Neutral Citation Number: [2018] EWCA Civ 1471
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
EDWARD MURRAY (SITTING AS A DEPUTY HIGH COURT JUDGE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE HONOURABLE MR JUSTICE BIRSS

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Between:

WILD DUCK LIMITED	**Appellant/ Claimant**
- and –	
1) DEAN SMITH **2) LUCY SMITH** **3) LEANNE SMITH**	**Respondents/ Defendants**

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Mr Adam Rosenthal (instructed by **Myers, Fletcher & Gordon**) for the **Appellant**
Mr Ewan Paton (instructed by **Royds Withy King**) for the **Respondents**

Hearing dates: 14th June 2018

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Judgment

Lord Justice Longmore:

Introduction

1. This appeal from Mr Edward Murray sitting as a Deputy Judge of the Chancery Division raises the question whether the owners and landlords of a site known as Waters Edge prevented performance of an obligation by a Management Company to undertake and complete works on common parts of the site, an obligation which (it is said) came into effect on the liquidation and disappearance of the original developer.

2. Waters Edge ("the site") is located in an area known as Cotswold Water Park near Cirencester, a nature reserve comprising more than 150 lakes. Planning permission was granted to the father of the defendants and respondents, Mr Colin Smith the then freehold owner, to erect 40 holiday homes at Lake Ten in 2002; it was renewed in 2006.

3. On 26th May 2005, Mr Colin Smith and Lake Ten Developments Limited ("the Developer") entered into a development agreement, for laying out and developing the 40 holiday homes ("the Units"). Each holiday home was to be sold "off plan", with the purchase monies being divided between Mr Colin Smith as landowner (who would enter into an agreement with the purchaser to grant a 999 year lease of the plot) and the Developer, which would enter into a building contract with the purchaser for the erection of the holiday home on the plot.

4. The development agreement provided for the Developer to incorporate a "Management Company" "for the future management of the Common Parts and the provision of services to the Units on behalf of the Owner in accordance with the terms of the Lease". By clause 16.1, it was agreed that, on the sale of the last unit to a purchaser, Mr Smith would transfer the Common Parts to the Management Company, Lake Ten Management Co. Ltd ("the Management Company").

5. On 3rd August 2007, the appellant ("Wild Duck") agreed to buy five units, by entering into agreements for lease with Mr Smith and building contracts with the Developer. The purchase price was £450,000 for each unit (which reflected a bulk discount).

6. The leases were granted on 7th September 2007 by Colin Smith to the appellant for a term of 999 years ("the Leases"). Each of the Leases was in materially identical terms.

7. Clause 7 of the Leases contained various obligations of the Management Company with regard to the repair and condition of the Common Parts and the management of the site. It was not disputed by the respondents at trial that the respondents were subject to an implied obligation to afford access to the Management Company to the Common Parts, as required to perform its obligations.

8. On 2nd December 2008, Mr Colin Smith died. The respondents to this appeal are his children on whom Waters Edge devolved pursuant to Mr Smith's will, by an assent and deed of appointment dated 30th April 2010. They were registered as

proprietors on 2nd July 2010 and inherited Mr Colin Smith's obligations under the leases. I will refer to them as "the Lessors".

9. On 14th May 2009, the Developer went into voluntary liquidation, at a time when various parts of the development remained unfinished; these are listed at para 19 of the judgment below; accessways (roads, pavements, paths) were not completed throughout the site; a sewage treatment plant was yet to be installed to replace the temporary septic tank (which required to be emptied on a weekly basis); communal lighting had not been installed; the landscaping was yet to be undertaken and there were no secure entrance gates to the site. These matters were referred to at trial as "the Outstanding Works".

10. By this time, only 24 of the 40 units had been completed, a further four were partially completed but abandoned, six further plots had footings laid out, without any construction and the remaining six remained bare plots of land.

11. The Management Company, which was still notionally under the control of the Developer, was dissolved and struck off the register of companies on 1st December 2009. The lessees of the 24 holiday homes, which had been constructed, formed a "management committee" to deal with the day-to-day maintenance of the site and also the completion of the Outstanding Works. There were some efforts to seek to persuade NHBC to assume responsibility for the Outstanding Works. Although NHBC initially accepted that it might be responsible for undertaking at least some of these works under a "Buildmark" policy, it subsequently changed its stance and refused to do so. The management committee engaged solicitors to act on behalf of the lessees as against NHBC, but ultimately accepted that NHBC could not be compelled to carry out this work.

