IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

Case No: HQ18X01752

Courtroom No. E100

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 21st January 2019

Before:
MASTER DAVISON

B E T W E E N:

WILSON AND SHARP INVESTMENTS LIMITED

and

FALMOUTH PROPERTY INVESTMENTS LIMITED

MR J FRAMPTON (instructed by BPL SOLICITORS LLP) appeared on behalf of the Applicant
MR A BUTLER QC (instructed by HOWELL & CO SOLICITORS LLP) appeared on behalf of the Respondent

JUDGMENT
(Approved)

MASTER DAVISON:

Introduction

1. This is an application for summary judgment. The claim is for a debt. It has been answered by a counterclaim which the defendant says is sufficiently closely connected to the claim so as to amount to a set-off and which will extinguish the claim. I take the background facts from a combination of paragraphs 5 to 17 of Mr Frampton's skeleton argument and the very helpful agreed chronology prepared by the parties.

The background facts

2. The claimant is a property development company run by Mr Craig Sharp and Mr Sam Wilson. They are also directors of a company called Falmouth Student Developments Limited. This case relates to the development of the site of a car park at Fish Strand Hill, Falmouth. On 10 November 2016, the claimant, via Falmouth Student Developments, agreed an option on the land for a student development. The option was subject to planning permission. (Falmouth Student Developments had, in fact, been set up by Mr Wilson and Mr Sharp solely for the development.) On 10 November 2016, the claimant submitted a planning application for the development. On 25 January 2017, Investin PLC, which is the defendant's parent company, approached the claimant and stated that it was interested in purchasing the land. This was entirely on the initiative of the defendant and its parent company, which had found out about the planning application from the Cornwall County Council website. On 9 March 2017, the defendant agreed in principle to buy the land unconditionally for a little over £1 million. The next day, they were introduced to the claimant's architect for the development to whom, from that point onwards, they had free access and who remains the architect to the scheme – now exclusively retained by the defendant.

3. On 22 and 23 March 2017, there was a very important exchange of emails. The first is that of 22 March, timed at 19.13. It is from Simon Brooks, who was the solicitor acting for the defendant, to John Munro who was the solicitor acting for the claimant. The material part is as follows:

> 'Dear John, I will be in touch with title enquiries and our comments on the contract in due course, but in the first instance, please could you let me have the following:'. [There then followed a list of five questions, the fifth of which was this:] 'Is there a right of light report and does your client's application take rights of light into account?'.

4. The response was the following day at 18.50:

> 'Dear Simon, with reference to your email below', [at paragraph five,] 'No, my clients did not think it necessary from the location of the site'.

5. On 27 April 2017, the planning application was refused on the ground that it was contrary to the published strategy for the location of student accommodation. On 11 May 2017, the proposed nature of the agreement was changed, at the defendant's request, from an outright purchase to an assignment of the option. On 8 June 2017, the parties agreed the assignment of the option to the defendant. (The option had been novated from Falmouth Student Developments to the claimant on 7 June.) Under the assignment, the claimant was entitled to an initial premium of £200,000. Pursuant to clause 13.7, if the planning appeal was successful and the defendant exercised the option, the claimant was entitled to a further £226,250. On 15 June 2017, the defendant submitted an appeal against the refusal of planning permission using the claimant's name. The claimant played no role in the planning appeal. The planning appeal was granted for 112 units on 13 December 2017 and the defendant exercised the option on 29 December 2017.

6. It is common ground that, as a result, the claimant became entitled to the sum of £226,250 on 7 February 2018, subject only to the counterclaim/set-off brought by the defendant.

7. The defendant actually purchased the land on 19 March 2018.

The counterclaim

8. The counterclaim arises out of the exchange of emails on 22 and 23 March 2017. The email of 23 March from Mr Munro to Mr Brooks is said to have been a misrepresentation. That is set out in paragraphs 25 and 26 of the defence and counterclaim:

> Paragraph 25:
>
> 'In fact the representation was false and amounted to a material misrepresentation. The statement that the claimant, "did not think it [i.e. a rights to light report] necessary from the location of the site" was a statement of fact about the claimant's opinion and carried with it the implication that the claimant had reasonable grounds for holding it. However, given its knowledge of the facts set out at paragraphs 16 to 21 above, the claimant had no such grounds for its opinion and further could not have reasonably held the opinion that an expert report was unnecessary.'
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> Paragraph 26:
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> 'Further, and in any event, it is averred that, by submitting the two shading reports, referenced at paragraph 19 above, to the council, the claimant's application for planning permission had, in fact, taken rights to light into account. Consequently, the representation was false in so far as it denied this fact and failed to make reference to the shading reports.'

