Case No: D00CT632

IN THE COUNTY COURT AT CANTERBURY

The Law Courts
Chaucer Road
Canterbury CT1 1ZA

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Before:

DEPUTY DISTRICT JUDGE EYLEY

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Between:

MR WILLIAM OFFLEY HINCHCLIFFE FRIEND **Claimant**

- and –

MR PETER ROBERT MILES **Defendant**

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MR JONATHAN McNAE, Counsel, appeared for the **Claimant**
DR TIM SAMPSON, Counsel, appeared on behalf of the **Defendant**

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Approved Judgment

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

DEPUTY DISTRICT JUDGE EYLEY:

1. In this case, the Defendant applies to strike out, or in the alternative to proceed by way of transfer of the Part 8 application which has been issued to Part 7, so that it may proceed as an ordinary action.

2. The Defendant is represented by Counsel, Dr Sampson, and the Claimant by Counsel, Mr McNae.

3. Regrettably, the matter has a long history and I am told that the dispute goes back to the 1980s. It is essentially a land dispute. The Claimant's father is said to have sold property, known as East Northdown House, Margate, to the Defendant in 1982.

4. The Claimant lives at East Northdown Farm, Margate, and the properties are separated by a private road, which is owned by the Claimant.

5. By all accounts, the dispute culminated in two actions: being one for nuisance by Mr Miles; and another by Mr Friend to the First-Tier Tribunal Property Chamber Land Registration Division.

6. All this occurred in 2013, and on 15 July that year the parties came to an agreement to reconcile their differences. That agreement resulted in an agreed order being put to the Adjudicator of the First-Tier Tribunal for approval, such approval being given on 16 July 2013.

7. For the avoidance of doubt, the agreement and the order consequently made purported to settle both the nuisance claim and the claim to the First-Tier Tribunal.

8. The order itself appears at page 16 of the bundle of the hearing, and states simply that, "Upon the parties having agreed the terms in the schedule attached and by consent, it is ordered that the Chief Land Registrar do cancel the application of the Applicant, Peter Miles", and it thereafter continues, "for the registration of easements over land which the Respondent…", and again, I have omitted part of it, "is the registered proprietor." That is what it says.

9. The agreement annexed to the order in paragraph 8 includes, perhaps hidden away with other matters, a liberty to apply clause, which simply says, "Liberty to apply by either party to the Property Tribunal for determination of the terms of grant".

10. It is a matter of regret that the parties were unable to agree the terms of the proposed grant of easements, and pursuant to the agreement, Mr Friend's solicitor wrote to the First-Tier Tribunal under that liberty to apply provision, only to be told that they lacked jurisdiction and that an application should be made to the court; hence these proceedings.

11. In passing, the Tribunal has explained in their response to the Claimant's solicitors why they decline jurisdiction, although I have noted that the document described to me by Counsel at the last hearing as a Tomlin order is, in my view, no such thing.

12. Under a Tomlin order, proceedings are stayed, pending the execution of the agreement reached. In this case, proceedings were not stayed, but cancelled, and I can

see an additional point that no proceedings existed to allow the liberty to apply provision to be put into operation.

13. It is, perhaps, an academic point, because upon reading the letter from the First-Tier Tribunal, they seem to decline jurisdiction for other reasons.

14. These proceedings, therefore, brought under Part 8 of the Civil Procedure Rules, in the particulars of claim – and I refer specifically to page 4 of the bundle – in paragraph 7, recite paragraph 18 of the agreement, and paragraph 15 of the order, in which the parties appear to agree that there be liberty to apply to the County Court for enforcement of the agreement.

15. The initial agreement was put into the form of the schedule for the purposes of the hearing.

16. Paragraph 9 of the particulars asks the court to determine/decide the terms of the deed resulting from the terms of the agreement and the terms of the order, and then sets out an alternative for the court to consider.

17. In the light of the failure to agree the terms of the deed of the grant, Mr Friend now pursues this action in the County Court on the basis just recited.

18. In turn, Mr Miles now applies for the proceedings to be struck out on the basis that the claim discloses no reasonable grounds for bringing the claim and/or is an abuse of process. In the alternative, an order is sought, pursuant to CPR 8.8, that the claim, as I have already indicated, proceed as a Part 7 claim and for directions to be given for the filing of a defence.