12. Accordingly, the management committee (assuming the role of the dissolved Management Company, which was eventually restored to the register on 11th May 2011) decided to take on the responsibility for completing the Outstanding Works. On 6th November 2010, the management committee held a meeting at which the committee agreed to arrange for the completion of the Outstanding Works. On 29th March 2011, they appointed Mr Grosscurth, a quantity surveyor, to provide a schedule of works and oversee the tender process for the Outstanding Works.

13. On 6th September 2011, Mr Grosscurth made recommendations to the Management Company in relation to engaging contractors to undertake the Outstanding Works. Mr Grosscurth's view was that the works would take approximately four to five months and could be completed by early 2012. Wild Duck's case therefore was that, if it were not for the actions of the lessors, outlined below, the Outstanding Works would have been completed by no later than June 2012.

14. At para 57, the judge accepted that by September 2011, the Management Company felt that it would soon be in a position to commence the Outstanding Works and to complete them in the first half of 2012. That was, however, against the background that the Management Company's only active director was unwilling to continue to have sole responsibility, a position that was not rectified until 23rd September when 3 new directors joined the board of the company.

15. Meanwhile, on 1st September 2011, before the Management Company had received Mr Grosscurth's recommendations, and before the reconstitution of the board, the lessors' solicitors, Messrs Withy King ("Withy King") wrote to Tanner Solicitors LLP ("Tanners") acting for the Management Company, referring to the Outstanding Works and to the delay occurring in relation to them. The letter invoked a provision in the leases, which enabled the lessors themselves to undertake the works and to recover the costs from the Management Company.

16. This was followed up with a letter dated 23rd September 2011, in which Withy King asserted that the Management Company was "in default of its obligations to remedy the current disrepairs" and therefore that the lessors (through Mr Dean Smith ("Mr Smith"), the first respondent) would undertake the works. They said:-

> "My client intends to install the new sewerage system in addition to the current one so that any lodge owner who is unwilling to make the payment to be connected to the new system will remain connected to the current one for which the Management Company will remain liable."

17. On 23rd October 2011, Withy King wrote to the Management Company's solicitors, stating:-

    1) works to install the new sewage treatment plant and drainage would begin on Monday 7th November 2011;

    2) any lodge owner not willing to contribute would remain connected to the existing temporary system (requiring weekly emptying of the septic tank) and would not be entitled to connect to the new foul drainage system without payment of their contribution;

    3) only if all lessees had contributed towards the costs of the new drainage system would the other Outstanding Works (roads, landscaping etc.) be undertaken, during "the latter stages of construction of the last of the remaining building plots", at some point during 2014; and

    4) the pro-rata cost would be £7,600 per lodge, rising to £8,800 if that was not paid by 21st November 2011.

18. Smith Roofing Company Limited ("SRCL"), a company controlled by Mr Smith, began the sewerage works on 7th November 2011.

19. There was no consensus amongst the lessees or the board of the Management Company as to whether to agree to pay sums demanded by Mr Smith. Correspondence between the parties continued into 2012 and became somewhat heated. On 13th and 14th March 2012, Mr Smith (in emails to Mr Gordon, a director of the Management Company) threatened to remove the contractors from the site if the terms he had proposed were not agreed to, including payment of the increased sum of £8,800 per unit. Subsequently, at some time in early April 2012, Mr Smith implemented this threat and the site was mothballed, leaving the new sewerage system incomplete, with no indication of whether any of the other Outstanding Works would be undertaken and if so, when.

20. There followed negotiations between the Management Company and the lessors to agree terms for the completion of the sewerage works and the remaining Outstanding Works. By this point, there was no prospect of the Management Company simply resuming the works where SRCL had left off, without the consent of the lessors. Mr Smith had made clear to the Management Company in the previous months that he would need to agree, on behalf of the lessors, to any further works being undertaken on the Common Parts (which remained in the ownership of the respondents).

21. On 31st October 2012, an agreement was finally reached between the Management Company, SRCL and the lessors ("the 2012 Agreement"), providing for the completion of the sewerage works and a timetable for the implementation of the remaining Outstanding Works (described in the 2012 Agreement as "the Final Works"). By this agreement, the lessors and the Management Company agreed upon a tender process and to act in good faith with a view to procuring completion of the Final Works by 30th April 2013 (as set out in clause 10 of the Agreement). At para 174 the judge said:-

> "There were delays, as I have noted, in concluding the 2012 Agreement, but that was a natural concomitant of the voluntary process of negotiation for which both parties were collectively responsible, and not something which in my view can be solely laid at the feet of the first defendant."