9. With a few refinements, which I will come to, the question for the application is whether the defendant has a, 'real prospect' of success on that plea of misrepresentation. I gratefully adopt the statement of the governing principles relevant to an application for summary judgment from paragraphs 10 and 11 of Mr Butler QCs skeleton argument.

10. The starting point is CPR Part 24.2, which provides:

> "The court may give summary judgment against a … defendant on the whole of a claim or on a particular issue if:
> (a) it considers that
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

11. The test set out in the rule has, of course, been the subject of much authority, with the dicta of Lewison J (as he then was) in *Easyair -v- Opal Telecom* (2009] EWHC 339 having obtained particular currency:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TIE Training Ltd* [2007] EWCA Civ 725.

The issues on the application for summary judgment

12. The central questions are:- (a) what are the representations in 23 March email? (This is essentially a matter of reading it in its context.) And, (b) is it more than merely arguable that they were false and amounted to one or more material misrepresentations? Those questions have to be approached in their context and the proper approach of the court is set out in paragraphs 215 to 219 of the decision of Hamblen J in the case of *Cassa di Risparmio della Repubblica di San Marinon SpA v Barclays Bank Ltd* [2011] EWCH 484 (Comm):

> "215. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: see *Raiffeisen*, supra, at [81]; *Kyle Bay Ltd v Underwriters Subscribing under Policy No. 01957/08/01* [2007] Lloyd's Rep IR 460, 466, at [30]–[33], per Neuberger LJ.
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> 216. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However, as stated in *Clerk & Lindsell* para 18-13:
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> > "A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud."
>
> 217. In addition, at least where the facts are not equally well known to both sides, a

statement of opinion by one who knows the facts best may carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it – see *Clerk and Lindsell* para 18-14, citing among other cases *Smith v Land and House Property Corp* (1884) 28 Ch D 7, 15, per Bowen LJ, and *Brown v Raphael* [1958] Ch 636.

218. A statement as to the future may well imply a statement as to present intention: "that which is in form a promise may be in another aspect a representation" - *Clerk & Lindsell*, para 18-12, quoting Lord Herschell in *Clydesdale Bank Ltd v Paton* [1896] AC 381, 394.

219. Silence by itself cannot found a claim in misrepresentation. But an express statement may impliedly represent something. For example, a statement which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention. The old cases about statements made in a company prospectus contain illustrations of this principle – for example, *Oakes v Turquand* (1867) LR 2 HL 325, where Lord Chelmsford said (at 342-3):

> "... it is said that everything that is stated in the prospectus is literally true, and so it is; but the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."'

13. Paragraph 215 of that judgment explicitly refers to the context and the context here includes the following facts:

    i. The defendant was at least as experienced in property development as the claimant; in fact, probably more so.

    ii. It was the defendant which approached the claimant.

    iii. The defendant did so, having itself reviewed the planning application on the website of Cornwall County Council.

    iv. As already mentioned, from 10 March 2018, the defendant had access to the claimant's architect.

    v. The defendant positively asserts that it did its own due diligence, that is to say, made its own researches - as would be expected in a transaction of this sort.

14. Before coming to the email, I must mention that Mr Butler QCs skeleton argument did add some refinements to paragraphs 25 and 26 of the pleading.

    Paragraph 24:

    'D therefore submits that it has, at least, reasonable prospects of establishing at least four positive representations, namely 24.1, that there was no right to light report. 24.2, that C had formed the opinion (and continued to hold the opinion) that none was necessary. 24.3 that C held the above opinion on reasonable grounds. 24.4. That the proposed development did not, in fact, give rise to any rights of light issues'.

    Paragraph 25:

    'D also submits that by concealing the existence of the shadow studies, C falsely gave the impression that there were no grounds for concern about rights to light issues'.

15. Mr Butler QC very fairly accepted that his paragraph 24.4 was not pleaded at all and his paragraph 25 was not quite how it was expressed in paragraph 26 of the Defence and Counterclaim.

