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**Neutral citation number: [2019] EWHC 3830 (Ch)**

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS IN MANCHESTER  
BUSINESS LIST (ChD)

Case No: E30MA305

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M60 9DJ

Friday, 8 November 2019

Before:

HIS HONOUR JUDGE HODGE QC  
Sitting as a Judge of the High Court

B E T W E E N :

MARK DAMIAN CLARKSON

Claimant/Respondent

- and -

(1) FUTURE RESOURCES FZE  
(2) PRADEEP SINGH  
(3) HOLY GROUP LTD  
(4) SUDARSHAN SADANA  
(5) WHITECARES HOLDINGS LTD  
(6) TEN ACRES HOLDINGS LTD  
(7) ANDREW PICKLES  
(8) CERTUS HOLDINGS LTD

Defendants/Applicants

Defendants

**APPROVED**

**MR WILLIAM BUCK** (instructed by **TWM Solicitors LLP**, Guildford) appeared on behalf of the 1st to 4th Defendants/Applicants

**MISS TINA RANALES-COTOS** (instructed by **Taylor's Solicitors**, Manchester) appeared on behalf of the Claimant/Respondent.

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**APPROVED JUDGMENT**

JUDGE HODGE QC:

1 This is my extemporary judgment in an application by the first to fourth defendants (to whom I shall refer as “the lenders”) in proceedings that were brought against them (and four other defendants) by the claimant, Mr Mark Damian Clarkson, in claim number E30MA305. By that claim, Mr Clarkson had sought declaratory and other relief in relation to the validity of certain contracts affecting a valuable potential development property, a brownfield site in Manchester, known as “Ten Acres”. Essentially, in those proceedings Mr Clarkson claimed to be the ultimate beneficial owner of the Ten Acres property and, as such, sought declaratory relief in relation to the validity of various contracts.

2 That claim was ultimately compromised by a Tomlin order incorporating terms of settlement within a settlement agreement dated 12 November 2018. At that time, Mr Clarkson was advised by his present solicitors, Taylors, with the assistance of advice from leading counsel practising in Manchester. The Tomlin order stayed all further proceedings against the first to sixth defendants upon the terms set out in a confidential schedule except for the purpose of enforcing those terms; and each of the claimant and the first to sixth defendants were given permission to apply to the court to enforce those terms without the need to bring a new claim.

3 The settlement agreement contained various recitals by which they agreed that certain facts and matters were true and that no party should assert as against any other any fact or matter which was inconsistent with any of the recited matters. There then followed the terms of the settlement agreement itself.

4 Clause 2 agreed various matters in full and final settlement of the released claims. They included the total amount outstanding on the loan from the lenders and how that was to be

repaid. By clause 2.7, following repayment of the revised debt on the repayment date or earlier, and following payment of all interest which had accrued by the date of such final repayment, the lenders were immediately to transfer the shares in Whiteacres Holdings Limited, which was the holding company of Ten Acres Holdings Limited, which owned the property, to an entity known as “TPT Corporate Services”. Clause 3 dealt with payment, and clause 3.2 acknowledged and agreed that the claimant was free to facilitate the making of the payments to the lenders in discharge of Ten Acres’ liability to the lenders (as provided by clause 2).

5 Clause 4.1 was an agreement whereby the parties agreed and declared unconditionally and irrevocably that the contracts were valid and binding on Ten Acres and Whiteacres under all relevant laws. By clause 4.2 the parties agreed and declared that the lenders legally owned the shares in Whiteacres. Nothing was said about their beneficial ownership. By clause 4.3, the claimant agreed not to bring any claims at any time, whether in this jurisdiction or any other, against the lenders and various other entities in relation to the same. By clause 4.4, the claimant agreed that he should not procure, permit, assist, or encourage TPT Services and/or any other third party in pursuing any action at any time, whether in this or any other jurisdiction, against the lenders in relation to Ten Acres, Whiteacres and/or the property. Clause 4.5 concluded with a statement that nothing in the agreement should be taken to mean that any of the first to sixth defendants accept that the claimant has any interest in the fifth or sixth defendants, nor any locus to pursue his existing claims against the seventh or eighth defendants.

6 Clause 5 set out what was to happen in the event of a “default”, which was an expression defined in clause 5.1. By clause 5.2 the parties agreed that:

- 1 On the occurrence of an event of default the revised debt, plus accrued interest, less any payments made pursuant to clause 2, should become immediately due and payable by Ten Acres;
  
- 2 All of the provisions of clause 2 of the settlement agreement should immediately cease to apply and the lenders should not be under any obligation to transfer the shares in Whiteacres to TPT Corporate Solutions;
  
- 3 The lenders legally and beneficially validly own the shares in Whiteacres (including beneficially);
  
- 4 Any and all benefits derived from their ownership of the shareholding in Whiteacres should be solely that of the lenders; and
  
- 5 The claimant should forthwith take all steps necessary to remove all and any unilateral notices, restrictions and cautions which he had caused, or was in the process of causing, to be recorded at HM Land Registry in relation to all and any titles to the property.

