Patrick Joseph Doherty v Fannigan Holdings Limited

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
12 July 2018

Case No: A3/2017/0754

Court of Appeal (Civil Division)

[2018] EWCA Civ 1615, 2018 WL 03383377

Before : Lord Justice Patten Lord Justice Coulson and Sir Colin Rimer

Date: 12 July 2018

On Appeal from the High Court of Justice Business and Property Courts of England and Wales Insolvency and Companies List

Mr Stephen Smith QC sitting as a Deputy Judge of the High Court

Hearing date: 12 June 2018

Representation

Peter Shaw QC and Rory Brown (instructed by Charles Russell Speechlys LLP) for the Appellant.
Andreas Gledhill QC and Peter Head (instructed by Ignition Law) for the Respondent.

Approved Judgment

Sir Colin Rimer:

Introduction

1. On 11 August 2016, on an application by the appellant, Patrick Doherty, Mr Registrar Jones made an order: (i) setting aside a statutory demand that the respondent, Fannigan Holdings Ltd ('FHL'), had served on Mr Doherty; (ii) requiring FHL to pay Mr Doherty's costs; and (iii) permitting FHL to appeal. On 28 February 2017, Stephen Smith QC, sitting as a Deputy Judge of the High Court, allowed FHL's appeal, set aside the Registrar's first two orders and permitted FHL to present a bankruptcy petition against Mr Doherty. On 24 May 2017, Hickinbottom LJ, having 'been persuaded, just, that the grounds of appeal raise an important point of principle', permitted Mr Doherty to pursue a second appeal to this court. Pending its disposal, he stayed the bankruptcy proceedings.

2. The dispute followed Mr Doherty's breach of his obligation under a share sale agreement to pay £2m to FHL on 1 July 2015 as the price for the transfer to him by FHL of a tranche of shares in Our Enterprise Haslar Limited ('OEHL'). Because of the breach, FHL did not transfer the shares. The question is whether Mr Doherty's breach resulted in his incurring an immediately enforceable liability to FHL in 'debt … for a liquidated sum', namely the unpaid £2m price. If it did, FHL was entitled to serve the demand; and, if Mr Doherty neither complied with it nor had it set aside, he would be presumed to be

unable to pay the debt, so entitling FHL to present a bankruptcy petition: see sections 267 and 268 of the Insolvency Act 1986 . If Mr Doherty's breach did not result in his incurring such a liability, FHL was not entitled to serve the demand.

3. The answer to the question turns on the nature of the parties' respective payment and share transfer obligations under the agreement. The substance of Mr Registrar Jones's reasoning was that they were *dependent* obligations, with the consequence that, as FHL had not transferred the shares to Mr Doherty, the latter's breach in failing to pay the £2m price for them did not result in his becoming liable to FHL as a debtor for a liquidated sum. The Deputy Judge disagreed and held that it did. This court has to decide who was right.

The facts

4. FHL and Mr Doherty were interested in developing a site of some 62 acres in Gosport, Hampshire. Their intention was to acquire a special purpose vehicle in which FHL and Mr Doherty (or one of his companies) would be interested as co-venturers. The vehicle acquired was OEHL. Differences then arose between the parties, which were disposed of by an agreement of 29 June 2012 under which Mr Doherty was to acquire 100% of the issued shares of OEHL: (a) 90% from FHL; and (b) 10% by an assignment to him of FHL's rights to acquire them from two minority shareholders. The shares comprising the 90% holding were to be transferred by FHL to Mr Doherty in eight tranches over six years for a total price of £14m payable in tranches over the same period. As to the 10% holding, FHL's rights to acquire it were to be transferred to Mr Doherty upon the completion of the sale of the first tranche of the 90% holding. I turn to the relevant provisions of the agreement.

5. Its title page described it as an 'agreement for the transfer of certain of the issued share capital of [OEHL]'. It was made between FHL and Mr Doherty (referred to as 'PJD'). Recital (B) was that 'FHL has agreed to transfer and PJD has agreed to take a transfer of certain of the issued share capital of OEHL on the terms of this Agreement.' The shares were to be paid for, and transferred, in eight tranches: Tranches A to H.