22. Although SRCL tendered for the Final Works, the Management Company ultimately caused Talland Homes LLP to be appointed on 1st September 2013 and the Final Works were completed in summer 2014.

The Lease

23. Each of the 999 year leases taken by Wild Duck was a contract between Mr Colin Smith as Landlord, Wild Duck as Tenant and the Management Company. Clause 7.1 provided:-

> "The Company covenants with the Tenant (subject to contribution and payment as before provided) and as a separate covenant with the Landlord as follows:
>
> a) To maintain repair redecorate and renew the boundary walls and fences of the site, the Conducting Media in under and upon the Site (but not part of the Premises), the Accessways leading to the Premises and the Common Parts;
>
> b) So far as practicable to keep the grounds of the site in good order and condition and so far as the Company deems appropriate cultivated and lit;
>
> c) As often as reasonably required to decorate the parts of the Site referred to in clause 7.1(b) usually decorated and in particular to paint the same as usually painted with two coats at least of good quality paint at least once in every five years[;]

d) To insure (unless such insurance shall be vitiated by any act or default of the Tenant or any undertenant or any agent servant licensee or visitor of the Tenant or any undertenant or the Company) and keep insured the Site and the Common Parts …

e) That (if so required by the Tenant) the Company will enforce the covenants similar (mutatis mutandis) to those contained in clauses 3 and 5 of this Lease entered into or to be entered into by the tenants of the other premises comprised on the Site the Tenant indemnifying the Company against all costs and expenses in respect of such costs and expenses as the Company may reasonably require[;]

Provided that if at any time the Company shall fail to perform any of the obligations comprised in the foregoing covenants on its part then without prejudice to any other right or remedy of the Landlord in respect of such failure the Landlord may (but without being obliged to do so) undertake the performance of the same and in that event the cost and incidental expenses of so doing shall be repaid by the Company to the Landlord on demand (together with interest at the Prescribed Rate on all payments made by the Landlord for the period from the date of payment until the date of repayment[.]"

24. In clause 7.1, "Company" means the Management Company; "Conducting Media" refers to any type of conducting media (sewers, drains, pipes, wires, cables, ducts etc) used for the passage of soil, water gas, electricity or other services of any kind and related fixtures, fittings and ancillary apparatus connected to such conducting media; "Accessways" refers to roads, pavements and paths on the site; and "Common Parts" means the property comprised in the site excluding the premises let or intended to be let to lessees.

25. By the end of the trial it was common ground between the parties that by virtue of clause 7.1 and, in particular, sub-clauses (a) and (b), the duty to complete the Outstanding Works fell on the Management Company following the failure of the Developer.

Submissions at trial relevant to the appeal

26. Wild Duck maintains that the leases all contained an implied term that the lessors would not prevent the Management Company from carrying out its obligations under the leases, including the obligation to undertake and complete the Outstanding Works once the Developer had gone into liquidation. It is said that the lessees by their actions as described above did prevent the Management Company from carrying out their obligation to complete the Outstanding Works and, that if they had not so prevented the Management Company, the Management Company would have completed the works at less expense to the lessees and sooner than summer 2014.

27. The lessors accept, on the basis of Stirling v Maitland (1864) 5 B. & S. and Chitty, Contracts 32nd ed (2015) para 14-015, that the leases did contain an implied term that the lessors would not prevent performance by the Management Company of its obligations. But they say that they were not in breach of such implied term

because the contract permitted them to do what they did. They maintain that there was by 1st September 2011 a failure on the part of the Management Company to complete (and even to begin to undertake) the Outstanding Works and that, pursuant to the proviso contained in clause 7.1 of the leases, they were entitled to undertake the Outstanding Works themselves.

The Law

28. There was virtually no dispute about the law. A party claiming that another party has prevented performance in breach of an implied term that he will do nothing to prevent performance has to prove that that party has in fact been prevented. If a landlord repossesses a site with a view to performing Outstanding Works himself but has no right to do so, he is (other things being equal) preventing the other party from doing the work itself. If on the other hand he is entitled to step in he is doing nothing wrongful and there is no question of breach of the implied term, see Luxor v Cooper [1941] A.C. 108, 148-9 per Lord Wright and Mona Oil Equipment v Rhodesia Railways [1949] 2 All E.R. 1014, 1016G-1017E per Devlin J.