19. For the avoidance of doubt, I have noted the various allegations made by Mr Miles, both through his Counsel's skeleton argument and the draft proceedings, but I place them to one side, because they are at this stage mere allegations. They have not been proven and there has been no trial on these issues in any forum, because of the agreement and/or schedule to the order of 16 July 2013 in relation to which the parties may well have been under the impression that the matter was settled.

20. In any event, and pursuant to Civil Procedure Rule 3.5, Dr Sampson, on behalf of his client, seeks an order that I strike out the claim.

21. In brief, the court may do so where:

    a) the statement of case discloses no reasonable grounds for bringing or defending the claim, and/or;

    b) that the statement of case is an abuse of the court's process, or is otherwise likely to obstruct the just disposal of the proceedings.

22. These are the parts of CPR 3.4 which Dr Sampson relies upon. His argument is that paragraphs 3 to 6 and 8 of the schedule are not enforceable.

23. The essence of his argument is that all of this amounts to an agreement to agree. He says that given what appears in the contemporaneous correspondence, paragraphs 4 to

6 of the schedule to the order do not reflect properly what the parties either thought, or believed, or understood, would constitute the terms of the deed of grant.

24. That does not, in my view, prevent the court from interpreting what was agreed. Further, if I recall correctly, I did ask in the course of the hearing whether the particulars of claim should be widened so as to encompass the dispute *ab initio*, as it were, so that all outstanding matters regarding this land could be encompassed. That is a matter for the parties, but to my mind the court can interpret the agreement. I say that, despite the ruling in *Foley v Classique Coaches Limited*, which was a case of a different nature to this one.

25. The case of *Morton* was mentioned. That, in my view, can also be distinguished. It is a family case, and an old one from 1942 at that. It is argued, on behalf of the Applicant, that the interpretation of what was agreed is in question and, as such, to result in an unreconcilable disagreement as to the question of these covenants.

26. As I understood it from the submissions, the real sticking point is that the Claimant seeks to include a clause in the deed of grant, which would have the effect of Mr Miles not being able to sell his property without Mr Friend's consent.

27. The argument is that this, and other matters, were never in the schedule or agreement on which the schedule is based.

28. Dr Sampson submits that these are so fundamental that the court cannot rewrite the agreement or the deed. His argument is that the schedule/agreement is an unsalvageable mess, which is entirely unenforceable.

29. The second limb of the application is to strike out these proceedings on the basis that they are an abuse of process. That submission relies upon paragraph 8 of the schedule, which provides for application to be made to the First-Tier Tribunal for determination of the terms of the grant.

30. This is used in support of the argument that there were no final terms agreed for the deed of grant. Yet, paragraphs 4, 5 and 6 of the schedule do appear to contain set terms.

31. Dr Sampson continues in his skeleton argument and in his address to me at the last hearing to deal with the fact that the FTT – the First-Tier Tribunal – declined further jurisdiction.

32. In paragraph 50 of his skeleton argument, he cites the letter from the First-Tier Tribunal, dated 18 January 2017, which says, "The parties cannot confer additional jurisdiction on the Tribunal by agreement, as in paragraph 8 of the court order or otherwise. The First-Tier Tribunal cannot assist in determining the terms of the deed."

33. In paragraph 51 of his skeleton, Dr Sampson says that from the Tribunal, which invited the parties to apply to the court, there is no explanation as to why that would be the case, or how the court would work around the express terms of the schedule, i.e. paragraph 8, which appears to indicate that any request to determine the terms of the deed should be made to the First-Tier Tribunal.

34. For the avoidance of doubt, I considered everything that Dr Sampson said to me and put in his skeleton argument, including the objectivity test in *Air Studios (Lyndhurst) Ltd (t/a Air Entertainment Group) v Lombard North Central PLC*.

35. In similar fashion, I considered everything that was said and written by Mr McNae. He disputed that the First-Tier Tribunal had an exclusive jurisdiction, and points out that in the schedule/agreement, the word "exclusive" is not used.

36. He asks the question that if it was exclusive, where does it leave the parties if the First-Tier Tribunal declines jurisdiction. He referred me to the case of *Arnold v Britton* [2015], which concerned the interpretation of an agreement.

37. I have taken into account those parts of the judgment to which I was referred, together with the remaining case law and the excerpt from *Chitty on Contracts* on incomplete agreements.