6. A list of definitions followed. The tranche in dispute is Tranche E and 'Completion of Tranche E' meant 'the day on which FHL receives the Full Payment in respect of Tranche E'. 'Completion' of each of the other tranches was defined similarly. 'Consideration' meant 'the payment from PJD to FHL of [£14m] payable in stage payments in accordance with the terms hereof and apportioned between the shares and the assignment of the OEHL Debt by FHL to PJD on completion of Tranche A.' FHL's and Mr Doherty's respective solicitors were identified. 'Payment Date' meant the listed payment date for each tranche. The payment date for Tranche A was on or before 6 August 2012 and that for Tranche B was 8 February 2013. The payment dates for Tranches C to H were 1 July in each of the years 2013 to 2018, with that for Tranche E being 1 July 2015. 'Tranche E' meant £2m. 'Tranche E Shares' meant 12.85% of OEHL's issued shares.

7. Clauses 2, 3, 5.1 and 8.1 of the operative parts provide:

> **'2. Agreement for Transfer of Shares**
>
> Subject to the terms of this Agreement, FHL shall transfer or cause to be sold and PJD shall take transfers of each Tranche of the Shares subject to the Full Payment of the respective Tranche being made on the respective Tranche Payment Day free from all Encumbrances and in all other respects with full title guarantee. On receipt of each respective Full Payment the relative Shares for that Tranche shall be transferred with all rights attaching to them and subject to the provisions of this Agreement including the rights to receive all dividends and other distributions declared, paid or made at or after Payment is made for the respective Tranche of Shares. The parties agree that

pending transfer of the Shares under this agreement FHL shall not be entitled to receive any dividend payments or financial benefits in respect thereof.

3 Consideration

The Shares shall be transferred for the Consideration as follows: each Tranche of Shares comprising Tranches A to H inclusive shall be transferred for and in consideration of the Full Payment by PJD to FHL of the respective Tranche payment set out in the definition of each Tranche and each Tranche payment shall be made no later than the respective Tranche Payment Date as set out herein in each case. …

5 Completion of Each Tranche

5.1 In CONSIDERATION of the respective Tranche Payment by PJD to FHL on the respective Tranche Payment Date to FHL's Solicitors Client Account by CHAPS transfer from PJD's solicitors client account being the respective Tranche Payment as part of the total Consideration but being the Full Payment of the respective Tranche Payment FHL shall deliver or procure the delivery to PJD of a transfer or transfers of the respective Tranche Shares duly executed by the respective registered holders thereof in favour or PJD or his nominees together with the relative share certificates or an indemnity in ordinary form duly executed in relation to any missing certificate(s). The figure stated as consideration in each Stock Transfer Form shall be at PJD's discretion having regard to a debt purchase element and may not necessarily be the whole of the amount paid on the relevant Tranche. For avoidance of doubt the sums actually payable on each Payment Date shall be the Full Payment of each Tranche A to H inclusive. …

8 Non Completion Or Default

8.1 In the event that PJD fails to pay any Tranche on the relative Payment Date FHL shall have the right to serve a notice of default on PJD requiring payment within twenty eight days. If the relative Payment is made within the time specified in the Default Notice then this agreement continues but in the event that PJD fails to make the relative payment within the time set out in the Default Notice then FHL shall have the right at any time thereafter to serve a Termination Notice immediately and effectually terminating all and any obligations of any party hereunder save in respect of any liability for any breaches or defaults occurring prior to the Termination Date set out therein.'

8. Mr Doherty duly made the Tranche A and B payments and received in exchange the Tranche A and B shares. Upon completion of the former purchase, he also received an assignment of the right to acquire the minority shareholders' 10% holding. He was late with the Tranche C and D payments in 2013 and 2014, which led to the presentation by FHL of a bankruptcy petition against him in respect of the former and a statutory demand in respect of the latter. Both disputes were settled and the transactions completed, albeit late. In neither case did Mr Doherty assert that the unpaid tranche payment was not a 'debt … for a liquidated sum payable to' FHL so that it was not open to FHL to serve a statutory demand in respect of it or petition for a bankruptcy order.