The judgment

29. The judge set out the history of the matter in great detail. He recorded (para 61) that the lessors were content to proceed on the basis that there was an obligation on the Management Company (as from 14th May 2009 when the Developer went into voluntary liquidation) to complete the Outstanding Works but held (para 162) that no act or combination of actions of the lessors had the effect of preventing the Management Company from complying with its contractual obligations. He held further (paras 164 and 167) that it was "open" to Mr Smith to take the view that there had been a failure of performance by the Management Company and that the lessors were therefore entitled to undertake the Outstanding Works themselves.

30. He also recorded Wild Duck's submission that the Management Company was "close to being in a position to perform" and that it had "nearly completed a tender process through Mr Grosscurth". But he observed there was substantial further progress to be made in that no contractor had been appointed and no arrangements for funding the work were in place. He also said (paras 168-170) that the Management Company never disputed the lessor's entitlement to take over the Outstanding Works and never complained that Mr Smith was interfering or had interfered with the performance of its obligations. He accordingly dismissed the claim.

Grounds of Appeal

31. There are 3 grounds of appeal:-

    1) the Management Company was performing its obligation to complete the Outstanding Works in September 2011 and there was thus no "failure of performance" entitling the lessors to invoke the proviso to clause 7 of the lease; in this regard the judge was wrong to focus on the time which had elapsed since the Management Company assumed the obligation to complete in May 2009 and should have focused on the activities of the Management Company in September 2011; those activities showed that in

September 2011 the Management Company was performing (not failing to perform) its obligations;

2) the lessors did not in fact act under the proviso to clause 7 at all because they

   a) proposed to and did defer other Outstanding Works until the sewage works were completed;

   b) required upfront payment for all Works;

   c) declined to connect lessees to the new sewage treatment plant if no upfront payment was made;

   d) threatened unilaterally to increase the costs demanded by them; and

   e) caused the sewage contractors to vacate the site between April and October 2012;

3) the Management Company's lack of objection to the course adopted by the lessors was irrelevant and should not have been relied on by the judge. But for this reliance, the judge would have concluded that the Management Company had been prevented from performing its obligations.

1) Failure to perform?

32. This is essentially a question of fact. In my judgment there was a failure on the part of the Management Company on 1st September 2011 to perform its obligations, whether one calls it a duty to complete the works as the judge did in para 61 or a duty to undertake (or do) the works as Mr Rosenthal for the lessors preferred to put it.

33. The Management Company had undoubtedly put in train a process by asking Mr Grosscurth to draw up a schedule of works and seek bids for the work. But Mr Grosscurth had not reported back on 1st September 2011 and, when on 7th September he did itemise the bids he had received, he did not recommend any one contractor but said merely that it would be necessary to take up references. Thus, there was no contractor appointed and no agreement as to the terms of any building contract or even any detailed specification. The Management Company, moreover, had not collected the money which would be required for the work to be done. Very little had thus happened since the Developer had gone into liquidation in May 2009 two and a quarter years earlier.

34. In these circumstances I do not think the judge was wrong to have regard to the lapse of time between May 2009 and September 2011, but even if he was, I do not consider that the Management Company was on 1st September 2011 performing its obligation to undertake (or do), let alone to complete, the works. It was at most preparing to undertake the works which is different from performing them. In para 164 the judge records Wild Duck as saying that the Management Company was "close to being in a position to perform" its obligations; that is to my mind not the same as performing its obligations. There was thus a failure to perform which justified the lessors in invoking the proviso to clause 7 of the leases.

35. In the same paragraph the judge says that Mr Smith's position was that he was entitled under the proviso to undertake the Outstanding Works and that that was a position "that it was open to him to take". Mr Rosenthal submitted that the judge in that sentence (and in para 167) was impliedly saying that it was a matter for Mr Smith to decide rather than the court. I do not regard the judge as saying that but that is not important, because it is clear, in any event, that the Management Company was on 1st September 2011 failing to comply with the obligations which it was common ground it had. I would, therefore, reject this ground of appeal.

2) Not acting in fact under the proviso?

36. Mr Rosenthal's submission was that the lessors in correspondence after 1st September 2011 insisted on obtaining an agreement on terms to which they were not entitled under the provision and that, although they were purporting to exercise their right under the proviso to step in and complete the Outstanding Works, they were not doing so in fact. He described the lessors as resiling from or acting inconsistently with their rights in such a way as meant that they were not exercising those rights or must be taken as being precluded from exercising those rights. He pointed out that Mr Smith said that lessees who did not pay their share of the cost of the new sewage plant would not be connected with the new plant at all but would only remain connected to the old sewage system. He also relied on the fact that in October 2011 Mr Smith, having said that work on the new plant would begin on 7th November, required each lodge owner to pay £7,600 by 21st November or £8,800 if paid after that date when the lessors' only contractual entitlement under the proviso was to be repaid the cost of the work by the Management Company (not the individual lodge owners) after the work was done. This requirement was not immediately insisted on by Mr Smith but it is true that, having not secured any agreement from the Management Company or the individual lodge owners, Mr Smith did in March 2012 instruct the sewerage contractor to stop work and leave the site. Mr Rosenthal also said that Mr Smith impermissibly said that works other than the new sewage plant would not start until the sewage plant was paid for and might not, therefore, start at all.

