

HOUSE OF LORDS

SESSION 2007–08

[2008] UKHL 24

on appeal from: [2007] CSIH 12

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Simmers (Respondent) v Innes (Appellant) (Scotland)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Neuberger of Abbotsbury. Like him, I can find no merit in any of the grounds on which the decision of the Extra Division was challenged. I would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

2. I have had the opportunity of reading a draft of the opinion on this appeal prepared by my noble and learned friend Lord Neuberger of Abbotsbury and I am in complete and respectful agreement with the reasons he has given for dismissing this appeal. There is nothing I can usefully add and so I too, for the same reasons, would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

3. I have had the advantage of reading in draft the speech which is to be delivered by my noble and learned friend, Lord Neuberger of Abbotsbury. I am in full agreement with it and, for the reasons he gives, I too would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

4. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Neuberger of Abbotsbury. I agree with it, and for the reasons given by Lord Neuberger I would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

5. By this appeal, Mr James Innes seeks to overturn the decision of an Extra Division of the Inner House of the Court of Session (Lords Osborne, Nimmo Smith and Kingarth) pronouncing a decree for specific implement in favour of the respondent, Mr Arthur Simmers. The Extra Division held that Mr Simmers had validly exercised an option to purchase certain property, and could validly enforce that option.

6. Mr Simmers carried on business as a pig farmer on land he owned in Aberdeenshire. In common with many others in that industry, he got into difficulties in 1998, and his business went into receivership. Mr Innes was anxious to obtain a supply of pigs, and the two parties entered into a shareholders' agreement ("the Agreement") which, as the Lord Ordinary, Lord Clarke, said in the Outer House, "was concluded

under some considerable pressure of time”. Pursuant to the Agreement, which was completed on 18 December 1998, the business was transferred to Scotpigs Limited (“the Company”), a company which had been formed for that purpose, and was a party to the Agreement. The Agreement also provided that Mr Innes would invest £2,500,000 in the business, of which £2,100,000 was attributable to most of the land on which the business was carried on (“the property”), and £400,000 was for 400,000 “A” shares in the company, which acquired the remaining land. In addition, the Agreement stated that there would be 400,000 “B” shares in the company, which were to be owned by Mr Simmers and members of his family.

7. The Agreement also provided that a pig farming business would be carried out on the property, that the property and all the other assets of the business would be transferred to the company, and that the company would transfer on the property to Mr Innes, who would then lease it to a partnership consisting of the company and himself. The rent under such lease was stipulated as being equal to the interest due on the loans advanced to Mr Innes to enable him to provide the £2,500,000. Mr Simmers was to be employed by the company as managing director at a salary of £20,000 per annum, and his wife was also to be employed by the company at the same rate of pay. The Agreement also provided that best endeavours would be used to ensure that Mr Innes was supplied with at least 800 pigs per week.

8. The two centrally relevant provisions of the Agreement for present purposes were clauses 10 and 21. They were in the following terms:

“10. Buy-Out by Mr Simmers

On [31 March 2004], Mr Simmers shall be entitled to effect the Buy-Out and acquire the Buy-Out Shares and the [property] in exchange for payment by way of telegraphic transfer of the Buy-Out Price, and the Buy-Out Expenses to Mr Innes or his nominees. In exchange Mr Innes shall execute all transfers, conveyances, deeds and documents as shall be reasonably required to constitute Mr Simmers as owner of the ‘A’ Shares and the [property]...

21. Duration and Winding-Up

The terms of this Agreement shall remain in full force and effect for a period of five years expiring on 31 March 2004. If Mr Simmers has not served on Mr Innes a notice

intimating his intention to effect the Buy-Out prior to [31 March 2004], then this Agreement shall terminate automatically without the requirement of any party to serve notice...”

9. In order to understand clauses 10 and 21, it is necessary to refer to some definitions in clause 1 of the Agreement. “The Buy-Out Price” was defined as “the aggregate of the Buy-Out Shares Price and the Buy-Out Properties Price”. “The Buy-Out Shares Price” was defined as being the higher of £400,000 or “...£400,000...plus half any gain in the net asset value of the company as disclosed by the balance sheet produced to 31 March 2004...”. The “Buy-Out Properties Price” was defined as meaning “...the higher of (i) [£2,100,000]; or (ii) the aggregate of [£2,100,000] and an amount equal to the figure brought out by the following formula: $\frac{1}{2} \times (\text{Buy-Out Valuation} - \text{£2.1M})$...”. The expression “Buy-Out Valuation” was defined as meaning “the valuation carried out by a valuer to be agreed between [Mr Innes] and [Mr Simmers] on or within one month prior to [31 March 2004]”. “The Buy-Out Expenses” meant “all legal and other expenses and outlays...incurred by Mr Innes in relation to the Buy-Out”.

