A cash buyer, a fraudulent misrepresentation, and no exchange of contracts

As a junior conveyancing solicitor in the late 1980's I acted on the sale of a number of residential properties where the seller was told by the estate agents selling the property that the buyer was a cash buyer. Invariably, it turned out that this was not correct, and that the buyer was obtaining a mortgage to assist them with their purchase. What the estate agent actually meant was that the buyer did not have a property to sell and so there was no linked transaction to delay matters.

Master Clark in the High Court in an unsuccessful claim for specific performance of a contract of sale has now considered the meaning of 'cash buyer' in *Shill Properties Ltd v Bunch*[1] and whether a representation by a buyer that they were a cash buyer when this was not the case amounted to a fraudulent misrepresentation. In addition, the court also considered whether it was possible to exchange contracts by telephone when the buyer's solicitor did not hold their client's signed contract.

The facts

The buyer, Shill Properties Ltd, was an investment company. The seller, Mrs Bunch, owned a property at 7 Gunstor Road, London, N16 8HF. At the time of the material event, Mrs Bunch was 86, turning 87, and lived on her own at the property. When the matter was heard at trial she was 91. She suffered from memory and cognitive issues and had difficulty understanding questions put to her and became confused very readily when giving evidence. The judge did not consider he could place. any reliance on her evidence, except where it was unchallenged.

The dispute between the parties was over whether there had been a valid exchange of contracts and whether a misrepresentation had been made to the seller that the buyer was a cash buyer. Mrs Bunch argued that:

(1) the contract was void for non-compliance with Law of Property (Miscellaneous Provisions) Act 1989 because:

(i) the purchase price was shown as £840,000 whereas the agreed price was £940,000; alternatively

(ii) the true purchaser was Safety Investments Limited, and the contract was not signed on its behalf; alternatively

(iii) at the date of exchange, the buyer's conveyancing solicitor did not hold a signed contract.

(2) she entered into the contract in reliance upon a misrepresentation by the buyer that it was a 'cash buyer', and the contract should therefore be rescinded.

(3) the contract was procured by undue influence exercised on behalf of the buyer and should be set aside on that ground.

The only copy of the contract in evidence was the part signed by Mrs Bunch. It included an endorsement that contracts were exchanged pursuant to Law Society Formula B at 11.42am on 7 December 2018 between the buyer's conveyancing solicitor and the seller's conveyancer.

The key terms of the contract were:

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[1] *Shill Properties Ltd v Bunch* [2023] EWHC 2135 (Ch).

(1) the purchase price was £840,000;
(2) the deposit was 5% of the price, £42,000;
(3) the completion date was 8 February 2019.

There was also a separate arrangement between the buyer and Safety Investment Ltd whereby this company proposed to take over the purchase of the property in place of the buyer.

Compliance with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989

Section 2 of the 1989 Act provides that a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each. The terms may be incorporated in a document either by being set out in it or by reference to some other document. The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

Wrong purchase price

The seller argued that the contract showed an incorrect purchase price. She submitted that the true price agreed was £940,000 and since the contract showed a price of £840,000, it failed to incorporate all the terms agreed by the parties. On the evidence, the judge decided that the contract did not show an incorrect purchase price.

The buyer's solicitor had emailed the seller's solicitor on 5 December 2018 as follows:

"I am instructed that the following has been agreed:
1. Purchase price of £840,000
2. Exchange on a 5% deposit to be released as agent
3. Completion to take place at the end of March 2019."

The judge relied on this as setting out the agreed price and felt that the seller's solicitor would have responded by return if this price had been wrong. In addition, the 5% of £42,000 was, in fact paid, albeit late. There were also some emails sent by the buyer's solicitor, one to the buyer copied to Safety Investment Ltd and the other to Safety Investment Ltd. The first of these stated that the purchase price being paid for the property was £940,000. The second e-mail referred to Safety Investment Ltd taking over the contract and sending £94,000 (where the normal deposit on exchange is 10% of the purchase price). The judge decided that these emails reflected the separate arrangements between the buyer and Safety Investment Ltd.

The argument that the contract showed an incorrect purchase price was therefore rejected.

Incorrect buyer

The seller argued that the buyer was not the true buyer of the property but was nominee for Safety Investment Ltd. The only evidence that the seller relied on for this argument was an email from the buyer's solicitor to the solicitors acting for the Safety Investment Ltd's lender as follows:

“The parties are JV Partners and Safety actually paid the deposit by way of loan/agreement with Shill. Shill acted as the nominee on exchange. Yes, we acted for Shill due to assessing there to be no conflict of interest due to having a substantial common interest. We shall provide the Deed of Variation or provide written confirmation to amend the Buyer to Safety in due course. Shill will have no claim on the Property”

The judge felt that the reference to the payment of £94,000 being paid by Safety Investment Ltd by way of loan/agreement, indicated that the funds were the buyer’s funds, having been loaned to it. Similarly, the reference to a Deed of Variation indicated that in its absence, the buyer would remain the purchaser. The sentence “Shill will have no claim on the Property” referred in his judgment to the position once the proposed Deed of Variation had been executed.

