Case No: B2/2015/0639

Neutral Citation Number: [2016] EWCA Civ 1125
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE SAGGERSON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE KITCHIN
and
THE RIGHT HONOURABLE LORD JUSTICE FLOYD

- -

Between:

	ALISON QUILTER	**Respondent**
	- and -	
	HODSON DEVELOPMENTS LIMITED	**Appellant**

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- -

Mr Paul Letman (instructed by **Magrath LLP**) for the **Appellant**
Mr Pepin Aslett (instructed by **Lester Aldridge LLP**) for the **Respondent**

Hearing dates: 3rd November 2016

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Judgment**Judgment of the court handed down by Lord Justice Floyd:**

Introduction

1. Alison Quilter exchanged contracts to purchase an apartment in a development at Chobham Lakes in Surrey, managed by the developers, Hodson Developments Limited ("Hodson"), on 5th January 2012. Completion occurred on 19th January 2012. The purchase price was £240,000. The claimant sold the property for £275,000 two years

later.

2. The development comprised 54 dwellings. It was a gated community with communally managed grounds. All the dwellings were serviced by the same communal central heating and hot water system, which was a biomass system.

3. Prior to the exchange of contracts Hodson, as vendor, was sent a standard form of pre-contract enquiries. Enquiry number 55 was:-

> "Is the seller aware of any past or current dispute which relates in any way to the property, its use, or any other matter connected with the property and, in particular, regarding boundaries, easements, covenants or any planning matters? If so please give details."

4. Enquiry number 56 was:-

> "Is the seller aware of any circumstances which may lead to such dispute. If so, please give details."

5. In response, Hodson was alleged to have omitted a number of important matters, because it impliedly represented, by omissions, that it was not aware of certain disputes which affected the value of the property.

6. Ms Quilter said that there had been four misrepresentations prior to contract. These were that Hodson had impliedly represented that it did not know about the following disputes:-

   i) a dispute in relation to the refusal, on the part of Hodson, to establish an independent management company for the development;

   ii) a dispute relating to excessive levels of service charges being imposed on occupiers of the individual units;

   iii) disputes regarding the working of the biomass boiler; and

   iv) disputes that existed as to inadequate provision of heating and hot water, inextricably linked to the malfunction of the biomass boiler.

7. With respect to the first two alleged misrepresentations, the judge found as a fact that

there had been no such disputes and there is no appeal as to that.

8. The judge considered the third and fourth alleged misrepresentations together. He noted at paragraph 46 of the judgment that "it is in this regard that it seems to me quite clear that the real substance of the claimant's case lies".

The judgment

9. HHJ Saggerson, sitting in the Central London County Court, found that there were ongoing problems with the boiler and that there was a dispute with Hodson in relation to this which ought to have been disclosed. Hodson was therefore making a misrepresentation by implying that it was not aware of these matters. The principal matters on which the judge relied in reaching his conclusion were:-

i) oral evidence from Ms Quilter who said she had experienced boiler problems herself and also recounted conversations with neighbours who had prior experience of the issue. The judge described the nature of the evidence relating to the neighbours as hearsay of "a gossipy nature";

ii) two other residents, Mr Courtney Warboys and Mr Geraint Herbert also gave oral evidence. The judge noted at para 51 that they said in their witness statements that "from the winter of 2010 onwards if not before, the heating and hot water system would fail regularly for various reasons";

iii) the judge then found at para 52 that there were "repeated, if intermittent" failures in the biomass system which were persistent over the winter of 2010/11 and resurfaced over the winter of 2011/2012;

iv) at para 54 the judge noted that the evidence in Ms Quilter's favour "is not always supported by documents" and that there were few specific records or minutes in the residents' committee meetings about the biomass failure;

v) at para 56 the judge said that there were "dogged, difficult and repeated problems" with the boiler and that the residents took it for granted that it was on the agenda and so did not always raise it at committee meetings for that reason. He preferred the evidence of the residents to the evidence of Mr Thomas Hodson and Mr Alan Hodson, who were the responsible individuals at Hodson;

vi) at para 58 the judge relied on a report by MCA Consulting Engineers Ltd from February 2010 which identified ways in which the system had been put together differently from the design. The judge recorded that this report was "withdrawn"

by the consultants but the judge did not think that this impacted on its accuracy;

vii) he also relied on a report by the National House Building Council ("NHBC") compiled at the beginning of 2014 at a time when the management company (now under the control of the residents) sought to enforce the NHBC guarantee given at the time of construction and purchase of the apartments; and

viii) the judge then concluded (para 66) that "the parties, the residents and the development company, were working closely together to try and salvage something out of this heating and hot water system problem". There was accordingly a dispute which should have been revealed in answer to Enquiry 55.