10. Unfortunately, the plight of the pig industry did not improve, and consequently the venture did not flourish. On 10 February 2004, Mr Innes presented a petition for the winding-up of the company. The following day, Mr Simmers’s solicitors wrote to Mr Innes to “give notice” on behalf of Mr Simmers pursuant to the Agreement that he “intends to effect the Buy-Out of the Buy-Out Shares and [the property] as at...31 March 2004 all in accordance with the terms of the...Agreement”.

11. The parties discussed the appointment of a valuer to determine the Buy-Out Valuation, and the correct basis of that valuation. They agreed that Mr J E Rhind FRICS of Aberdeen & Northern be appointed valuer but they could not agree on the correct basis of the valuation. Mr Innes argued that the property should be valued with vacant possession, whereas Mr Simmers contended that it should be valued subject to the tenancy created under the Agreement (“the tenancy”). In letters from their respective solicitors, the parties each informed Mr Rhind as to how they said the property was to be valued.

12. Mr Rhind proceeded to carry out his valuation, and produced a report dated 26 March 2004 (“the Report”). Having devoted several

pages to describing the land and buildings constituting the property, with further details in appendixes, Mr Rhind then set out his valuation (“the Valuation”). It was divided into three parts. The first part set out the “Vacant Possession Value” which he assessed at £3,931,000. The second part consisted of a deduction for improvements, fixtures and farm payments, which resulted in a reduction of £226,000 to £3,705,000. The third part involved applying a “discount subject to tenancy”, in other words, a reduction in the vacant possession value on the basis the land was subject to the tenancy. Mr Rhind estimated the deduction as being 45% resulting in a “Value subject to a lease in favour of the firm Scotpigs & Co”, which was £2,038,000.

13. Following receipt of the Report, the parties adhered to their respective positions. Mr Innes’s solicitors contended that the total consideration due under clause 10 was £3,415,000 “namely half the gain on the [property] and £400,000 for the shares”, but Mr Simmers’s solicitors argued in a letter of the same date that the consideration was £2,500,000 on the basis that the value of the property as set out in the Report was less than the £2,100,000 specified in the Agreement. It was made clear on behalf of Mr Innes that he was prepared to complete the transaction at £3,415,000, but Mr Simmers was not prepared to complete at that price. Indeed, on the Lord Ordinary’s finding, Mr Simmers “could not have paid the Buy-Out Price (as he understood it to be) on 31 March 2004”.

14. Mr Simmers then began proceedings for specific implement, seeking an order that the sale of the property be completed for a consideration of £2,500,000. This was resisted by Mr Innes on the ground that specific implement should not be ordered at all, or, in the alternative, on the ground that, if specific implement was to be ordered, it should be in the sum of £3,415,000 and not £2,500,000.

15. After what appears to be, at least on the face of it, a surprisingly long trial with evidence of questionable admissibility, the Lord Ordinary gave a judgment (reported at 2006 SCLR 61) in which he effectively found in favour of Mr Innes on all points. In particular, he decided that specific implement should not be ordered for two principal reasons, namely that (1) time was of the essence for completion of the sale of the property on 31 March 2004, and Mr Simmers failed to complete on that date, and (2) in any event the Valuation put forward two values, namely a vacant possession value and a tenanted value, and consequently it was an ineffective valuation for the purposes of the Agreement. He also found that, on the true interpretation of the Agreement, the valuation

should have been on a vacant possession basis. Consequently, he assoilzied Mr Innes.

16. Mr Simmers reclaimed to the Inner House. During the hearing of his reclaiming motion, Mr Simmers accepted that vacant possession was a possible basis of valuation and consequently that, if specific implement was ordered, he would be obliged to pay £3,415,000 (subject to a slight adjustment not material for present purposes). He did not seek to reopen that issue in this appeal. Accordingly, the contention that the Valuation should have been on a tenanted basis has (in my view, quite correctly) been abandoned by Mr Simmers, and it is common ground that, if specific implement is to be ordered, it must be at a price which reflects the vacant possession value of the property.

17. The judgment of the Extra Division was given by Lord Osborne, who concluded that:

1. Time was not of the essence for completion of the sale of the property on 31 March 2004, and as no notice making time of the essence had been served, specific implement could and should be ordered in favour of Mr Simmers;
2. Given that it was common ground that the valuation should be on a vacant possession basis, the Valuation was valid for the purposes of the Agreement. Accordingly he decided that it was appropriate to order specific implement at a Buy-Out Price of £3,415,000 (subject to the small adjustment to which I have referred).