9. Mr Doherty also failed to pay the £2m Tranche E purchase price due on 1 July 2015. Had he paid it, the Tranche E shares would have been transferred to him, but as he did not that did not happen: FHL was not going to transfer them except against his payment of the £2m, any more than he would have paid the £2m except against the delivery of the share transfer documents. Following Mr Doherty's breach, FHL served him with a statutory demand dated 26 August 2015 for payment of £2m. The demand asserted that under the June 2012 agreement FHL agreed to transfer shares in OEHL to Mr Doherty for a total payment of £14m and that Mr Doherty was required to make the Tranche E payment of £2m by not later than 1

July 2015. It asserted that he had failed to do so and that the debt remained due and owing. Mr Doherty did not comply with the demand and, on 13 October 2015, he applied to have it set aside. The courts below took different views as to his right to do so. I must explain the reasoning of each.

The decision of Mr Registrar Jones

10. At the initial hearing on 16 June 2016, Mr Doherty advanced two arguments as to why the demand should be set aside, neither touching on the point now in issue. The Registrar reserved his judgment. Whilst considering it, he raised with counsel his own third point, namely whether Mr Doherty's failure to pay Tranche E made him a debtor for a liquidated sum as required for a creditor's petition under sections 267 and 268 . He received written submissions in response and, on 11 August 2016, heard oral submissions, following which he delivered his judgment: [2016] EWHC 2098 (Ch); [2016] BPIR 1377. At [5] to [21] he rejected Mr Doherty's two original arguments, to which there is no need to refer. He then dealt with the new point.

11. He said, at [26], that for the purposes of sections 267 and 268 a debt must be:

> '… a pre-ascertained liability under the agreement which gives rise to it … [including] a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure.' (See *McGuinness v. Norwich & Peterborough Building Society [2011] EWCA Civ 1286, [2012] BPIR 145* , per Patten LJ at [36]).'

12. He said, at [28], that whilst there was undoubtedly a fixed sum of £2m to be paid, the question was whether FHL could claim a debt of that sum without the Tranche E shares being transferred or without taking account of FHL's continued ownership of them. If it could, there would be a debt for a liquidated sum. If it could not, all that FHL could do was to sue for specific performance and/or damages, or else (if Mr Doherty's breach was repudiatory) terminate the agreement for such breach and claim damages.

13. The Registrar, at [29], said the answer to that question turned on the construction of the agreement. It was not suggested by FHL that Mr Doherty had already become the beneficial owner of the Tranche E shares, leaving a debt outstanding in respect of the payment for them, and the Registrar proceeded on the basis that the beneficial interest in them would only pass upon payment. The essence of his reasoning for his decision was as follows:

> '30. When read as a whole, taking into account the factual background for the purpose of objective construction, but with particular reference to clauses 2, 5 and 8, in my judgment the Purchase Agreement requires the payment of £2 million in order to receive the relevant tranche of shares. Mr Doherty must pay and FHL must deliver executed share transfers to him. The two are not and cannot be disconnected. The former sets up and enables completion. The Purchase Agreement does not create a debt to be claimed irrespective of compliance with the obligation to transfer the shares. Payment is a contractual obligation which, if breached, gives rise to a claim for specific performance and/or damages or termination and damages under clause 8. …
>
> 32. [Counsel for FHL] also submits that it is sufficient for FHL to be ready, willing and able to transfer the shares following payment of the £2 million. In my judgment that submission fails to apply the contractual connection between payment and transfer. This is not a case where the price is payable irrespective of whether Mr Doherty receives the shares. Thus, clause 2 identifies the

> underlying obligation as a transfer of the shares subject to the terms of the Purchase Agreement which include payment. Obviously but expressly provided within clause 3, the consideration for the transfer of the shares is payment. Under clause 2, the transfer takes place upon receipt of payment. Clause 5 identifies the procedure for completion based upon receipt of funds in a client account. That is when the transfer occurs and it is to be implied that the payment will remain in the client account until completion. Clause 8 provides for time to cure a breach of contract by non-payment on time not the creation of a debt. When the default notice expires without the breach being cured, a right to terminate is expressly created. This sustains the construction that there is no debt but a damages claim in circumstances of the beneficial interest in the relevant shares remaining with FHL.
>
> 33. Insofar as necessary, the point can be demonstrated by considering the content of a Part 7, CPR claim form should one be issued by FHL. It will plead breach of contract following expiry of the default notice [a reference to a notice under clause 8] and (in the absence of termination) pray for specific performance and/or damages. In the event of termination, it will pray for damages taking into account retention of the shares. FHL could not enter and then execute judgment for £2 million ignoring the fact that it retains legal and beneficial ownership of the shares.'

