Joint and several obligations

Andy Creer considers the recent decision of Laditi and another v Marlburay Ltd [2016] EWCA Civ 476 in which Brie Stevens-Hoare QC and Lina Mattsson acted for the Claimants/Respondents.

In an interesting decision of Gloster LJ (with which MacFarlane and Jackson LLJ agreed), the Court took an approach to the appeal which overturned assumptions by the judge at first instance, which had been based on concessions by the Defendant’s counsel at trial, and adopted a new analysis of the contractual issues which had not been advanced in the grounds of appeal or appellant's skeleton.

As a result, the Court of Appeal decided that:-

a) A contract for sale expressed to create joint and several liability which was signed by only one of two joint purchasers (the 1st Respondent signing on behalf of himself and his wife, the 2nd Respondent), was valid as between the vendor and the 1st Respondent, on the basis that there was a perfected several contract;

b) Even if this was not the case, applying Sharma v Simposh Ltd [2011] EWCA Civ 1383, then the 1st Respondent was not entitled to the return of the 25% deposit (subject to as yet undecided claims for rescission on the grounds of unconscionable bargain, contractual penalty or under s.49(2) of the Law of Property Act 1925). Properly analysed, there had been no total failure of consideration, so the issue of a restitutionary claim based on the vendor’s unjust enrichment did not arise.

Buyer Beware – of the ‘Hard Sell’ at a Sales Fair

The claim arose from transactions exchanged at a sales fair in October 2005 and February 2006, at which the Defendant (Appellant) was selling off-plan 999-year leases of individual hotel rooms at the Park Plaza Westminster Bridge Hotel. It was originally brought by six Claimants in respect of the purchase of five rooms.

The event had been widely advertised in London and the promotion material made clear that contracts could be exchanged on the day on payment of a deposit.

Pre-contract enquiries had been dealt with by the Defendant’s solicitors and four firms of solicitors, who were then present on the day to represent prospective purchasers and, if so instructed, to exchange contracts with the Defendant’s solicitors using Formula B (that is, in each other’s presence).

The format of the day was not in dispute:-

i) Prospective purchasers registered their details in a reception area (if not pre-registered for “fast-track entry”);

ii) They then met with a sales representative from Galliard Homes Ltd (the developers, who were acting as the Defendant’s agents) who outlined the opportunity;

iii) If they wished to reserve a specific unit the prospective purchasers made a credit card payment to Galliard’s employees of £1,000 in a ‘closing room’ and were given a printed “Particulars” page with the number of their unit on it;

iv) They then queued to see an available solicitor, who would explain the transaction from a pre-prepared legal report;

v) If the purchasers wished to proceed, the Defendant’s solicitors would provide the contract terms with one of their copies of the Particulars page attached to the front;

vi) The purchasers then signed a 1 page authorisation for the firm to act on their behalf and signed the completed Particulars page, which was exchanged with the Defendant’s solicitors;

The Claimants contended (for various reasons) that the execution of the Particulars page fell foul of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, as it did not incorporate all of the terms of the contract, alternatively that the contract was void as there was no identifiable lease incorporated into it.
Additionally, the Respondents argued that, as Mrs. Laditi had not signed the Particulars, there was no binding contract in existence for their joint purchase of the unit; her husband did not have her consent to sign on her behalf and, if he acted as her agent, on the facts the contract was never ratified.

The Defendant raised a defence of equitable set-off and counterclaimed for damages for breach of contract.

Representatives from two of the firms of solicitors who acted for the purchasers were called by the Defendant and gave evidence as to how they undertook the task of completing their legal obligations to their clients.

Expert evidence was adduced that showed that, in all but one case, the contract had been physically underneath the Particulars page at the time of signature by the Claimants, as the imprints could be seen on the top page of the contract.

The Claimants were all existing investors in residential property and, accepted in evidence that they understood what ‘to exchange contracts’ meant in the context of a property transaction.

At first instance Nicholas Strauss QC, sitting as a deputy High Court judge, made the following findings:

i) By the time of the sales fair, there was an agreed form of a draft lease, so the contracts were not void for uncertainty;

ii) He preferred the solicitors’ evidence of the system in place for taking instructions and dealing with exchange. The prospective purchasers were told that there were detailed terms and knew that by signing the Particulars page that they were instructing the solicitors to exchange contracts, even if the Claimants themselves had not read the contracts;

iii) The Claimants’ evidence was adversely affected by the lapse of time, the excitement created by the event and by having discussed together afterwards their recollections. It was demonstrably wrong on some details of the event.

iv) At the point of exchange all of the material required to satisfy s.2 of the 1989 Act had been collated and was exchanged by the purchasers’ solicitors, who had actual authority to do so.

v) There was no binding contract with the Respondents, however, as the 2nd Respondent had not given express authority to the 1st Respondent to execute the Particulars on her behalf nor could she have ratified the contract, as she did not know that it had been purportedly entered into on her behalf.