18. The reasoning of the Extra Division which led them to the conclusion that time was not of the essence for completion of the purchase of the land may be summarised as follows. First, clauses 10 and 21, when read together, created an option in favour of Mr Simmers to purchase the property on 31 March 2004, provided he had served a notice before that date. Secondly, time for the service of the notice was of the essence, as it involved the exercise of an option, a unilateral right, for which time limits are (at least normally) strict. Thirdly, the time for completion of the agreement, which arose as a result of the exercise of the option, was prima facie not of the essence, as the time fixed for completion of an agreement for the sale of land is (at least normally) not of the essence. Fourthly, far from undermining the presumption that time was of the essence in relation to completing the sale of the property on 31 March 2004, the terms of the Agreement strongly supported such

a conclusion. Fifthly, time had never been made of the essence by either party, and there was no reason why specific implement should not be ordered. Sixthly, Mr Rhind had valued the land on the correct, vacant possession, basis, so the Buy-Out Price could be determined in accordance with the Agreement.

19. Accordingly, the Extra Division held, the option was validly exercised by Mr Simmers, as the notice had been served before 31 March 2004, and the fact that completion did not take place on 31 March 2004, even though that might have been the fault of Mr Simmers, did not prevent his seeking specific implement, which was consequently ordered.

20. Mr Innes challenges the conclusion that time was not of the essence for the payment of the purchase price on two grounds. First, he says that, properly analysed, the Agreement does not envisage the option being exercised by service of the notice referred to in clause 21, but by tender of the purchase money under clause 10. In the alternative, even if the Extra Division was right in holding that the option was exercised in the service of the notice, Mr Innes contends that the normal rule that time is not of the essence for completion was rebutted by the terms of the Agreement.

21. In my view, each of these two grounds is without merit. So far as the first is concerned, I accept that it is somewhat odd to find the provision for a notice to exercise the option contained in a clause headed "Duration and Winding-up", but, if one reads the Agreement as a whole, it seems to me perfectly clear that the purpose of providing for a notice in clause 21 was to enable Mr Simmers to exercise the option. The notion that the option was to be exercised by Mr Simmers turning up with the money on 31 March 2004 is nothing short of absurd. The Buy-Out provisions can only work if (a) a notice in accordance with clause 21 is served, (b) a valuation of the "A" shares and the property then takes place as envisaged by clause 10 as expanded by clause 1, and (c) completion then takes place in accordance with clause 10. Completion will involve the normal procedure of the buyer paying the purchase price and the seller executing all relevant documents.

22. If Mr Innes were correct in his argument, the notice provided for in clause 21 simply has no purpose, as Mr Haddow QC, who appeared on his behalf, was constrained to concede. An interpretation of an agreement which renders a provision for a notice pointless is very

unlikely to be right. In those circumstances, as my noble and learned friend, Lord Rodger of Earlsferry pointed out, clause 21, by providing for what happens if such a notice is not served, strongly supports the conclusion, based on commercial common sense and necessity, that one must imply into clause 10 a term that, in order to exercise the option, Mr Innes has to serve a notice before 31 March 2004.

23. I turn to the alternative ground relied on by Mr Innes, namely that the presumption that time is not of the essence of completion of the bilateral sale agreement is rebutted in the present case. It is clear that “In a contract for the sale of heritage, where it is stipulated that the price is to be paid on a particular date, payment of the price on the appointed date is not, in general, an essential condition of the contract, and failure to pay on that date does not entitle the seller to rescind”: see *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 492. The law of Scotland and the law of England and Wales march together here (although on somewhat different jurisprudential bases): see *Visionhire Ltd v Britel Fund Trustees Ltd* 1991 SLT 883. Accordingly, time will only be of the essence where the contract so provides, or where “the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence”: see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 944.

24. There is no doubt that the Agreement does not expressly provide that time is to be of the essence in respect of the 31 March 2004 date in clause 10. However, as is apparent from paragraphs 52 and 58 of the reasoning of Lord Clarke, the argument advanced on behalf of Mr Innes which found favour with the Lord Ordinary was that the notion that time was of the essence of the date in clause 10 was apparent once one considered the Agreement as a whole. In particular, 31 March 2004 was “a potential date for the termination of the limited partnership. It was the date for the termination of the shareholders’ agreement if no notice of exercise of the option had been given” (see at 2006 SCLR 96 E-F).

25. Quite apart from any other point, it seems to me that that argument contains the seeds of its own destruction. As appears to have been accepted on behalf of Mr Innes (in the light of the words “potential” and “if no notice of exercise of the option had been given”) clause 21, although inartistically drafted, envisaged that the Agreement would end on 31 March 2004 unless, by that date, a notice exercising the option had been served, in which case the Agreement would continue, no doubt until the contract which came into existence on the

exercise of the option had either been completed or rescinded. So 31 March 2004 was not a fixed date for determination of the Agreement: on the contrary, it was liable to be extended beyond that date if the option was exercised by Mr Innes. In those circumstances, the whole foundation for the contention that time should be treated as being of the essence for the completion of the sale contract envisaged by clause 10 of the Agreement falls away.