14. The Registrar did not consider expressly whether it was open to FHL to sue Mr Doherty for the £2m as debt, but it is implicit that he considered it was not. He opened [34] by saying that 'Equally, FHL cannot petition for a £2 million debt when it still has the legal and beneficial ownership of the shares.' The same reasoning would show why FHL could not have sued in debt: it could not sue for the price whilst retaining the legal and beneficial ownership of the shares whose transfer was the consideration for it.

15. Upon FHL's appeal, the Deputy Judge took a different view as to the construction of the agreement.

The decision of the Deputy Judge

16. After citing [28] to [31] of the Registrar's judgment (but not [32]), the judge expressed his disagreement with the Registrar's decision. He said:

> '24. … It is entirely right that payment and transfer of the shares are connected events but it is in my judgment quite clear that payment must come first and if it does not occur, there is no obligation on FHL to transfer the shares. The payment is the trigger for the obligation to transfer but the obligation to pay the tranches is not an optional obligation, it is an absolute one.
>
> 25. In this connection, I refer back to some other provisions … from the May 2012 agreement, in particular, the definition of the completion of tranche E, which is the day on which FHL receives the full payment in respect of tranche E irrespective of whether the shares have by then been transferred. Similarly, the definition of payment date is 1 July 2015 irrespective of whether the tranche E shares are also transferred on that date. Clause two of the agreement makes it clear that FHL is not obliged to procure the transfer of – it says "relative shares"; "relevant" may be a more appropriate description – "until receipt of each respective payment". Clause three provides towards the end that each tranche payment shall be made no later than the respective tranche payment date. The otiose clause four concerns the guarantee for Mr Doherty, which is a guarantee of payment of each tranche on the respective payment dates, with no reference to the shares having to be transferred before the obligation guaranteed arises. Clause 5.1 concludes that the sums actually payable on each payment date shall be the full payment of each relevant tranche, and again makes no reference to the shares having been transferred simultaneously or indeed at all before the sums are to be payable.

> Clause eight provides that FHL may serve a notice to terminate the agreement in the event of a failure to pay any tranche on the relevant payment date and does not refer to any constraint on that right by reference to the shares having already been transferred by FHL to Mr Doherty. Then finally clause 11.4 provide for interest to run from the relevant payment date on any unpaid tranche, again irrespective of whether any shares have been transferred.
>
> 26. Those provisions, it seems to me, all point in one direction, which is that the tranches fell due for payment on the dates set out in the definition section of the agreement and from those dates they amounted to a debt for a liquidated sum payable to FHL; and until the relevant tranche was paid, FHL was under no obligation, whether under the agreement or as a matter of insolvency law, to transfer the shares before it could present a statutory demand in respect of non-payment. I should record for completeness that in response to Mr Doherty's witness statement in support of his application to set aside the statutory demand, a director of OEHL, a Mr Paul Manning, served a witness statement in which he states that OEHL is ready and willing to perform its side of the bargain as regards the tranche E shares if and when Mr Doherty makes payment of the £2 million and any other amounts due under the agreement. …
>
> 30. Thus, on the question of construction of the June 2012 agreement, I with regret and great respect disagree with the learned registrar. The payment of the tranche monies was not dependent on a simultaneous transfer of shares and the amount unpaid did, in my judgment, amount to a debt for a liquidated sum. That, I think, suffices to determine this appeal. The appeal should be allowed and the statutory demand reinstated.'

17. The judge therefore allowed FHL's appeal, set aside the material parts of the Registrar's order and permitted FHL to present a bankruptcy petition.