38. That must bring me to my decision in relation to this application. There are a number of matters for me to deal with and to consider in the light of CPR 3.4, which, in fact, gives me a discretion to strike out a statement of case if there are no reasonable grounds for bringing or defending the claim.

39. That discretion is in the form of the word "may", because the rule begins, "The court may strike out a statement of case…" There is no obligation to do so.

40. In any event, it is said that this court does not have jurisdiction to deal with the claim. I have already made the point that Dr Sampson states to me that the agreement is not enforceable and that the effect of paragraph 8 is to give the First-Tier Tribunal exclusive jurisdiction.

41. Of course, if he is right there is no enforceable agreement, then surely there can be no clause giving the First-Tier Tribunal exclusive jurisdiction, because the whole thing goes, but however, if the agreement is of no effect, then a party to it cannot pick and choose which parts he intends to rely on as it may assist him.

42. On top of that, it would appear to me that the First-Tier Tribunal, which was approached first by Mr Friend's solicitors, and before the issue of county court proceedings, declined jurisdiction, and for the reasons stated in its letter to Messrs Furley Page, dated 18 January 2017, and in particular the second paragraph of that letter, which is that the Tribunal's jurisdiction is limited to the disputed Land Registry application. That is why they say they have no jurisdiction to determine the terms of the deed. The application, of course, had in any event been cancelled by agreement between the parties.

43. If I were to strike out these proceedings and then if Dr Sampson is right, it means that at best one of these parties has to start again, or at worst the parties have nowhere to go to resolve their dispute.

44. I do not see that as being right. Further, there appears to be a completed agreement. Paragraph 8 of the schedule insofar as it is relevant is merely permissive. It does not relate back to any particular part of the agreement, as contained in the schedule. It is

arguable, for instance, that it is no more than a liberty to apply clause, which is often attached to a final court order.

45. The schedule itself does not indicate that there is anything else left to be decided.

46. Dr Sampson argues that the court has no authority to write the deed of grant, as the Claimant says it should be. Nevertheless, it must be open to the court to determine whether or not there is a completed agreement, and, if so, how to interpret the provisions of it.

47. Insofar as the case law is concerned, I was referred to a number of cases and given a folder of authorities by Mr McNae, which I did look at. Although the wording of the particulars of claim in the matter is attacked, as is the wording of the liberty to apply provision, if I call it that, regard needs to be had to that question of objectivity.

48. In that respect, this does not appear to be a case of asking the court to draw the deed of grant, but simply to interpret the agreement reached between the parties.

49. There is to my mind no reason why the court cannot decide whether a clause which one party may wish the agreement to contain, or the other not, is within the ambit of the terms agreed by these parties. It is clear to me from the submissions I received on the last occasion that there is no doubt in the parties' minds what this argument is about.

50. I also bear in mind the overriding objective in the Civil Procedural Rules, which in essence is to deal with cases fairly and at proportionate cost.

51. So applying all of this to the various elements of Civil Procedural Rule 3.4, there are, in my view, reasonable grounds for bringing this claim.

52. I base this on my finding that this is not simply an agreement to agree. Consequently, and for the same reason, there is a difficulty as between these parties and the interpretation of the agreement entered into by them, and the statement of case is not, therefore, an abuse of the court's process.

53. I have to ask myself: how can it be when the First-Tier Tribunal declines jurisdiction? Otherwise, the claim is brought within the time limit given by the Limitation Act 1980 on the basis that it is a simple contract in writing and there is no question in my mind of there being any breach of the principles of equity.

54. Consequently, I reject the submission that I should strike out the statement of case.

55. That brings me to the second limb of the application, which is to transfer the case to the Part 7 procedure.

56. In support of that contention, I have the written submission of Dr Sampson, where the matter is briefly mentioned in paragraph 65, and the brief oral submission made at the end of his address to me at the last hearing.

57. The point is disputed, and Mr McNae, for Mr Friend, sets out why he contends in his skeleton argument that the matter should remain within the realms of Part 8. That part

of the Civil Procedural Rules is available where the court's decision is sought on a question that is unlikely to involve a substantial dispute as to fact.

58. As I have already intimated, this dispute, as it currently stands, must relate to the interpretation of an agreement reached between the parties. That, in my view, is not a dispute as to fact, and I accept Mr McNae's submission on the point in entirety.

59. I, therefore, also dismiss that part of the application.

This judgment has been approved by the Judge.