26. Quite apart from this, I consider that, far from calling into question the presumption that time is of the essence in the present case, consideration of the provisions of the Agreement strongly supports the applicability of the presumption in this case. The fact that the notice under clause 21 could be served at any time up to and including 30 March 2004 shows that the parties cannot have envisaged that completion had to take place on 31 March 2004. Mr Innes would have had to be given time to consider and prepare the relevant documentation referred to in clause 10, and there would have to have been time for a valuation of the property and the “A” shares, and, indeed, the preparation of a balance sheet. As Lord Osborne said, “it would be quite impossible in practical terms for the buy-out transaction to be completed on the same date” as, or even within a few days of, the service of the clause 21 notice.

27. Quite apart from this, as my noble and learned friend Lord Scott of Foscote said during argument, the whole nature of the Agreement, at least from the point of view of Mr Simmers, was that it represented, to a substantial extent, a medium-term financing arrangement for a business that had got into difficulties. The purpose of the buy-out arrangement was to enable him to get his business, including the property, back provided he repaid the money which Mr Innes had put up, together with an uplift reflecting any subsequent increase of value of the property or the company. The nature of the transaction, as it seems to me, is such that it is very unlikely that the parties would have envisaged that time would be of the essence for completing that repurchase once Mr Simmers had exercised his option to do so.

28. Mr Haddow suggested, perfectly reasonably, that one should look at the position of Mr Innes as well as that of Mr Simmers. However, Mr Innes was entitled to remain in occupation of the property and, indeed, to receive interest in the form of rent under the lease, until completion of the Buy-Out. It is fair to add that, in the event, because of the company’s difficulties, no rental-interest was paid for some time, but Mr Innes has had the benefit of occupying the property for the past four years.

29. I turn, then, to Mr Innes' second argument, namely that the Valuation was not effective for the purposes of the Agreement, and, in particular, did not satisfy the definition of "the Buy-Out Valuation" in clause 1. This seems to me to be an equally weak point. In order to be a valuation which satisfies the requirements of the Agreement, two requirements have to be satisfied. First, the valuation has to be carried out by a valuer agreed on by both parties; secondly, the valuation has to be one which is in accordance with the terms of the Agreement, namely a valuation of the whole of the property on a vacant possession basis. It is quite clear the figure of £3,705,000 satisfies those two fundamental requirements. It was a figure arrived at by Mr Rhind, who was a valuer agreed on for this purpose by both parties; it is also a valuation of the whole of the property with vacant possession.

30. The only criticism which is made of the Valuation is that, having valued the property on the correct basis, namely with vacant possession, Mr Rhind went on to discount that value by allowing for the fact that the property was subject to a tenancy. Whether, on a fair reading of the Report, Mr Rhind effected two valuations of the property, one with vacant possession and the other subject to a tenancy, or whether he carried out one valuation, namely on a tenanted basis, but, in the process of carrying out that valuation, he valued the property on a vacant possession basis, appears to me to matter not a jot. The essential point is that, in the Valuation contained in the Report, Mr Rhind plainly valued the property on the right basis. The fact that he went on, whether in addition or instead, to value the property on the wrong basis is irrelevant, and cannot vitiate the effectiveness of what was undoubtedly his valuation on the right basis.

31. In view of the fact that Mr Rhind has been criticised for carrying out the Valuation while there was a dispute between the parties as to its correct basis, I should like to add this. It seems to me that, where a contract provides for a payment to be made on the basis of a valuation, and the parties disagree as to the proper basis of valuation, there is frequently much to be said for a valuer proceeding to value on each of the two alternative bases, with a view to leaving it to the parties then to decide how to proceed. In such a case, it seems to me that the valuer should state which basis he prefers, as, otherwise, there would be no definitive valuation, without a subsequent agreement or court ruling. Having seen the two valuations the parties can then decide whether to accept one valuation, to compromise, or to seek the assistance of the court as to the proper basis of valuation. It may frequently transpire, for instance, that the difference of principle between the parties does not in

fact lead to a great difference in the two valuations, or that, once the two valuations are obtained, it is easier for the parties to compromise. There may, of course, be circumstances in which it would be inappropriate for a valuer to proceed in such a way, either because of the terms of the contract or because of the nature of the dispute. However, in the present case, it seems to me that Mr Rhind proceeded in an eminently sensible way.

32. In all these circumstances, I have no hesitation in concluding that this appeal should be dismissed.