10. The judge then went on to consider damages. He relied on McGregor on Damages (19th ed. 2014) at paragraph 47-054 to 47-057. He applied what is described there as the normal measure, which is the difference between the actual value of what was acquired and the price which was paid. Taking into account expert evidence the judge concluded that the purchase price of £240,000 constituted the market value of the apartment as it was represented to be. Having regard to the defects, the judge held that the property should have cost £225,000. He therefore gave judgment in Ms Quilter's favour of £15,000.

11. The judge then considered whether the subsequent sale of the property by Ms Quilter altered the position as to damages. He concluded that the claimant was entitled to take advantage of the market value increase. He noted that the profit she had made would have been £15,000 greater if she had paid the appropriate price for the apartment initially.

12. When it came to the question of costs, Hodson submitted that Ms Quilter should to be awarded only a third of her costs, on an issue based approach. However, the judge thought that was too crude an analysis and that she should be awarded 70%.

13. Although Longmore LJ refused permission on the papers McFarlane LJ, after hearing Mr Letman, granted permission at an oral hearing.

Grounds of appeal

14. There are 6 grounds of appeal which are:-

i) the judge erred in law and reached a conclusion which no reasonable tribunal could have reached by holding that there was a dispute between residents and

Hodson Developments about the performance of the biomass system, when the documentary evidence (such as minutes of meetings and performance records) showed that there was no dispute and Mr Herbert's evidence confirmed the absence of any such dispute;

ii) the judge relied on "gossipy" hearsay evidence and mistook the other witness evidence in determining that the biomass system was a "catastrophe" again without referring to the performance records of the system;

iii) the judge wrongly took into account the MCA and NHBC reports relating to the biomass system. One of those reports was withdrawn and the other was prepared 16 months after Hodson handed over the running of the development;

iv) the judge erred in law in deciding that the claimant had suffered a capital loss on the purchase of the property by wrongly assessing loss at the date of the transaction when he ought to have taken into account the profit on the subsequent sale;

v) the judge acted irrationally in accepting the claimant's expert's evidence of the property's diminution in value when this was premised on the biomass system only working intermittently and being out of action the majority of the time; and

vi) the judge made a costs award which was outside the bounds of his discretion when discounting the claimant's costs by only 30% because she succeeded on only one of the misrepresentations alleged and recovered less than a third of her claim.

15. We take the grounds of appeal in turn.

Ground 1: was there a dispute?

Submissions

16. Hodson submitted the claimant could give no first hand evidence of any dispute in the period prior to her entry into the apartment. Mr Warboys noted that in a meeting on 2nd December 2010 agreement was reached between the parties to work collaboratively on the heating issue. Although he became impatient at the lack of progress on key issues about the middle of 2011, his only email at that stage did not refer to the biomass.

17. In Mr Herbert's statement there was no evidence that there was any matter regarding the

working of the biomass that was actually put to Hodson and disputed. Mr Herbert's own correspondence only refers to there being a dispute for the first time in February 2012.

18. Neither the minutes of meetings with resident's representatives nor the service record for the boilers indicated any ground for thinking that there was any dispute.

19. Ms Quilter submitted that the judge carefully considered the issues and was entitled to reach his conclusions; he had relied on oral evidence and the factors mentioned in paragraph 9 above. Although Mr Herbert did not use the word dispute, a fair reading of the totality of the evidence showed that there were ample primary facts from which the court could conclude that there was a dispute. She relied in particular on paragraphs 60, 66, 77, 80-81 and 102 of the transcript of Mr Herbert's oral evidence and on 9 documents which were said to evidence the dispute, as set out in Annex 1 of her respondent's skeleton argument. The absence of reference to the dispute in the minutes of the resident's meetings or in the service records did not mean that no dispute existed.

Decision

20. It cannot be said that there was no evidence from which the judge could conclude that there was a dispute about the biomass system. No doubt Ms Quilter could not give evidence from her own knowledge of the position as at the date of the enquiries or the date of her contract to buy her apartment. All she knew was that shortly after she moved into the apartment in January 2012 she was without any heating for 4 consecutive days. She was able, however, to call evidence from two of the other residents Mr Warboys and Mr Herbert about the residents' dissatisfaction with the heating in the dwellings and the notification of that dissatisfaction to Mr Thomas Hodson and Mr Alan Hodson. That was evidence on the basis of which the judge was entitled to conclude that there was a dispute.