The appeal to this court

18. We had succinct arguments from Peter Shaw QC for Mr Doherty and Andreas Gledhill QC for FHL.

19. Mr Shaw's submission was that, whilst the agreement does provide for Mr Doherty's payment on the Tranche E sale and purchase completion date (1 July 2015) to precede the delivery to him of a share transfer and the relative certificates, its sense is nevertheless that the parties' respective obligations to pay and transfer the shares were dependent obligations such that neither was required to perform his or its obligation except against the performance of the other's. Their dependent nature is apparent from clauses 2, 3 and 5.1. Nowhere does the agreement suggest that the price payable on 1 July 2015 was payable irrespective of FHL's obligation to transfer the shares or, therefore, that its payment was an independent, freestanding obligation that FHL could enforce as a debt.

20. Mr Shaw said that if (improbably) FHL were to transfer the Tranche E shares to Mr Doherty without having first received the price, it could sue him for the price, but it has not done that. Otherwise FHL's remedies are: (i) to sue for specific performance of the contract, which would require it to assert its readiness and willingness to transfer the shares; and, if an order were made, the court would fix a time for the concurrent performance of the parties' obligations; (ii) alternatively, to treat Mr Doherty's breach as a repudiation of the contract, accept such repudiation and sue him for damages, with the assessment of damages taking account of the fact that FHL retained the shares. Save in circumstances in which FHL has first transferred the shares to Mr Doherty, FHL has no claim against him for the £2m price.

21. The case is, said Mr Shaw, in principle no different from a domestic house sale and purchase governed by the Standard Conditions of Sale (Fifth Edition), condition 6 of which shows that, as here, the obligation to pay the price is to be performed before the vendor has to deliver the documents of title. It is clear, however, that if in breach of contract the buyer fails to pay the price on the completion date, the vendor cannot sue him for it. His remedies are explained by Lord Wilberforce in *Johnson and Another v. Agnew [1980] AC 367* , at 392E to 394D, and do not include the right to sue for the price whilst retaining the house.

22. As to the law's recognition of the distinction between dependent and independent contractual promises, Mr Shaw referred to various text books. *Chitty on Contracts* , 32nd Edition, Vol 1, at para 24.036, says this:

> ' **Relation of the promises** . In the first place, it is necessary to discover the relation to one another of the promises which form the contract. They may be either independent or dependent. Promises are said to be independent when the obligation of one party is absolute and not conditional upon the performance by the other party of his part of the bargain. They are said to be dependent when the obligation of one party depends upon the performance, or the readiness and willingness to perform, of the other ….'

23. *The Interpretation of Contracts* , 6th Edition, Lewison, discusses the same topic at 16.15, where it is said that:

> '… Which species of obligation has been created is a question of interpretation, but if the obligation constitutes the whole or a substantial part of the consideration for the contract, the court is likely to interpret it as a dependent obligation.'

The author writes that 'So, for example, in a contract for the sale of land, the vendor's obligation to convey and the purchaser's obligation to pay the purchase price are dependent obligations' and refers to *Heard v. Wadham (1801) 1 East 619* . That case concerned a contract for the sale of land, but Mr Shaw's submission is that the like principle applies equally to a contract for the sale of shares such as that in this case. Lord Kenyon CJ said, at 629:

> '… but it is as clear that these are dependent covenants. I never expected to hear it said that these were independent covenants; where one man agrees to pay a certain sum of money on a given day, and another covenants to convey an estate to him on the same day; can it be contended for an instant, that though the one has not conveyed he may call upon the other to pay the money. Common sense revolts at such a proposition. …'

24. Mr Gledhill, in defence of the proposition that so revolted Lord Kenyon's sensibilities, adopted the same reasoning as did the judge. The terms of the Tranche E sale showed that the contract provided a specific date, 1 July 2015, upon which Mr Doherty had to pay the £2m to FHL. His obligation to pay preceded FHL's obligation to transfer the shares and was a condition precedent to the triggering of that obligation. Until Mr Doherty performed his obligation, FHL needed to do

nothing. It is therefore clear that, upon Mr Doherty's breach, FHL was entitled to compel the performance of Mr Doherty's obligation to pay the price, a debt owed by him to FHL.

25. Mr Gledhill referred us to the ancient case of *Pordage v. Cole 1 Wms. Saund. (1669) 319; 85 ER 449* , one in which the defendant executed an agreement under which he was, before midsummer 1668, to pay the plaintiff £775 'for all his lands'. He did not do so and it was held that the vendor's action against him for the price was:

> '… well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said that both parties had sealed it; and therefore judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.'