7 Clause 6 was headed "Release". It provides that:

"The claimant hereby releases and forever discharges all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to him or to the law (of any jurisdiction), and whether in law or

equity, that he has ever had, may have, or hereafter can, shall or may have against any of the First to Sixth Defendants arising out of or connected with:

1 the claim; and

2 the underlying facts relating to the claim;

(together, the ‘released claims’).”

8 By Clause 7 the claimant agreed not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any of the first to sixth defendants any action, suit or other proceedings concerning the released claims in this jurisdiction or any other.

9 It is common ground that an event of default occurred. Apart from the first payment due to the lenders, no further payments have been made, whether on the due date or dates or at all.

10 In those circumstances, the present application was issued by the lenders seeking an order lifting the stay in the Tomlin order and requiring the claimant to sign and return to the lenders’ solicitors the application to remove a unilateral notice from the Land Registry title to the relevant property.

11 The application was originally returnable on 1 November but, at the request of the claimant, it was adjourned to today’s applications list in Manchester (on 8 November). The claimant had sought a longer adjournment and now seeks an order adjourning the present application until after a date in January when there is presently listed an application by the claimant to

discharge a freezing injunction made against him as long ago as 4 June in other proceedings. The claimant says that until that freezing injunction has been discharged, he is in no position to bring proceedings, which he had first threatened on 1 March this year, seeking to challenge certain of the provisions of the settlement agreement as unlawful penalties. In particular, the claimant seeks to challenge the provisions of clause 2.3 whereby, if the debt was not repaid in full by 4 pm on 28 February 2019, the balance of the debt should immediately increase by a further £1m; and also the provisions of clause 5.2, whereby on the occurrence of an event of default, the lenders should be under no obligation to transfer the shares in Whiteacres to TPT Corporate Services, but the lenders should legally and beneficially validly own those shares (including beneficially) and be solely entitled to any and all benefits derived from their ownership of the shareholding in Whiteacres.

- 12 For the purpose of the present application, I am content to proceed on the footing that the claimant, or someone entitled to challenge the settlement agreement, has an arguable case that those two provisions are indeed unlawful penalties in accordance with the authoritative re-statement of the law by the Supreme Court in the conjoined cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.
- 13 The evidence on this application is first of all contained in the second witness statement of Mr Simon Brew, a solicitor and partner in TWM Solicitors, who act for the lenders, dated 28 October 2018 together with exhibit SBL. In response to that evidence the claimant relies upon his second witness statement dated 4 November 2019; a witness statement from a Mr Richard Luxmore dated 4 November 2019: he is a chartered accountant and a former director of Funding Secure Limited; an unsigned witness statement – at least so far as the copy in the hearing bundle is concerned – from Mr Glenn Thomas, also dated 4 November

2019; and, finally, the claimant's third witness statement dated 6 November 2019, together with all of their respective exhibits. There is, in response a third witness statement from Mr Vijay Gandhi, a director of the third defendant, dated – I think – 6 November, together with exhibit VG2.

14 The lenders are represented by Mr William Buck (of counsel) and the claimant is represented by Miss Tina Ranales-Cotos (also of counsel). Both counsel have submitted detailed written skeleton arguments. At the court's suggestion, Miss Ranales-Cotos addressed the court first for a little under an hour. In the light of observations from the court during the course of Miss Ranales-Cotos's address, Mr Buck responded only briefly; and Miss Ranales-Cotos replied equally briefly.

15 Miss Ranales-Cotos, for the claimant, first of all seeks an adjournment. I reject that application for a number of reasons. First, Miss Ranales-Cotos says that this matter should be adjourned until the application to discharge the freezing injunction has been heard, so that funds can be released to enable the claimant to bring the proceedings which his solicitors, Taylors, had threatened as long ago as 1 March, and in relation to which draft particulars of claim, settled by Mr Neil Berragan (of counsel) appear at pp.2 through to 10 of exhibit MDC2. My reasons for rejecting the application for an adjournment are, first, that I see no reason why those proceedings could not have been pursued long before now. The initial letter from Taylors was dated 1 March 2019. It received a peremptory response from the solicitors acting for the lenders by a letter dated 6 March 2019. That letter concluded:

“Should your client commence proceedings, we shall immediately list an application to strike them out as an abuse of process before His Honour Judge Hodge QC and will seek our client's costs on an indemnity basis”.