21. Mr Letman for Hodson accepted that it might be said with some accuracy that there was something of a dispute in January 2010 when the heating was either not working efficiently or failed altogether, the residents wanted reassurances that the failings were being addressed and Hodson said that the designers of the system were going to carry out a review. That review was indeed carried out by MCA who made their report in February 2010 which said that there were a number of respects in which the system had been installed which were contrary to the design. There is no evidence that that report was shown to the residents but new parts were ordered to enable an automatic switchover if the system failed and to enable servicing and improvements to the system to be carried out. Automatic switchover did not happen but there were no problems in summer 2010. In September the residents expressed concern "in trenchant terms" according to the judge about the robustness of the system for the coming winter and it broke down three times in November. In December Mr Alan Hodson agreed to put a system in place for informing the residents about what action was being taken in

response to the boiler breakdown and he later agreed to procure a third party to make a site visit to inspect and then to manage the biomass system.

22. Mr Letman submitted that at this stage any dispute was resolved and he pointed to the absence of any record of a dispute in the residents' meetings minutes and the records of servicing the boiler at any rate until November of the following year.

23. That is, however, an incomplete picture. No arrangements for an automatic switchover were made. Although Mr Thomas Hodson had promised that a company called Wood Energy would inspect the system and make recommendations, Mr Letman could not say that had ever happened before November 2012. The minutes of residents meetings recorded throughout the summer of 2011 that a site visit and inspection was still being awaited, see e.g. the minutes of 28th June and an email from Mr Warboys to Mr Thomas Hodson of 12th September 2011. There was then the breakdown of November 2011. Although that was fixed at about this time there was much acrimonious discussion about the residents' threat to withhold service charges if the heating was not improved and Hodson's counter-threat that, in that event, no attempt would be made to repair the boiler if it did break down. The judge declined to hold that there was a dispute about the excessive level of changes but it is not surprising that he was able to hold (para 56):-

> "there were dogged, difficult and repeated problems with the central heating and hot water system on this estate to such an extent that residents simply took it for granted that it was implicitly on the agenda the whole time between themselves and the defendant company. They were being repeatedly "fobbed off" by those responsible for managing the estate that they probably in my judgment despaired of anything sensible being done about it, until such a time as they could assume responsibility for the management of the estate themselves."

24. He continued that he preferred the evidence of Mr Warboys and Mr Herbert (see e.g. paras 60, 81, 102 and 139 of the transcript) and rejected that of Mr Alan Hodson and Mr Thomas Hodson whom he said knew perfectly well that they were in a continuing dispute about the system with the residents from 2010 onwards.

25. That is a conclusion plainly open to the judge on the evidence and we do not see how this court could properly interfere with that finding of (essentially) primary fact. It may be that the judge may have exaggerated the position when in (the earlier) paragraph 47 he described the system as "a catastrophe" but a system which residents could not trust to function continuously in cold weather is, on any view, deeply unsatisfactory. The extent of the defects is, in any event, not the key issue; it is only preliminary to the question whether there was a dispute.

26. Although Mr Thomas Hodson exhibited to his witness statement a schedule which had been prepared of the servicing of the biomass boiler, the actual service records, on which Mr Letman relied as showing that there was no significant 2011 breakdown before November of that year, were only produced on the second day of the 2 day trial with an offer to recall Mr Alan Hodson and/or Mr Thomas Hodson if the claimants wanted to ask questions about them. The judge does not refer to them and that is a major complaint of Mr Letman; but it is not satisfactory for Ms Quilter to be "bounced" at such a late date by the production of the service documents. The judge was entitled to prefer the "live" evidence which he heard to documents produced so late in the proceedings.

Ground 2: Hearsay evidence

27. The judge's reliance on hearsay evidence from other residents as adduced by Ms Quilter was secondary only. The important evidence was the live evidence adduced from Mr Warboys and Mr Herbert such as the passages referred to in paragraph 24 above. The reference to the subsidiary hearsay evidence does not vitiate that conclusion. Mr Letman submitted that Mr Herbert's evidence was contradictory because he had accepted in cross-examination that the turning point for him was February 2012 when it became clear that the Hodsons were prepared to let the boiler fail without making any arrangements for repair. But a fair reading of Mr Herbert's evidence as a whole does not lead us to conclude that he was agreeing that there was no dispute before that date.