The construction of the emails

16. I turn then to the emails. It is clear, and Mr Butler QC accepted, indeed submitted, that the email of 23 March from Mr Munro on behalf of the claimant, simply did not address the second part of question five in the email from Mr Brooks. The question, 'Does your client's application take rights of light into account?', was not answered. If any claim were to arise out of this it would have to be the defendant's concealment claim to which I will come separately. The question does still provide context in the sense that the question was about the planning application.

17. Paragraph five of Mr Munro's email, therefore, subdivides into two parts. Part one was simply saying, no, the claimant did not have a report, and part two simply said they did not think it, (that is to say a report), necessary from the location of the site.

18. The first statement was a statement of fact and it is not argued that it was false. The pleading certainly does not so allege, and I need to give this aspect no further attention.

19. The second part of the statement is properly characterised as a statement of fact as to the claimant's past belief. It is not possible to characterise it as a statement of an existing, or continuing, belief. To put it another way, the claimant was not there making any representation as to whether a right to light report was now necessary or might be necessary in the future. The language simply does not admit of such an interpretation. Still less does it admit of the interpretation that the proposed development did not, in fact, give rise to any rights of light issues. That alternative (and unpleaded) interpretation is simply hopeless.

Implied assertion of fact justifying statement of belief

20. Given that I have found that the statement was a statement of fact as to past belief, could it carry with it a further implication of fact, namely an implied statement that the claimant believed that facts existed which reasonably justified the belief?

21. The test for an implied statement of fact finds a good expression in the textbook, written by Professor John Cartwright, entitled, 'Misrepresentation, Mistake and Non-Disclosure'. The relevant passages are at 3-18:

> '*Tests for Implied Statement of Fact* In deciding whether there is such an implied statement of facts, the question is what the representee was entitled to understand. A key issue is the balance of information (or access to relevant information) held by the representor and the representee respectively. If the representee has significantly less information than the representor about facts or other circumstances which are relevant to the opinion expressed, it is more likely that he will be held entitled to rely on his statement as being more than just an opinion'. [An example of that is then given but I will skip to the next paragraph where Professor Cartwright continues as follows:] Where, however, the representee has no reason to believe that a statement, couched in the language of belief or opinion, is made with any special basis of information or skill, the statement will be characterised as simply belief or opinion and so will not be actionable'.

22. It seems to me that those tests will plainly not be met here. These were two property developers with similar skill and experience. The claimant had 'no special basis of information or skill'. The information on which the belief was based was simply the location of the site, as stated on the face of the email. The facts and matters set out in paragraphs 16-21 of the Defence and Counterclaim were all available to the defendant, including the public objections based upon rights of light and the shading reports. Further, and at the risk of repetition, by this time the defendant was communicating and corresponding directly with the claimant's architect.

23. However, leaving aside an analysis based upon the respective positions and knowledge of the contracting parties, there is a more fundamental objection to the defendant's case of misrepresentation based upon an implied assertion of facts justifying the statement of belief. This is that the facts justifying the belief, that is to say the location of the site, are expressly stated. There is

no need, and it would be inappropriate, to imply or read into the statement anything further.

24. For these reasons, the only serious question that arises is whether the defendant has some "real prospect" of demonstrating that the claimant did not genuinely hold the belief stated. There is no such real prospect. The stated belief is plausible, supported by a statement of truth and very powerfully corroborated by a contemporaneous email, which the claimant was not obliged to disclose, but which it has disclosed. This is an email sent by Mr Sharp to Mr Munro on 23 March, timed at 9.35 in the morning and which included, or in which rather it gave Mr Sharp's instructions to Mr Munro to enable him to answer the email from Mr Brooks. I quote the email in full:

> 'Hi John, Thanks for your email. Till [I interpose that Till was the architect of the scheme and he was copied in to this email] please can you send over all professional reports we have had commissioned for Fish Strand Hill? John will need to send these over the Investec solicitors today'. [I think there are a couple of typos there. I think that should probably read, 'send these over to the Investin solicitors today'.] Regarding right to light, we did not have any reports commissioned as the development site is based in a car park which backs on to a large retaining wall, so right to light would not be seen as an issue.
>
> Kindest regards,
>
> Craig Sharp'.