- 16 There appears to have been no response to that letter from the claimant's solicitors until 14 August 2019, when Taylors stated that they were instructed to issue proceedings alleging (amongst others) that the specific terms of the settlement agreement amounted to penalties, in particular clauses 2.3 and clauses 5.2.2 to 5.2.5.
- 17 Thus, there had been a delay of almost six months in pursuing the threatened proceedings by the claimant; and when the threat was repeated there was no suggestion that there was any impediment to the issue of those proceedings by reason of the existence of the freezing injunction. That is as I would have expected. The freezing injunction contained the usual provision (at para.11.1) excepting from the order a reasonable sum for expenditure on legal advice and representation. Miss Ranales-Cotos submitted that that should impliedly be confined to legal advice and representation in relation to the proceedings the subject matter of the freezing injunction. I would not accept that; but, in any event, in accordance with normal principles relating to the grant of freezing relief, I would have expected any court to have been prepared to order the release of sufficient monies to enable proceedings to be brought. As I say, Taylors did not consider the freezing injunction to be an impediment to the threat to bring proceedings some two months after the freezing injunction was granted.
- 18 Secondly, and in any event, however, it seems to me that separate proceedings are not necessary. The court is in a position to determine whether the argument founded upon unlawful penalties has any merit in considering the lenders' application to enforce the terms of the settlement agreement incorporated within the Tomlin order. I therefore turn to consider that.

- 19 As I say, I do so on the footing that there is an arguable case that clauses 2.3 and 5.2.2, 5.2.3 and 5.2.4 are unlawful penalties. It does not seem to me, however, in the light of the provisions of the settlement agreement, that the claimant is in any position to contend that any of the provisions of the settlement agreement constitute unlawful penalties. That is because of the release in clause 6, and the agreement not to sue in clause 7, when read also with the acknowledgment in the last sentence of clause 4.5 of the settlement agreement.
- 20 Miss Ranales-Cotos emphasises that the release in clause 6 is not general but is specific. However, it specifically relates to claims arising out of or connected with the claim or the underlying facts relating to the claim. When one looks at the draft particulars of claim, para.7 pleads that in the course of the claim the claimant claimed to be the ultimate beneficial owner of Whiteacres and, consequently, Ten Acres, which owned the brownfield site known as the former Jacksons Brickworks. Thus, the whole thrust of the particulars of claim is that the original claim had involved the assertion by the claimant that he was the ultimate beneficial owner of Whiteacres and, consequently, the property. At para.20 of the draft particulars, it was said that accordingly, and in all the circumstances, the claimant has standing to enforce the material terms of the agreement for his own benefit, as the ultimate beneficial owner of shares in Whiteacres, subject to the legal ownership of the lenders and the terms of the agreement.
- 21 It seems to me that that assertion that he is the ultimate beneficial owner of the shares in Whiteacres is an essential part of the claim which was expressly released by clause 6. It therefore seems to me that Mr Clarkson, the claimant, is no longer in any position to seek to rely upon his ultimate beneficial ownership of shares in Whiteacres in order to challenge the settlement agreement.

- 22 When this point was put to Miss Ranales-Cotos, her answer was that the claimant is the only individual who would have the standing to bring the claim in respect of penalties or to seek relief from forfeiture. I am not sure that that is correct because, under the terms of the settlement agreement, and but for one of the clauses asserted to be an unlawful penalty, on repayment the shares would pass to TPT Corporate Services. It seems to me that that entity would therefore be able to maintain a claim.
- 23 I acknowledge that under the terms of the settlement agreement, the claimant, by clause 4.4, has agreed that he shall not procure, permit, assist, or encourage TPT Services and/or any other third party to pursue any action against the lenders (amongst others) in relation to Ten Acres, Whiteacres and/or the property. But that provision is not binding on TPT Corporate Services itself.
- 24 Whether for good or ill, and whether or not the lenders may, as Miss Ranales-Cotos asserts, obtain a windfall, the fact is that by the terms of the settlement agreement, entered into with the benefit of legal advice from solicitors and leading counsel, the claimant has bargained away his right to assert that he is the ultimate beneficial owner of the shares in Whiteacres as against the lenders.
- 25 Miss Ranales-Cotos submitted that she would also seek to pray in aid the terms of clause 2.7 of the agreement but, again, that does not assist the claimant, as distinct from TPT Corporate Services. Miss Ranales-Cotos then submitted that Mr Clarkson had the necessary standing because he was the only person who was required to remove the unilateral notice and if there was a penalty, that clause was unenforceable. She also pointed to clause 3.2, which acknowledged and agreed that the claimant was free to facilitate the making of payments to the lenders in discharge of Ten Acres' liability to the lenders. Again, it seems to me that

neither of those provisions gives Mr Clarkson any standing to challenge the relevant provisions of the settlement agreement as a penalty.