There were also two client care letters sent to the buyer by the buyer’s solicitor which were addressed to the buyer. The judge felt that if Safety Investment Ltd was the ‘true purchaser’ and the buyer only an agent nominee on exchange, the obvious thing to have done would have been for Safety Investment Ltd to have been the named party, and to have instructed the solicitors who acted for the buyer (or their own solicitors) in the transaction.

The judge also found that there was also other email correspondence which showed that the buyer was the purchaser at the date of exchange.

The seller’s submission that the buyer was not the true buyer of the property was therefore rejected.

No signed contract

The contract signed by the seller included an endorsement that contracts were exchanged using Law Society Formula B on 7 December 2018 at 11.42am. It had the following manuscript amendments or additions:

- the price was changed from £820,000 to £840,000,
- the completion date was 8 February 2019, and
- the deposit was 5%, £42,000 said to be ‘released to buyer’ (which must have been intended to be ‘released to seller’).

Formula B is in the following terms:

“For use where each solicitor holds his or her own client's signed part of the contract.

A completion date of .... is agreed. Each solicitor confirms to the other that he or she holds a part contract in the agreed form signed by the client(s) and will forthwith insert the agreed completion date.

Each solicitor undertakes to the other thenceforth to hold the signed part of the contract to the other’s order, so that contracts are exchanged at that moment. Each solicitor further undertakes that day by first class post, or, where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor’s office, to send his or her signed part of the contract to the other together, in the case

of a purchaser’s solicitor, with a banker’s draft or a solicitor's client account ‘for the deposit amounting to £..... .”

No original or hard copy or electronic copy contract signed by or on behalf of the buyer had been located.

The buyer’s solicitor’s written evidence was:

“At the time of exchanging contracts I held Shill’s signed contract. I know this because I signed it (on behalf of [*the buyer’s solicitor’s firm*]) as agent of Shill, having been authorised to do so.”

However, there was no evidence that anyone in his firm had sent him the contract before 7 December 2018.

On 10 December 2018 (the Monday following exchange), a paralegal at the buyer’s solicitor’s firm emailed the buyer’s solicitor as follows:

“Hi, Sorry can you tell me the address of the property for which I have to print the contract? I got 7 Gunstor rd but I think I did not write it correctly”.

Shortly after sending this email, the paralegal emailed an attachment named ‘Freehold Contract of Sale 5th edition.DOC’ to the buyer’s solicitor’s secretary. Regrettably, that attachment was not provided to the court. The following day, she emailed the buyer’s solicitor an attachment named ‘letter to seller’s solicitor enclosing contract 7 Gunster road.doc’. On 11 December 2018, the buyer’s solicitor sent to the seller’s solicitor a letter referring to the exchange of contracts on 7 December 2018 and enclosing “our client’s part of the executed contract”.

The buyer’s solicitor gave oral evidence that he was authorised by a director of the buyer by telephone call to exchange contracts, but there was no attendance note recording that authorisation. He had no recollection of exchange itself or of amending the contract or putting in the completion date, or of anything that happened on 7 December. There was also no note of the exchange on file.

As to requesting a copy of the contract from the paralegal, the buyer’s solicitor’s evidence was that this was a further copy of the contract, because the copy signed by him had been “misplaced” between Friday 7 December and Monday 10 December. He said that he printed off a “duplicate” and added in the amendments and additions in manuscript. None of this was found in his witness statement. Neither did he explain how a document of such importance could have been lost in a solicitors’ office over a weekend (or why he did not send the signed contract to the seller’s solicitor on 7 December having undertaken under Formula B to do so). The judge decided that his explanation was a recent fabrication to explain the inconvenient fact that the draft contract was not sent to him by the paralegal until 10 December. The judge rejected this explanation.

Counsel for the buyer submitted that this would be a finding of dishonesty, and that the buyer’s solicitor had no apparent reason or benefit in misrepresenting the position to another conveyancer. As to this, the position on 7 December was that neither the buyer, or its solicitor had taken any steps to progress the conveyancing. Going through the motions of exchange without actually having a signed contract was “corner cutting” i.e. achieving the result the

client was pressing for, with a reasonable belief that in the normal course of events this would not be detected.