37. In the course of argument Birss J put to Mr Rosenthal that, if the works were to proceed, negotiations between the parties were inevitable and Mr Smith's requirements were no more than part of those negotiations which eventually led up to an agreement in principle for the lessors to do the work in February 2012 and the detailed agreement of October 2012 pursuant to which the Outstanding Works were ultimately done. Mr Rosenthal's response was that it was not a negotiation at all but the lessors seeking to impose impermissible terms on the lessees whom Mr Smith "had over a barrel".

38. However one chooses to characterise the sometimes acrimonious correspondence in 2011 and 2012, I am satisfied that the lessors were still acting pursuant to the proviso to clause 7 in the leases. To seek early payment to which the lessors were not strictly entitled and to encourage such payment by pointing out that there would be no obligation to connect non-payers to the new sewage plant is not to cease to act under the proviso. As a matter of practical politics, it is hardly surprising that the lessors would want some understanding about how the work about to be done was to be paid for. The lessees and the Management Company did not have to comply with non-contractual demands if they did not wish to do

so. What they are not entitled to do is to say that lessors are no longer proceeding under the proviso or that they have in some way precluded themselves from relying on the Management Company's failure to perform its own obligations.

39. The judge did not deal expressly with this argument which is the foundation of the second ground of appeal but, as Mr Rosenthal said, he must be taken to have implicitly rejected it. I would expressly reject it and likewise reject the second ground of appeal.

3) Management Company's lack of objection

40. In para 108 the judge said:-

> "It is significant, in my view, that the Management Company did not dispute the defendants' right to take this position, and in fact appears to have acknowledged and accepted this right by its conduct … following receipt of the 1st September WK Letter."

41. Mr Rosenthal did not seek to challenge the finding of fact that the Management Company acknowledged and accepted the lessors' right to step in and take over the obligation to complete the Outstanding Works. He submitted, however, that the Management Company had little option other than to accept the position and that, as a matter of fact, it was prevented from performing its obligations under clause 7 of the lease. That was an obligation owed to Wild Duck just as much as it was owed to the lessors under the lease which was a tripartite agreement. Therefore a consensus between the lessors and the Management Company could neither relieve Management Company of its obligation to Wild Duck under clause 7 nor could it relieve the lessors of their obligation to Wild Duck under the implied term not to prevent performance. He submitted further that, while he could not say that the Management Company's lack of objection to the lessors taking over the obligation to complete the Outstanding Works was completely irrelevant on the question whether there was a prevention of performance and thus a breach of the implied term relied on, the judge had placed far too much weight on that lack of objection.

42. Mr Paton for the lessors submitted that the judge was correct to give it the weight which he did. He said, further, that even if the first ground of appeal succeeded and there was no right on the part of the lessors to step in and complete the Outstanding Works, there was still no breach of the implied term because the Management Company had not been prevented from doing the Outstanding Works. It had agreed (or at least accepted) that the works could be done by the lessors and was thus not "prevented" from doing something which it had agreed to do.

43. I do not accept either of the party's extreme submissions.

44. There must, however, be prevention in fact. That is, as Mr Rosenthal submitted, not a pure question of fact but depends on a multi-factorial evaluation of the case as a whole. In that context in a tripartite case it cannot be irrelevant to consider the conduct of the party said to be prevented. It will not be a decisive factor but it is a matter which any judge is entitled to take into account.

45. Looking at the case as a whole like the judge, I do not consider that the Management Company was prevented from performing its obligations. That is mainly because the lessors were entitled to and did invoke the promise to clause 7 of the leases and what they did was not, therefore, wrongful. But I agree with the judge that in coming to that conclusion it is significant that there was never any serious dispute by the Management Company that the lessors were entitled to take the action that they did.

46. I would accordingly reject the third ground of appeal.

Conclusion

47. Despite Mr Rosenthal's attractively presented arguments, this appeal must, in my view, be dismissed.

Mr Justice Birss:

48. I agree.