The Appeal (and Cross-Appeal)

The Defendant appealed against the finding that there was no binding contract in respect of the Respondents and in respect of a case management decision, whereby the judge refused permission to allow the Defendant to amend its Counterclaim to include a claim for damages for breach of warranty of authority.

The Respondents sought to uphold the judge’s decision on a series of additional grounds and cross-appealed that the judge had been wrong to allow the Defendant’s amendment to extend its defence of set-off to the 1st Respondent’s claim for the return of the deposit.

Taking a very different approach from the lower Court, her Ladyship decided that s.2 of the 1989 Act was not defeated because, as between the 1st Respondent and the Defendant, there was a several contract. It did not affect the validity of that several contract that the joint obligations with the 2nd Respondent were not enforceable.

She rejected the basis of the concession by the Defendant’s trial counsel that without ratification there was no binding contract, which was based on Suleman v Shahsavari [1989] 1 E.G.L.R 203. With reference to the case as reported at (1989) 57 P. & C.R 465, she distinguished the case as being one where the joint vendors could not act alone. There was no reason why one of two joint purchasers should not be contractually liable when he had signed the documentation and authorised his solicitors to exchange.

The Court held that, in any event, the Defendant could retain the deposit (subject to points yet to be decided). The question was not whether an estoppel arises, but whether there had been a total failure of consideration. Where, as here, the payment of the deposit was not conditional upon the successful conclusion of the contract, then the consideration for which it was given may have been provided. Here, the 1st Respondent had received the benefit for which the deposit had been paid: the specific unit had been taken off the market, he was entitled to purchase it for an agreed price, the development had been able to proceed and, once 10% of the deposit had been paid the 1st Respondent became entitled to 10 nights free accommodation at a sister hotel.

The Defendant also succeeded on the second limb of the appeal and was granted permission to amend as the claim was not statute-barred as it arose out of the same or substantially the same facts as already pleaded (s.35 of the Limitation Act 1980 applied).

The Court dismissed the cross-appeal on the basis that it had found that the 1st Respondent had purported to sign the Particulars on his wife’s behalf. In little more than one sentence the Court held that the Defendant had a defence “by way of declaratory set-off” to the 1st Respondent’s claim for the return of his deposit.

It is clear from the judgment that it was highly material that the Respondents were trying to get out of a contract for sale, which, in the cold light of day wasn’t such a ‘bargain’ after all, when (some 5 years later) mortgage finance could not be obtained and they failed to complete. At paragraph 78 Gloster LJ said:

“It would make a mockery of the policy of the section (2) if the 1st respondent could rely on technical arguments, such as those presented to the court on this appeal, to escape from his several contractual obligations, in circumstances where the failure to obtain his wife’s authority to sign the contract was entirely his.”

While the very pragmatic sentiment that a statute should be invoked for its proper purpose can be applauded, having read the first instance decision, attributing the failure to the 1st
Respondent is somewhat harsh. It does not appear in the judgment whether the 1st Respondent was asked in evidence if he appreciated that his wife should have signed and he had solicitors acting for him, who overlooked the necessity of clarifying whether he had consent. Whereas, the Defendant’s solicitor accepted that he should have questioned the single signature. Nonetheless in terms of the commercial realities of the situation the outcome is probably harsh, but fair.

Worth a Read?

The first instance decision includes:-

- a useful summary of the key authorities on section 2 of LP(MP)A 1989
- consideration of when an adverse inference can be drawn from the failure of a party to call a witness (that is, obtain a statement from them)
- acts amounting to ratification

The appeal covers:-

- joint and several liabilities
- whether (or not) an estoppel arises in respect of a deposit
- that the holding of monies by a third party (here the deposit by the Defendant’s solicitors) does not affect a defence by way of declaratory set-off for breach of warranty.

1. His decision is reported as Rabiu and others v Marlbray Ltd [2013] EWHC 3272 (Ch)
2. The only reference I can find to this principle is this case.

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