As to the deposit, this was also not sent on 7 December, contrary to the undertaking required by a Formula B exchange. The buyer's solicitor's initial evidence was that he would not have exchanged contracts unless his firm was holding the deposit. However, it was clear and the judge found that he did do so, and he did not send the deposit to the seller's solicitor until 17 December. The note on the contract "£42,000 released to [seller]" was therefore untrue.

Having concluded that the buyer's solicitor did not hold a signed contract on 7 December when he purported to exchange contracts, it followed that the requirements of section 2 of the 1989 Act were not satisfied, and there was no valid exchange. The claim failed for that reason.

Misrepresentation

The seller alleged a dishonest (fraudulent) misrepresentation which, if established, entitled her to rescind the contract. To establish fraudulent misrepresentation, the seller had to prove that the false representation was made knowingly, or without belief in its trust, or recklessly, careless whether it be true or false. The buyer also had to intend the representation be acted upon. The misrepresentation must have materially influenced the seller to enter into the contract but need not have been the sole cause. In a case of fraudulent misrepresentation, it was not a defence to show that if the misrepresentation had not been made, the seller might have still entered into the contract. It was enough that it had some impact on her thinking. Although the legal burden of reliance was on the seller, there was an evidential presumption of reliance which was very difficult to rebut.[2]

The alleged misrepresentation was that the buyer was a 'cash buyer'. The judge considered that the ordinary and natural meaning of the expression 'cash buyer' is a person who intends or expects to buy a property without the assistance of a secured loan or finance. Although there was no evidence as to the seller's understanding of this expression, the proper inference was that she understood it to have its ordinary and natural meaning.

The expression was not ambiguous and was not capable of meaning someone who intends to pay in cash if they need to, i.e., if they cannot obtain a mortgage. The buyer's argument was that its preferred course was to buy the property using mortgage finance (as was its usual practice), but that if finance could not be commercially obtained, then a cash purchase would be progressed with. Such a person was not a cash buyer.

On the evidence, the natural and uncontradicted inference was that the buyer's representative made the representation to the seller's agent for the purpose of it being communicated to the seller and her solicitors.

The judge inferred that the buyer did not want the seller to know that it was intending to obtain a mortgage or some other form of secured finance, i.e., that it was not in fact a cash buyer. It therefore followed that the representation was not true when it was made.

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[2] *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596 and *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep. P.N. 189 considered.

In any case, there was no evidence from which it could be inferred that the buyer was able to complete without obtaining a secured loan.

The buyer had positively alleged that it would pay cash on completion, so it had the burden of proving that allegation. The only evidence relevant to the buyer's financial position were its accounts filed at Companies House. These comprised only balance sheets. These showed:

Balance sheet date	Current assets/liabilities £	Net assets/liabilities £
30 September 2018	153,597	(41,958)
30 September 2019	170,126	(52,990)

The buyer realistically accepted that on a balance sheet basis it was not able to complete in cash. So, there was no evidence before the court showing that the buyer would have been able to complete in cash, and the available evidence was that it could not.

It was clear that the buyer's intention and expectation throughout was that it would fund the purchase using secured finance. Given the judge's finding as to the meaning of 'cash buyer', the only conclusion was that the buyer knew that it was not in fact a cash buyer. This was sufficient for the representation to be fraudulent.

The seller believed that the buyer was a cash buyer at all relevant times. This materially influenced her decision to proceed with the buyer and she had established her defence of fraudulent misrepresentation, so that, if necessary, she would have been entitled to set aside the contract.

Undue influence

The defence based of undue influence failed at the first hurdle as the seller was unable to establish that the agents who introduced the buyer to her were acting on the buyer's behalf in their dealings with her.

Comment

Aside from considering the meaning of 'cash buyer', the case also illustrates a worrying trend of contracts being exchanged by telephone using the Law Society Formulae when either (or both) of the parties solicitors do not comply with the undertakings in the relevant formula.

Exchanging contracts by telephone is the most common method of exchange as it is quick and convenient. Whilst there may little or no opportunity in a busy conveyancing practice for either party to check the form of the other party's part of the contract or that it has been properly signed before exchange takes place, it should good practice to ask the solicitor acting for the other party to confirm the contract in advance of exchange. Alternatively (or in addition), copies of the signed parts of the contract could be sent by fax or by email before the exchange so they can be checked. In any event, when using one of the Law Society formulae, confirmations are incorporated as to signature and that the various parts of the contract are identical. Each solicitor should also keep a written record of what was agreed during the telephone conversations so that there is evidence of what was agreed in the event of a dispute.

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