26 Miss Ranales-Cotos submitted that the lenders had mounted a pincer movement to secure a stranglehold on Mr Clarkson's funds to enable the lenders to be repaid. She submitted that an adjournment for a few short months would be proportionate, given: (1) The value attributed to the property, some £26.5m on a forced sale basis, and a residual value of in excess of £37m (which Mr Clarkson asserted was less than the true value, which he had put at £40m); (2) the fact that the lenders were adequately secured; and (3) the fact that interest continued to accrue. She also prayed in aid Mr Clarkson's concerns about money laundering.

27 She submitted that the court should adjourn the matter to allow the issue concerning the penalty clauses to be determined. The fact is, however, that if Mr Clarkson lacks the necessary standing to challenge the settlement agreement because he is precluded from asserting that he is the ultimate beneficial owner of Whiteacres, then it would be pointless to prolong matters and to grant an adjournment. The lenders assert that they have a beneficial sale in view which may be lost if the hearing of this application is delayed.

28 I therefore reject the application for an adjournment.

29 Mr Buck in his short response provided a further answer to the opposition to the application to enforce the Tomlin order. He pointed out that under the terms of para.24 of the draft particulars of claim, the claimant acknowledged that the lenders remained entitled to be repaid the original debt, together with accrued and accruing interest, although not the additional penalty of £1m.

- 30 Paragraph 25 of the draft particulars acknowledged that the lenders were entitled to retain legal ownership of the shares in Whiteacres by way of security pending repayment of the outstanding debt, together with interest. Paragraph 26 also acknowledged that the defendants were entitled to realise their security by the sale of the shares in Whiteacres, alternatively by the sale of the shares in Ten Acres held by Whiteacres, alternatively by the sale of the property, provided the defendants then accounted for the balance remaining after repayment of the original debt, the interest, and the proper and reasonable costs of sale.
- 31 In order to effect a sale of the property, the unilateral notices needed to be removed. The claimant is recognising, in para.26, that one of the ways of realising their security which is available to the lenders is the sale of the property, which necessitates the removal of the unilateral notice.
- 32 Again, I accept that submission. Even if there is a valid challenge to the increase in the debt by £1m, and the extinction of the equity of redemption over the shares in Whiteacres, on the footing that they are unlawful penalties, in my judgment that in no way affects the ability of the lenders, now that there has been an acknowledged event of default, to require the claimant to comply with his contractual obligation to submit a unilateral notice.
- 33 I do not consider that concerns about money laundering, which are hotly disputed by the lenders and their witnesses, afford any reason why the property should not be sold. Any concerns about money laundering are not something which gives the claimant the right to refuse to comply with the obligation he entered into under the terms of clause 5.2.5 of the settlement agreement to take all steps necessary to remove all and any unilateral notices which he has caused to be recorded at HM Land Registry in relation to the property.

34 So, for those reasons I refuse the request for an adjournment; and I will make an order in the terms sought by the lenders, lifting the stay and enforcing compliance with clause 5.2.5 of the settlement agreement.

(Short break)

35 I now, having delivered my substantive extemporary judgment, have to address the issue of costs. Mr Clarkson has failed in resisting the application, and it is therefore right that costs should follow the event and that he should pay the costs of the application. Mr Buck submits that they should fall to be assessed on the indemnity basis.

36 Although Mr Clarkson has been unsuccessful, I do not consider that his defence of the application has been so far out of the norm as to justify an indemnity costs order in accordance with normal civil procedure principles.

37 So far as clause 9 of the settlement agreement is concerned, that provides that the claimant hereby indemnifies and shall keep indemnified the first to sixth defendants against all costs and damages, including the entire legal expenses of the first to sixth defendants incurred in all future actions, claims and proceedings in respect of any of the released claims which they may bring against another party.

38 I am not satisfied that this is litigation that properly falls within the scope of that indemnity clause. This was an application to remove the stay imposed by the Tomlin order and to enforce the terms of the settlement agreement. It does not seem to me that this was a

released claim brought against another party to the settlement agreement, and therefore I see no reason to order costs to be assessed on anything other than the standard basis.

39 Turning now to the statement of costs, I do consider that the hourly rate claimed is rather on the high side. Looking at the matter in the round, I propose to address that by a notional reduction in the amount equivalent to the increase that I would have allowed in the number of hours spent in attendance at the hearing. If one were to have allowed a further five or six hours, it seems to me that that more or less cancels out the high hourly rate charged by the lender's solicitors.

40 It does seem to me that there should be a reduction of about £1,000 in terms of work done on documents. It does seem to me that there should be a reduction in counsel's fees by £3,000. On that basis, I would propose to summarily assess the costs, exclusive of VAT, in the sum of £17,229.50. VAT will be added to those if applicable. So, I summarily assess the costs at £17,229.50.

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**CERTIFICATE**

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**\*\* This transcript has been approved by the Judge (subject to Judge's approval) \*\***