by Briggs J (as he then was) in the Court of Appeal decision in North Eastern Properties Limited v Coleman [2010] EWCA Civ 277 from para. 38). The Law Commission considered that the section caused uncertainty as to whether such a contract was enforceable with litigation often being the only way of determining enforceability. In addition the outcome was not always mutually enforceable obligations. There was a tendency for contracts to become enforceable inadvertently or for persons to escape from obligations genuinely agreed. It was believed that the statutory requirement would remedy these injustices. The hoped for removal of injustice with the introduction of section 2 1989 Act has unfortunately not been achieved.

Briggs J said of the operation of section 2 in North Eastern Properties supra that "because of the rigorous discipline which it imposes upon parties to land contracts, it does indeed enable persons who have genuinely contracted to do just that. It enables parties to land contracts who have changed their minds to look around for expressly agreed terms which have not found their way into the final form of land contract which they signed, for the precise purpose of avoiding their obligations, on the ground that the lack of discipline of their counterparty, or even their lack of discipline, has rendered the contract void". The Sukhlall case illustrates this potential for continuing injustice but increases the capriciousness as it does not involve a contract being treated as void but rather the alleged avoidance of some only of the obligations agreed after the transfer of the property. If the Claimants were correct then they suffered actual loss by transferring their house for less than agreed.

2. Facts of Mrs Sukhlall's case - Mr. and Mrs. Sukhlall decided to sell their house and received a subject to contract offer of £1,250,000. They were then approached by Mrs Sukhlall's brother-in-law who wanted the house to remain in the family and suggested that with his assistance the house be bought for his son. Mr. and Mrs Sukhlall were well disposed to this suggestion and a price of £1,100,000 was agreed orally. Subsequently the brother-in-law said he could only raise £750,000 and asked that this sum be paid on completion and the balance of £350,000 be paid by

instalments thereafter. This was agreed orally. Then solicitors were instructed who acted for the vendors and prepared a contract with a purchase price of £750,000 and no mention of the balance. It is not clear what was discussed between the vendors and their solicitor. It would seem that the arrangement regarding the purchase price was disclosed to the solicitors as it was pleaded that the potential consequences of omitting the agreed terms was not explained by the solicitors. On completion the sum of £750,000 was paid by the brother-in-law and the house was transferred to his son and subsequently registered at HM Land Registry. When no further payments were made to them the vendors claimed for the alleged balance of £350,000 from the brother-in-law. Following the death of her husband the claim were pursued by Mrs. Shukhlall.

3. Claims – in the claim form five different causes of action were pleaded. These were misrepresentation; rectification combined with specific performance; collateral contract; constructive trust; and deceit. All were dismissed on a summary judgment application. On the appeal only collateral contract and deceit were pursued. It is understandable that the rectification claim was dropped but a pity that the claim based on constructive trust was not argued.

4. Collateral contract – the pleaded case was that there was a collateral contract that in return for selling the house for £750,000 the Claimants were to be paid £350,000 by the brother-in-law. This sought to limit compliance with the statutory requirement to the written contracts and treat the obligation to pay the additional sum as a separate contract falling outside the scope of the statutory requirement. Such an argument had to face an uphill struggle because it was alleged that the original agreement was to pay £1,100.000 which was then subsequently split into two. In the light of that the further payment was inevitably viewed as part of the purchase price. The obligation to make that payment was also inevitably linked to completion of the land contract. In such circumstances it is hard to envisage how the obligation to make the further payment could be viewed as a separate contract which did not form part of the terms of the land contract.

5. Test as to whether contract outside scope of section 2 - Arnold J. considered that there are two issues to decide when determining whether a collateral contract is outside the scope of the statutory requirement. It is first necessary to decide whether the arrangement involves one or two contracts and then if there are two whether the second is genuinely separate from the land contract so as not to be part of the terms of that contract. In this case dividing the original agreement into two meant that there was no realistic prospect of the two being regarded as genuinely separate and that is what Arnold J. held on appeal.

The further payment undoubtedly remained part of the purchase price. This is in contrast to the finders fees in North Eastern Properties supra which were payable by the purchaser to the vendor upon the exchange of contract for the sale of each unit rather than completion. The fee was not repayable in the event of a failed completion and this allowed the Court of Appeal to accept that that obligation was separate from the land contract and not within the scope of the statutory requirement. It was a term in a simultaneous contract along with the land contract and part of the same commercial transaction but was not part of the terms of the land contract. Just hiving provisions off into a separate contract is not sufficient. Those terms must be genuinely

separate from the land contract and not, for instance, dependent on completion of the land contract.