Ground 3: the MCA and NHBC reports regarding the condition of the biomass system

Submissions

28. Hodson says that these documents ought to have been regarded as irrelevant because the issue in the case was about whether or not there was a dispute not whether the boiler system had problems. The reports were not expert evidence and the authors had not been called to give evidence. The 2012 MCA report had also been "withdrawn" in October 2012 on the basis that "the report is inconclusive and therefore no conclusion can be drawn …". The 2014 NHBC report cannot be relied on to show the state of the system prior to 5th January 2012.

29. Ms Quilter says that the judge was aware of the constraints of the evidence in this regard. The judge was aware that the MCA report had been withdrawn but was still able to rely on its contents because, as he said at paragraph 59 of the judgment:-

> "The [MCA report] on the face of it clearly demonstrates that there were good underlying reasons why one should not be surprised to learn that the residents were having so much trouble

with this system, over such a prolonged period of time."

Decision

30. The judge relied on the MCA report as demonstrating that the biomass system performed poorly at the relevant time. No real reason was given for its "withdrawal" beyond the statement that it had been compiled by a junior employee. There was no explanation of why it was actually wrong. It is true that the NHBC report was compiled a significant period of time after the time of the representations when steps were taken by the management company to enforce the NHBC guarantee but it was still capable of supporting the judge's conclusion that the biomass system had never worked satisfactorily.

Ground 4: measure of damages

Submissions

31. Hodson asserts that Ms Quilter made a £35,000 profit on the sale of the apartment and submits that this is a case in which the normal measure of damages applied by the judge does not accord with the overarching principle of compensation. Ms Quilter, moreover, sold her apartment in 2014 at its market value unaffected by the matters alleged to have been misrepresented. She had (unlike Hodson) made full disclosure to her purchaser of the difficulties with the heating system but was able to say that NHBC were addressing the matter, pursuant to their guarantee.

32. In a supplementary skeleton argument the appellant sought to rely on the recent Court of Appeal case, Bacciottini v Gotelee and Goldsmith [2016] 4 WLR 98 [2016] EWCA Civ 170.

33. Ms Quilter submitted that damages are to be assessed at the date of breach unless a different date furthers the compensatory principle. If a claimant takes a step "arising out of the transaction" which has the effect of diminishing the loss then that reduction should be brought into account if "it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction": British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways Company of London Ltd [1912] AC 673, per Viscount Haldane. Her subsequent sale of her apartment was no part of any continuous dealing.

Decision

34. The contention that a wrongdoer should be able to take advantage of a rise in the market

value of an apartment when he had induced the purchase by a misrepresentation is, at first sight, rather surprising. It would be natural to suppose that such rise was something with which his wrong has nothing to do. But there is certainly authority, stemming from British Westinghouse, for the proposition that, if the subsequent transaction is all part and parcel of the transaction which gave rise to the wrong, any resulting profit can be brought into account.

35. In the rather more dramatic case of Hussey v Eels [1990] 2 QB 227 in which the victim of a misrepresentation about the condition of a bungalow had made subsequent applications for planning permission (the last of which had been ultimately successful) and had thus unlocked the development value of the land on which the bungalow was sited, this court held that the representor could not take advantage of the increase in value to argue that the claimant had suffered no loss. Mustill LJ said (page 241) that the issue was primarily one of fact:-

> "Did the negligence which caused the damage also cause the profit – if profit there was? … To my mind the reality of the situation is that the plaintiffs bought the house to live in and did live in it for a substantial period. It was only after two years that the possibility of selling the land and moving elsewhere was explored, and six months later still that this possibility came to fruition. It seems to me that when the plaintiffs unlocked the development value of their land they did so for their own benefit, and not as part of a continuous transaction of which the purchase of land and bungalow was the inception."

There the land increased in value because of the grant of planning permission. In the present case, the increase in value arose from market forces. But otherwise the cases are similar and should be resolved in the same way.

36. It is true that, in his dissenting judgment in Gardner v Marsh and Parsons [1997] 1 WLR 489, Gibson LJ described Hussey v Eels as "an exceptional case turning on its own facts"; but it does not seem to us to be as exceptional as all that. Many people buying property with a defect will not want to move for a while and, if any subsequent sale is not undertaken as part of their obligation to mitigate their loss, should be able to recover loss calculated on the traditional basis of the difference in value between the value of the property as represented and the property's true value at the date of purchase.