26. The decision in *Pordage* , to which I shall return, has been interpreted as based on the view that the parties' respective covenants (for payment and conveyance respectively) were independent; and if that is how the parties' obligations in this case are to be interpreted, it may be that *Pordage* provides support for the judge's decision. *Pordage* is, however, more usually referred to for the benefit of the Notes that follow it. They were the work of Serjeant Williams, refer to many authorities and attempt to draw from them some general principles as to when contractual obligations will be dependent or independent. They include, at 85 ER 451, the following passage:

> 'But where the covenants, &c. are *dependent* , it is necessary for the plaintiff to aver and prove a performance of the covenants, &c on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant. … The difficulty lies in the application of the rule to the particular case. It is justly observed, that covenants, &c. are construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. … In order therefore to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose.'

27. Of the five rules then set out, rule 4 has perhaps the most direct application to the present case:

> '4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and performance must be averred. …'

28. Mr Gledhill developed FHL's case by reference to the principle that when a contract is repudiated, the innocent party has a right either to accept the repudiation, and so bring the primary obligations under the contract to an end, whilst retaining the right to enforce the secondary obligation to pay damages for the loss of bargain; or else to treat the contract as subsisting and claim any sums falling due under it as and when they fall due, together with any damages for the repudiating party's failure to perform as when performance should have occurred (see Lord Sumption's judgment in *Geys v. Société Générale, London Branch [2013] 1 AC 523* , at [113]). Applied to this case, the submission was that Mr Doherty had repudiated the agreement by his failure to pay the price on 1 July 2015, but as FHL had not accepted the repudiation it was entitled to compel the performance by Mr Doherty of his obligation to pay the £2m price that had accrued due for performance on 1 July 2015.

29. As an illustration of that principle, Mr Gledhill cited the decision of the House of Lords in *White & Carter (Councils) Ltd v. McGregor [1962] AC 413* . It does illustrate the principle, but sheds no light on this case of any assistance to FHL. The essential difference is that, in *White & Carter* , having declined to accept the defender's repudiation, the pursuer was able to, and did, proceed to perform its own obligations under the contract and its claim was for the payment due to it under the contract earned by such performance. In this case, FHL's only obligation under the agreement was to transfer the shares to Mr Doherty; and it did not need his assistance to execute a share transfer and send it to him together with the relative share certificates. Unsurprisingly, it has chosen not to do that, but its choice means that, unlike the pursuer in *White & Carter* , it has done nothing to earn the price due to it under the agreement. FHL's case remains, as it must, the simple one that when Mr Doherty breached his obligation to pay FHL the £2m on 1 July 2015, he incurred an immediately enforceable liability in debt that FHL can enforce without first performing its own obligation.

30. Mr Gledhill also relied on *Ministry of Sound (Ireland) Ltd v. World Online Ltd [2003] EWHC 2178 (Ch); [2003] 2 All ER (Comm) 823* , a decision of Nicholas Strauss QC, sitting as a Deputy Judge of the High Court. With no disrespect to Mr Gledhill, I shall not take time discussing it. The dispute there arose out of a contract for the provision of services, the question being whether the claimant was entitled to recover the last stage payment. The case did raise an issue as to whether the defendant's payment obligations were or were not dependent on the performance of the claimant's obligations. Its facts were, however, so far removed from the simple, very different facts of this case that I derived nothing from the deputy judge's full and careful decision on them of assistance in the resolution of this appeal. One passage of his judgment is, however, of relevance, namely his recognition at [52] that in contracts for the sale of land 'there is a presumption that promises are mutually dependent, so that the right to payment arises simultaneously with transfer of property.'

Discussion

31. The only question is whether Mr Doherty's obligation to pay the £2m purchase money and FHL's obligation to transfer the shares to him in exchange were dependent or independent obligations. If they were dependent obligations, FHL is not entitled to the payment of the price except against its transfer of the shares. If they were independent obligations, I would agree that Mr Doherty's failure to pay the £2m on 1 July 2015 exposed him to an immediately enforceable claim in debt for £2m.