6. Deceit – there was no allegation of a conspiracy to defraud the claimants and no pleaded false statement of fact. Arnold J. stated that there was an implication that the Claimants' had informed their solicitors of the payment arrangement and not been warned of the consequences of omitting the further payment from the written contract. Accordingly there was no basis for a deceit and that claim fell to the ground.

7. Rectification – the dropping of the rectification claim is understandable as it faced the problem that the part of the arrangement relied on by the Claimant had it would seem been deliberately omitted for the contract. Morgan J. held in Oun v Ahmad [2008] EWHC 545 (Ch) that "it is beyond the ambit of the court's owners to rectify to write in terms which the parties agreed should not be recorded in the [written agreement]" (para. 69). That case concerned the failure to include in the written contract the agreement as to how the price for the leasehold interest and the stock was to be apportioned. As this omission was agreed between the parties Morgan J. held that the Court could not rectify the agreement which, therefore, failed to comply with the statutory requirement and was not binding on the vendor.

8. Constructive trust – it is a great pity that the claim for a constructive trust was not pursued. On the basis of the Claimants' case the house was transferred as a result of a void agreement and payment of part of the purchase price. There was an agreement albeit one which did not satisfy the statutory requirement and the Claimants acted to their detriment on the basis of that agreement by transferring the house for the lesser sum of £750,000. In principle such an approach is similar to the approach adopted in cohabitation cases. This looks to be very fertile ground for a constructive trust which by reason of section 2(5) 1989 Act is outside the scope of section 2. One side has achieved everything from the arrangement and the other having discharged its obligations had an expectation that the further payment should be made. If correct the arrangement would be sufficient to be compliant with the House of Lords in Cobbe v Yeoman's Row Management Limited [2008] UKHL 55 as discussed by Arden LJ in Henderson v Doyle [2010] EWCA Civ 1095. The transfer of the house marks this case out as very different from the normal section 2 case. It is one thing to argue that failure to include all the terms of the purchase price means that neither party can enforce the contract. It is quite another for the vendor to perform and then find that it has to accept a much reduce purchase price. However, using this route faces difficulties as illustrated by the following case.

9. The Tootal principle – a principle was extracted from the Court of Appeal decision in Tootal Clothing Limited v Guinea Properties Limited (1992) 64 P & CR 452 that once all the land elements of an alleged contract have been performed then the enforceability of all the remaining parts of the alleged contract can be considered without reference to section 2 1989 Act. (see Lewison J (as he then was) in Kilcarne Holdings Limited v Targetfollow (Birmingham) Limited [2004] EWHC 2547 (Ch) at para. 198). Once the agreement ceases to be an executory contract section 2 no longer operates. The application of such a principle would be extremely beneficial to the Claimant in this case. However, standing in the way of such an application is the forceful rejection of the principle by the Court of Appeal in Keay v Morris Homes (West Midlands) Limited [2012] EWCA Civ 900. Rimer LJ stated (at para. 47) that

“the proposition that a void contract can, by acts in the nature of part performance, mature into a valid one is contrary to principle and wrong” In consequence notwithstanding the completion of the land elements a works obligation which was not incorporated in a supplemental agreement was held not to be capable of being independently enforced. Early in his judgment Rimer LJ had said of section 2 that its “effect is merciless”. It will be interesting to see whether this can in the future be mitigated and some mercy achieved using constructive trusts. When the land element has been discharged then I consider that the courts should certainly seek to achieve that objective.

10. Lessons –

10.1 Section 2 1989 Act can be applied in a manner which is harsh and works an injustice. Great care should, therefore, be taken to ensure arrangements do not fall foul of it

10.2 Completing the land elements of a contract for the sale of land will not necessarily result in the other obligations previously falling foul of statutory requirement becoming enforceable.

10.3 Failure to incorporate in the written agreement an obligation to make a further payment after completion will not only make the written agreement void but if completion takes place will not on this authority permit the obligation for the further payment to be independently enforced.

10.4 There is still scope for a successful argument based on constructive trust in such circumstances and it is to be hoped that this approach will be adopted by the Courts.