

Neutral Citation Number: [2014] EWHC 2835 (Ch)

Case No: 3 NE 30105

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG

Date: 21 July 2014

Before :

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

Between :

BANK OF SCOTLAND PLC

Claimant

- and -

(1) JOHN THOMAS WAUGH

(2) KATHLEEN WAUGH

(3) TIMOTHY ROHAN GRAY

(4) IAIN ERNEST WILLIAMS

Defendants

Ian Wilson (instructed by **Shepherd and Wedderburn LLP**) for the **Claimant**
John Waugh appeared as a Litigant in Person

Hearing date: 17 June 2014

Approved Judgment (No. 2)

Judge Behrens :

Introduction

1. There are before me two applications. One is an application by Mr Waugh, which in effect invites me to revisit various parts of the judgment I have handed down earlier this morning. The other is an application by the Bank for orders

- (a) for permission to amend the Particulars of Claim to plead that Mr and Mrs Waugh are obliged under the terms of the Charge to perfect the instrument by executing it as a deed,
- (b) for an order (by way of specific performance) requiring them to do so, and
- (c) in default, for an order under section 39 of the Senior Courts Act 1981 that the Charge be validly executed as a deed by a District Judge of the Chancery Division

Mr Waugh's application

2. There may be a technical point in that I formally handed down the judgment earlier this morning and it may be arguable, that that formal handing down makes it too late for me to reconsider it. However, Mr Waugh's application was before me prior to my handing down the judgment. In those circumstances it would be unfair to Mr Waugh simply to dismiss his application on the grounds that I have formally handed down the judgment earlier this morning. I have to confess that I had not appreciated the extent to which Mr Waugh was wishing to invite me to reconsider the matters that were in my judgment. If I had appreciated that I certainly would have dealt with it before formally handing down the judgment. Therefore, as I say, I think it right to consider whether I ought to reconsider any aspects of my judgment.

The Power to reconsider

3. There is an acknowledged power of the court to reconsider a judgment at any time before it is handed down. It is a power which is to be exercised extremely sparingly, but it exists. The reason it is to be exercised sparingly is to prevent matters that have already been argued being argued again or to prevent parties who have afterthoughts from raising them, but on the other hand there are circumstances where it is appropriate and the judge always has a discretion to consider the points that have been raised.

4. Thus in *Robinson v Fernsby* [2003] EWCA Civ 1820 May LJ said at paragraphs 91 and 94:

If a judgment has not been handed down or delivered, it has not been given. Until it is given, it is of no effect. Granted that there are obvious reasons why it would be unfortunate, as it has been in this case, for a judge to alter a draft judgment which has been handed to the parties, it remains a draft judgment which, in my view, the judge is at liberty to alter. The jurisdiction to do so is not in doubt. The question is whether "exceptional circumstances" or something less rigorous will enable him to do so in a particular case.

Parties should understand that this procedure is not an invitation to pick holes in the substance of the draft judgment nor to invite the court to reopen or add to contentious

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matters. The court will only exceptionally make material alterations to a draft judgment provided in this way. So perhaps the uninformative label "exceptional circumstances" needs to be appended to the exercise of the jurisdiction. I personally prefer Rix LJ's "strong reasons", but that again is only a label. The question whether to exercise the jurisdiction can only depend on the circumstances of the particular case.

5. In this case the bank is seeking an additional remedy, which I had expressly indicated would be dealt with when the judgment was handed down. In those circumstances I do think it appropriate that I should at least consider the points raised by Mr Waugh.

The Facility Letter

6. Mr Waugh has drawn to my attention various authorities on s.2 of the Law of Property Act (Miscellaneous Provisions) 1989 and has repeated submissions, firstly that the facility letter was within s.2 and secondly, that the legal charge was not enforceable as a contract to create a legal charge or as an equitable mortgage.

7. The authorities relied on by Mr Waugh do not, with respect, assist him. For reasons that are set out in my judgment, the facility letter is not an agreement within s.2. That has been established by Lloyd LJ's judgment in the Court of Appeal and for those reasons, as I set out in my judgment, it is not open to Mr Waugh to go behind that decision. I explain this in paragraphs 37 and 46 of my judgment.

The Legal Charge

8. Mr Waugh referred me to a number of authorities including *United Bank of Kuwait v Sahib* [1995] 2 AER 973 and *Murray v Guinness* [1998] NPC 79. However these authorities are all authorities where there is no compliance with s.2.