32. The Registrar held that they were dependent obligations, although he did not use that term in describing their nature. The judge preferred the view that they were independent obligations, although he too did not so describe them. What counted in his view was that the agreement showed that Mr Doherty had to pay the £2m *before* FHL had to transfer the shares. It follows from the judge's view that, had it chosen to do so, FHL could have sued Mr Doherty to judgment for £2m and then sought to enforce the judgment. If the maximum to which it was able to enforce it was less than £2m (say only £1m), FHL would presumably claim to be entitled to keep both the £1m and the shares. Many might view such an outcome as surprising.

33. I consider, with respect, that the judge was wrong to regard the parties' obligations as independent. I regard it as clear from the terms of the agreement that their respective obligations of payment and delivery were intended to be dependent.

Their intention was that completion of the sale and purchase of the Tranche E shares was to take place on the same day and at the same time; and that the making by Mr Doherty of his payment was dependent upon his receiving the transfer documents in exchange, just as the performance of FHL's obligation to transfer the documents was dependent upon receiving the price. That, in my judgment, is how the reasonable person would interpret the parties' obligations under the agreement.

34. It is correct, as the judge noted at [25], that the agreement's definitions place emphasis on the fact that 1 July 2015 was the day when Mr Doherty's payment was to be made rather than when the share transfer was also to be made: see the definitions of 'Completion of Tranche E' and of 'Payment Date' at [6] above; and the judge observed at [26] that these definitions supported his conclusion that payment was to made on 1 July 2015 irrespective of whether the Tranche E shares were also transferred on that date. I regard them, however, as weak support for that. These provisions were merely definitions. The critical question is as to the sense and intention of the operative parts read in the context of the whole agreement.

35. As to that, the agreement is described on its title page as an agreement for the transfer of shares in OEHL. Recital B records the parties' agreement respectively to make and take such transfers. Those provisions show that the agreement is about the transfer of shares. There follow the definitions, the function of which is not to identify the parties' rights and obligations but to assist in the interpretation of the operative provisions. Of those provisions, clause 2 provides for the transfer of the shares against payment for them. Clause 3 explains what the consideration for each tranche of shares is, and provides that the payment for the Tranche E shares is to be made no later than 1 July 2015. Clause 5.1 provides that upon payment of the price to FHL's solicitors' client account on that day, FHL shall deliver the transfer documents to Mr Doherty.

36. I regard as irresistible the inference that the intention of clause 5.1 is that there is to be an immediate delivery of such documents upon receipt of the price and that the parties' objective was to achieve what would in practice be a simultaneous exchange. To attribute to the parties the intention that either should perform his or its completion obligation except against the performance of the other's is to fix them with unlikely, and uncommercial, intentions. No purchaser of the shares is going to part with £2m to the vendor except against the receipt of the share transfer documents, any more than the vendor is going to part with the documents except against the receipt of the £2m.

37. There is in my view no substance in the judge's heavy reliance on the point that the agreement as a whole shows that FHL's document delivery obligation arises only upon, and therefore after, the payment by Mr Doherty of the £2m from his solicitors' client account to FHL's solicitors' client account. The key provision is clause 5.1 and the sequential timing arrangements for which it provides are apparently no different from those applying to an ordinary domestic sale of land governed by the Standard Conditions of Sale (5th Edition). There the payment of the price will, as in this case, be made by an electronic bank transfer (money-laundering considerations generally preclude other forms of payment) and Condition 6.5.1 provides that 'As soon as the buyer has complied with all his obligations under this contract on completion the seller must hand over the documents of title.' There is no doubt that the intention of the parties in such contracts is that there will in practice be a contemporaneous exchange of money for documents at completion; and also no doubt that the parties' obligations are dependent ones. There is a presumption to that effect. In *Heard v. Wadham* (see [23] above), the price had to paid 'at or upon the execution of the conveyance'. On one view, that meant immediately following such execution, yet Lord Kenyon had no doubt that the obligations were dependent.

38. The judge dismissed the analogy with contracts for the sale of land, saying at [29]:

> 'Contracts for the sale of land are in a special position as regards completion because it has long been recognised that save where the contract makes alternative provision, the balance of the purchase money has to be handed over simultaneously with the transfer of title to the property concerned and to that end a regime of undertakings and/or assurances has been established by, I think, the Law

> Society in standard terms. That is very far removed from the situation which appertains in the case of the June 2012 agreement.'