37. Mr Letman relied on other cases in which subsequent events persuaded the court that the claimant's loss had been reduced or extinguished. The most notorious example is that of the widow whose claim under the Fatal Accidents Acts was reduced because she had re-married, see Curwen v James [1963] 1 WLR 748, 753-4 per Harman LJ. That rule was reversed by statute, but Mr Letman pointed to Kennedy v van Emden [1996] P.N.L.R. 409 in which a solicitor, advising the prospective assignee of an underlease in 1983 had

failed to advise his client that the premium being charged by the assignor was illegal. The prohibition of premiums on (under) leases was removed by the Housing Act 1988 and this court held that the claimant had, therefore, suffered no loss. That, however, was because the claimant had got what she bargained for, namely an underlease which she could herself sell or assign and for which she could herself charge a premium. Ms Quilter did not get what she bargained for and should be compensated accordingly.

38. Mr Letman also relied on Bacciottini v Gotelee and Goldsmith [2016] 4 WLR 98, EWCA Civ 170 in which the claimants discovered that planning consent for a property which they had bought was subject to a restrictive use condition unknown to them at the time of purchase. They sued their solicitor for substantial damages but by the time of trial had had the restriction lifted without difficulty at a cost of £250. This court upheld the decision of the judge to award the claimants merely £250. Davis LJ cited a number of authorities including Hussey, Gardner and Kennedy but (para 59) regarded the case "as an illustration of ordinary principles of mitigation". In the present case it is not suggested that Ms Quilter had any obligation to mitigate by re-selling. She needed to live in an apartment with her young son. When the time for buying another property arrived, it arose in the ordinary course of her domestic life rather than being due to the defects in the heating system which were in the course of being repaired. The benefit of the rise in the market value of the apartment should be a benefit she is entitled to retain rather than a benefit for which she should account to the misrepresenting vendor.

39. The heating system had not been put right at the time of the re-sale but NHBC were in the process of arranging rectification pursuant to their guarantee. To the extent that the existence of that guarantee brought a benefit (or a potential benefit) to Ms Quilter, it was in any event in the nature of insurance. On well-established principles, the fact that a claimant has been able to use an insurance policy to reduce or extinguish her loss is not to be brought into account, see Bradburn v Great Western Railway (1874) LR 10 Exch 1 and Parry v Cleaver [1970] A.C. 1 The same principle should apply to the NHBC guarantee which Ms Quilter acquired as part of her contract of purchase. This is a second (unarticulated) reason why the judge came to the right conclusion.

Ground 5: expert evidence or diminution in value

40. Hodson submitted that, since the judge's factual conclusions regarding the working of the biomass system were wrong to the extent of being irrational, Ms Quilter's expert could not be relied on to value the apartment as his valuation was premised on the system being out of action for the majority of the time. Mr Aslett for Ms Quilter pointed out that the expert had not been cross-examined on the facts and the judge could, in the circumstances, not be criticised for accepting his evidence on valuation.

41. This ground cannot be sustained once the judge's factual conclusions are upheld. Even if the defects in the system could not be described as catastrophic, they were still defects

giving rise to a dispute of which Ms Quilter should have been informed. The judge had to choose which expert's valuation was to be accepted. He heard them give evidence and this court cannot interfere.

Costs

42. Hodson submitted that it had won on two of the (effectively) three misrepresentations which had been alleged. The judge said in terms (para 46) that the real substance of Ms Quilter's case was the third misrepresentation. Hodson were, if not the substantial victors, at least winner on two out of the three issues. The judge said (para 90) that it was too crude to say that Ms Quilter had "won a third on liability and quantum and therefore she should only get a third of her costs", which was what Mr Letman had submitted. In the event he awarded her 70% of her costs.

43. It is impossible for this court to hold that this was a result no reasonable judge could reach. Much of the evidence was common to both the second and third of the alleged misrepresentations inasmuch as the alleged dispute about the level of service charges was part and parcel of the dispute about the Biomass boiler and vice versa. An apportionment of 70% of the costs was by no means beyond the range of reasonable orders to make. As the judge pointed out, no admissible offer was made by Hodson. It would not be right to interfere with the judge's order.

Overall conclusion

44. We therefore reject all six grounds of appeal and will dismiss this appeal.