Yee & Others v 174 Law (2023) EWCA Civ 13

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INTRODUCTION

Almost exactly a year ago, we reported on the handing down of the first instance judgment in *Various North Point Pall Mall Purchasers v 174 Law Solicitors Limited v Key Manchester Limited* (2022) EWHC 4 (Ch), in which Caytons acted for the Third Party. Last Friday, the Court of Appeal handed down its judgment, unanimously dismissing the Claimants' appeal.

This is a short note on the case.

THE FACTS

It may be recalled that this was claim by a cohort of investors in a failed buyer-funded development project in Liverpool. The Claimants sued the seller's solicitor for alleged breach of stakeholder agreements.

It is central to the 'fractional sales' funding model adopted here that buyers pay a significant proportion of the purchase price upfront on exchange and that the developer applies those monies to the funding of the project. In consideration for this, buyers are given various incentives such as a discounted purchase price and a guaranteed rental income for a period after completion.

In many projects funded on this model, the seller's solicitor will hold the monies as agent for the seller. This means that it can release the monies to the developer straight away. In this particular project, the monies were to be held by 174 Law as stakeholder to the order of a 'buyers' company'. This was a limited company in which the buyers were to be members and the directors were solicitors acting for them and the seller. The buyers' company was to have a first charge over the development site, but this could be outranked through a deed of priority if the developer obtained further funding from a lender. The monies held by 174 Law were to be released on the issue of certificates to confirm that development costs had been incurred.

Through a series of missteps, a bridging loan lender ended up with a first charge before the buyers' company charge could be registered. This created an impasse. The seller's solicitor would not release the monies it held and the lender would not relinquish its priority charge.

To address this, one of the directors of the buyers' company proposed what came to be known as 'the workaround'. This aimed to put the parties in the position that they would have been in if the buyers' company had obtained a first charge and then entered into a deed of priority with the lender. The other directors, the developer and the lender all agreed to this.

Shortly afterwards, the seller dis-instructed its original solicitor and retained 174 Law. It took over as stakeholder and released monies against the certificates which were issued from time to time.

The developer ran out of money before the project was finished. The lender appointed a receiver which dols the site. The buyers' monies were lost.

THE DISPUTE

The Claimants' case was that it was a precondition of any release that the buyers' company had a first charge over the site and that, as it never did, it followed that 174 Law had breached the stakeholder agreements by paying away the monies it held. They maintained that the parties to the stakeholder agreements were the buyer, the seller and the seller's solicitor, as in a traditional property sale.

This was resisted by 174 Law. It argued that the parties here were the *buyers' company*, the seller and the seller's solicitor. It followed, 174 Law contended, that it was entitled to treat the workaround as authority to release monies despite the buyers' company having a second charge.

The Judge dismissed the claim. He unexpectedly found that the stakeholder agreements were quadripartite with the buyers *and* the buyers' company being parties but accepted that 174 Law was entitled to look to the buyers' company for authority to release monies. The Claimant obtained leave to appeal.

THE APPEAL

The Court of Appeal (Newey LJ, Warby LJ and Sir Christopher Floyd) did not entirely agree with the Judge's reasoning but accepted that he had come to the right conclusion. The court accepted 174 Law's alternative construction of the deposit release provisions to the effect that the stakeholder was to release monies on the conditions set out in the applicable clause but that the buyers' company alone, or at any rate together with the seller, could authorise release outside those conditions There is a hint in the judgment that the court might have departed from the Judge's quadripartite analysis if asked to do so.

One point of wider interest arose in the appeal proceedings. In buyer-funded development claims, claimants commonly seek to rely on agreed outcomes (*i.e.* settlements of regulatory proceedings) between the SRA and David Hayhurst of 174 law and another solicitor who acted for buyers in this project. These were relied on in submissions at first instance but the Judge placed no weight on them.

Before the Court of Appeal, the Claimants' Counsel began to make reference to the agreed outcome with Mr Hayhurst but was immediately shot down by Newey LJ who made clear that the Agreed Outcome could have no significance to the matters at hand. He also questioned how it could even be said to be admissible in light of the rule in *Hollington v Hewthorn* [1943] 1 KB 587, which provides that findings of one tribunal are not to be admitted as proving a fact in another. Counsel sensibly conceded the point and moved on.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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