39. I disagree that the position in relation to the present share sale agreement is far removed from that applying to contracts for the sale of land. In their relevant essentials, its material terms are the same, as is the dependent nature of the parties' obligations. The judge, however, regarded the position in relation to contracts for the sale of land as distinguishable because of his understanding that in the case of such contracts the simultaneous exchange of money for documents at completion is achieved by compliance with practices established by the Law Society.

40. The judge did not explain the practices he had in mind. Condition 6.2.1 of the Standard Conditions leaves it to the parties' conveyancers 'to co-operate in agreeing arrangements for completing the contract.' It is nowadays relatively rare for completion of contracts to which those Conditions apply to take place by personal attendance; and The Law Society Conveyancing Protocol 2011 says nothing material about the precise arrangements to be adopted at such a completion (see Stage E, steps 60 to 66). Most domestic house sales are nowadays completed by post, and step 61 provides in such a case, subject to a qualification, for conveyancers to comply with Law Society's Code for Completion by Post 2011. Subject to agreed variations, in broad summary that provides for completion to take place when the seller's solicitor becomes aware of the receipt of the money at his bank, whereupon he will hold all the documents to be handed over to the order of the buyer's solicitor. He will then inform the buyer's solicitor that completion has taken place, following which he will send the latter the documents by first-class post or the document exchange. Had Mr Doherty been ready and willing to complete the purchase of the Tranche E shares, it is quite likely that the parties' solicitors would have agreed to complete by post and quite possible also that they would have agreed to adopt a procedure similar to that provided for by the Code.

41. That said (albeit only in brief and general terms), and contrary to the view favoured by the judge, it is anyway not the particular practical arrangements that the parties or their solicitors make for the performance of their completion obligations that govern whether their obligations are dependent or independent. That turns on the interpretation of their contract. The parties' mutual obligations in a contract for the sale of land incorporating the Standard Conditions of Sale are dependent obligations; and the judge was in error in declining to regard the dependent nature of the obligations in such a contract as providing compelling guidance as to the nature of the parties' obligations in the essentially analogous circumstances of this case. There is no sound basis for drawing the distinction that he did.

42. In agreement with the Registrar, I would therefore hold that the parties' respective obligations in relation to Tranche E were dependent obligations. Neither party was entitled to enforce the performance of the other's except against a performance of his/its own. The probable explanation of the decision in *Pordage* is that the court interpreted the agreement 'as if it appeared on the face of it that there was no intention that the conveyance should take place on the day appointed for the payment of the money': see *Marsden v. Moore and Day (1859) 4 H. & N. 500; 157 E.R. 936* , per Bramwell, B, at 505 (or 938), who added that 'whether I would have so construed the agreement is another matter.' The court in *Pordage* was therefore probably regarding the parties' obligations as independent ones.

43. It follows that, whilst Mr Doherty breached the contract by failing to make the £2m payment of the price, he did not thereupon become a debtor for the price. FHL could sue him for specific performance or damages (compare Lord Wilberforce's explanation in *Johnson v. Agnew* , supra). What, however, it could not do was to sue him for the price or serve a statutory demand. Nowhere in his explanation of a disappointed vendor's rights under an uncompleted contract for the sale of land did Lord Wilberforce suggest that he can simply sue for the price; and 217 years ago Lord Kenyon, in *Heard v. Wadham* , expressed trenchant views to the effect that he cannot. FHL was in no different position in the present case: it makes no

difference that the subject matter of the agreement was shares, not land. FHL had its remedies for Mr Doherty's breach. Its mistake was to attempt to deploy one that it did not have.

Disposition

44. I would allow Mr Doherty's appeal, set aside paragraphs 1 to 5 and 7 of the judge's order of 28 February 2017 and restore paragraphs 1 and 2 of the Registrar's order of 11 August 2016 setting aside the statutory demand. I would ask counsel to attempt to agree a form of order covering such matters and, so far as necessary, providing for the unwinding of the judge's costs orders against Mr Doherty. As for the bankruptcy petition, I presume its dismissal will have to be ordered by the court in which it is pending.

Lord Justice Coulson :

45. I agree.

Lord Justice Patten :

46. I also agree.