25. There is no credible evidence to contradict the email or Mr Sharp's evidence on this matter. And to say, as Mr Butler QC did in his submissions, that the defendant would like to test the belief under cross-examination is a completely inadequate basis to avoid summary judgment.

26. For the same reasons, it is clear beyond serious argument that the claimant would satisfy the closing words of Section 2 (1) of the Misrepresentation Act 1967, if resort to that section were necessary.

27. It remains to deal with the case alleged in paragraph 26 of the Defence and Counterclaim, and paragraph 25 of Mr Butler QCs skeleton. I assume, for present purposes, that paragraph 25 of the skeleton sets out the defendant's case in the form which the defendant wished to advance at trial. The authorities, (see especially Chitty on Contracts at 7017-7020), do support the proposition that there may be occasions when parties may be under a, 'duty to speak'. However, the allegation that in this exchange, the claimant, 'concealed the existence of the shadow studies' is unrealistic, indeed extravagantly so. The shadow studies were on the council website and no more needs to be said.

28. These conclusions mandate judgment for the claimant on the claim and the counterclaim. However, in case the case should go further, I will set out, briefly, my conclusions on the other matters which were canvassed before me.

Reliance

29. The first matter was that of the defendant's reliance on the alleged representations. The defendant's case on reliance is, in my judgment, extremely flimsy given that the objections based upon rights of light and the shadow studies were on the council website. There are also some serious credibility issues with the defendant's case on reliance, and its case generally:

    i) It is concerning that the existence of rights of light issues was not raised until the claimant sought payment of the second tranche under the assignment contract. Even then these issues were not immediately raised, even though the defendant had been in possession of the report it now relies on for some weeks. The defendant's first response to the demand was that it had been distracted by tax issues.

    ii) It is also concerning that Mr Downer of the defendant nowhere "tells the story" of how the issue surfaced. The implication of his statements is that the alleged misrepresentations lulled the defendant into a false sense of security, and that the issue, when it arose, was

unexpected. However, there is no narrative to elaborate upon or explain this.

iii) The pleaded case is that the defendant, had it known there were rights of light issues, would not have entered into the assignment contract and would have walked away from the contract as, 'commercially unviable'. This case sits very uneasily with a quantification of loss on a contractual basis alleging a net profit, even allowing for the alleged effects of the misrepresentation, of more than £1 million.

iv) My confidence in the defendant's credibility was further diminished by Mr Downer's lack of clarity regarding the measure of the defendant's alleged loss on the more conventional tortious basis to which I will now turn.

Loss

30. The defendant's case on loss now rests on the less ambitious proposition that they would have attempted to renegotiate the consideration for the assignment contract and, not having had that opportunity, must now simply meet any rights to light claims or buy insurance to cover those claims off. Along the way, the defendant's case has been through a number of intermediate stages, from which yet further credibility issues have arisen.

31. In the Defence, the defendant said it had been obliged to reduce the number of units in the development from 112 to 73. This was supported by a statement of truth, signed by Mr Downer. That, it appears, was not the case. No such amended planning application has ever been submitted. In evidence, Mr Downer modified that position to allege that the defendant was working with its professional advisors to mitigate the impact of rights of light issues and the appointment of contractors was on hold. That is a very different thing from saying the number of units had been drastically reduced. Furthermore, the statement in November 2018 that the appointment of contractors was on hold seems to be flatly contradicted by the fact that at least two months before the defendant was actively seeking tenders for contractors. In his second statement, Mr Downer modified his position again. He now says that the tender is out to contractors and that was done because the defendant has secured appropriate insurance, (though the precise cost of that insurance and that part of it attributable to the student development as opposed to some town houses which were a subsequent add-on, is not clear to me. Nor is it clear to me whether any premium has, in fact, been paid.)

32. Leaving aside these further serious credibility issues, the defendant's current formulation of its loss is not pleaded and there is no evidence that any loss has, in fact, yet been incurred.

33. For these reasons and taken in conjunction with the flimsiness of the defendant's case on reliance, even if I thought there was some more than barely arguable claim of misrepresentation, I would still have entered judgment for the claimant on the claim and left it to the defendant to reformulate its counterclaim in an amended form and pursue that claim separately and independently.

34. However, that does not arise because I reject the claim for misrepresentation as having no real prospect of success.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.