9. In this case the legal charge was signed by both parties and insofar as it incorporated the conditions they are expressly referred to in the legal charge. Thus, the legal charge did comply with s.2. It follows that Lightman J's observations in *Murray v. Guinness* about the effect of non-compliance with s.2 do not assist Mr Waugh.

10. For the reasons that I gave in paragraphs 83 - 85 of my judgment that the legal charge creates an equitable charge and/or an agreement to create a legal charge incorporating the conditions.

11. Mr Waugh also referred me to *Herbert v Doyle* [2010] EWCA Civ 1095, where Arden LJ refused to allow an estoppel to override s2 of the 1989 Act. It is not necessary for me to go into the detail of that case, because it will be recalled that I ruled in paragraph 81 of my judgment that there is no estoppel, which prevents the Trustees from alleging that the legal charge did not comply with s.1.3 of the 1989 Act. However, as I pointed out in paragraph 60 of my judgment this does not mean that the conveyance is void for all purposes, it is only void for the purpose of conveying or creating a legal estate.

Amount of debt

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12. The next matter that Mr Waugh raised related to the financial figures and he asserted that the actual monies that had been paid back came to more than the monies that had been lent by a figure of approximately 49,000. This was, of course, to ignore all the terms in relation to interest and the like, which were contained in the facility letter. Furthermore, as Mr Wilson reminded me, there was no real documentary basis for the assertions which were being made by Mr Waugh. No documentary evidence was exhibited to any of his witness statements and therefore, of course, Mr Wilson was not in a position to deal with the minutiae of the figures.

13. In paragraph 32 of my judgment I drew attention to the provisions of clause 9 of the facility letter. Any determination by the bank or any amount of principal interest commission is in the absence of manifest error conclusive and binding on the trustees. In paragraph 49 of my judgment I said that there was no realistic prospect of Mr Waugh establishing a manifest error. I do not think that the assertions now made by Mr Waugh require me to reconsider that part of my judgment.

The Letter of 7 January 2011

14. Finally, a number of detailed submissions were made about the effect of the letter of 7 January 2011. It is I think important in the light of those submissions and the serious allegations that Mr Waugh was prepared to make against the bank, its solicitors and various other people who were involved in the transaction, to bear in mind the chronology. It is right, of course, to note that the letter was not sent Mr Waugh. It was sent to Mr Gray whatever the previous history may have been between Mr Gray and his indemnity insurers and Mr Waugh.

15. As far as the bank is concerned the first time this letter was raised was at the hearing before His Honour Judge Kaye QC on 28 April 2014. At that hearing Judge Kaye adjourned the application at Mr Waugh's request in order for him to find the letter which he said existed. The letter was in fact found by the solicitors for the bank, who disclosed it by a letter on 8 May 2014. That gave rise to a statement from Mr Waugh which is dated 5 June 2014, which deals with a number of points, but paragraphs 12 and 13 assert:

"Regardless of the statement of account which is vigorously disputed, the letter from Shepherd and Wedderburn dated 7 January in paragraph 2 says: `For the avoidance of doubt, however, we can confirm that the trustees are not personally liable for the debt in the name of the trust.'" (Quote unchecked)

16. The next paragraph repeats that assertion. It is to be noted that there is nothing in paragraphs 12 and 13 which asserts any ground which could give rise to an estoppel. It is simply an assertion in relation to what paragraphs 12 and 13 say.

17. Mr Waugh today has sought to enlarge on his assertions in relation to that letter and has explained that it has caused him a great deal of concern. He set out in some detail in his latest witness statement discussions he had with Mr Gray and/or his indemnity insurers to attempt to find the letter. He made a number of allegations against Mr Gray, which he is not here to answer and about which I shall say nothing.

18. In my view Mr Waugh has still not demonstrated any prejudice to him as a result of what is said in that letter. Indeed, the nearest he came to asserting prejudice was that the fourth defendant, Mr Ian Williams, has become a trustee after the date of the letter. However there is no claim against Mr Williams in relation to the monies due under the facility letter; the claim

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against Mr Williams is under his guarantee. The claim is not before me today. Thus, the new material which Mr Waugh seeks to add in relation to the letter does not cause me to reconsider what I have said in paragraphs 50 to 54 of my judgment.

Mr Waugh's history

19. Mr Waugh also invited me to reconsider paragraph 55 of my judgment. He wished to emphasise that the costs of the bankruptcy were not part of the monies due and also that the sum due to the Inland Revenue was only modest, some 350.

20. I make it clear, as I noted in paragraph 56 of my judgment that I am not passing any comment adverse or otherwise in relation to Mr Waugh's history.

21. In paragraph 55 I simply attempted to summarise what was said in the letter dated 16 April 1989 from Dickinson Dees. I did not attempt to comment on the assertion that Mr Waugh had paid monies after he was discharged from his bankruptcy nor on the fact that there were still some sums unpaid as a result of the bankruptcy. As I stated in paragraph 56 that is to say that the past history is not in fact relevant to the issues which are before me.

Mr Gray's liability

22. The only other matter (and it is not really clear whether this is being raised by Mr Waugh) relates to the possible liability of Mr Gray beyond the facility. That is a matter which was not raised before today and as Mr Gray is not here even to answer it in any event, I do not think it is a matter that I need deal with today.

Conclusion

23. In those circumstances I am not willing to reconsider my judgment or to alter its effect in any way.

The Bank's application

24. I move on therefore to the application made by the bank. Mr Wilson reminds me, that clause 3 of the legal charge incorporates the bank's standard conditions and clause 14 of the standard conditions specifically contain a requirement for further assurance in the following terms:

You shall take whatever steps and execute whatever documents we may require for:

14.1 The purpose of perfecting and giving effect to the Charge ...

25. The bank wrote both to Mr and Mrs Waugh and indeed to Mr Gray on 27 June inviting them to execute a new charge in a way that complied with s.1.3 of the 1989 Act. The new charge was identical to the charge of 8th August 2003 save that the name of the trustees was amended to comprise Mr and Mrs Waugh and Mr Gray rather than the reference to the company contained in the original charge. The new charge provided for the attestation of the trustees' signatures. There were no other amendments.

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26. The Bank's request was thus a request under condition 14 that Mr and Mrs Waugh execute a further document for the purpose of perfecting and giving effect to the charge.

27. Mr Gray complied with that request, but Mr and Mrs Waugh have not. Accordingly, there is now an application before me firstly to amend the Particulars of Claim so as to include a claim for specific performance of condition 14 and for me to order that they execute the charge.

Section 39(1) of the Senior Courts Act 1981

28. The bank anticipates that notwithstanding an order of the court the history of this case shows that Mr and Mrs Waugh are unlikely to execute the charge and they therefore also invite me to exercise my power under s.39(1) of the Senior Courts Act 1981 to direct that if they do not execute the charge within a time specified by the court the charge can be executed by a person that the court may nominate for that purpose.

S. 39 provides

(1) Where the High Court [or family court] has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person-

(a) neglects or refuses to comply with the judgment or order; or

the High Court [that court] may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose.

(2) A conveyance, contract, document or instrument executed or indorsed in pursuance of an order under this section shall operate, and be for all purposes available, as if it had been executed or indorsed by the person originally directed to execute or indorse it.

29. The notes to paragraph 9A- 138 of Vol 2 of the 2014 White Book make clear:

An order under this section should not be made in anticipation of a failure to execute unless the defendant has already shown by his conduct that he refuses and will refuse to execute (*Savage v Norton* [1908] 1 Ch. 290).

30. I take the view that this case does fall within the proviso to the note. Indeed Mr Waugh, who at all times has been frank with the court, made it clear that he was not in a position to tell me that he would comply with any order that I made. I made it clear that he was not required to answer my question; however his answer together with the extensive previous history in this case persuades me that it is unlikely that if I make an order he and his wife will refuse to execute the charge. Therefore, the effect of making a s.39(1) order at this stage will be to reduce the necessity for a further hearing.

31. A further point has arisen in the course of discussion. It relates to the method by which the appointed person should execute the deed. In my view, execution by an officer of the court is execution by an individual and therefore, under s.1.3 of the 1989 Act such execution needs to be witnessed. It seems to me therefore, that the order should make it clear if and in so far as the

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document is not properly executed by Mr or Mrs Waugh, any execution by an officer of the court should be attested in accordance with s.1.3 of the 1989 Act.

32. The question arises as to who that officer should be. In my view the appropriate person is a District Judge of the Leeds District Registry authorised to deal with matters in the Chancery Division.

Conclusion

33. It follows that the applications by the bank succeed, but the application by Mr Waugh for me to reconsider my judgment fails.
