



Neutral Citation Number: [2022] EWHC 1369 (Ch)

Case No: C31BS166

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 9 June 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) JOHN MICHAEL GEE	<u>Claimant/</u>
(2) JOHN P GEE & SONS LTD	<u>Applicants</u>
- and -	
(1) THE ESTATE OF JOHN RICHARD GEE	<u>Defendants/</u>
(2) ROBERT GEE	<u>Respondents</u>

William Moffett (instructed by **Thrings LLP**) for the **Claimant/Applicant**
Francis Ng (instructed by **Royds Withy King**) for the **Defendants/Respondents**

Hearing dates: 11 March 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Thursday 9 June 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by the claimant (who is the first applicant) and the second applicant by notice dated 10 December 2021 seeking orders for “(a) the second applicant to be added as a second claimant,(b) specific disclosure,(c) an enquiry to determine the defendants’ breach of a court order dated 14 February 2019 and the appropriate relief; and (d) further directions...” The application is supported by a witness statement dated 10 December 2021 from Robert James, who is the claimant’s solicitor, and opposed by a witness statement of the second defendant. The matter was argued before me remotely, via MS teams, by William Moffett and Francis Ng of counsel. I am grateful to both of them for their cogent and well expressed arguments.
2. This application follows an earlier one made to me in June 2020, for various orders arising out of a judgment given on 11 June 2018 in the claimant’s favour at a trial before Birss J (as he then was) which took place in April 2018 over 6 days. His judgment is to be found under neutral citation number [2018] EWHC 1393 (Ch). The judgment on the earlier application before me is to be found under neutral citation number [2020] EWHC 1842 (Ch). Essentially, the 2020 application complained that the defendants had not complied with the orders of Birss J. I found the complaint justified, and made further orders intended to lead to the enforcement of those earlier orders. The claimant comes back to me now and applies for further orders on the basis of allegations of other, different breaches of the original orders.
3. After this application was issued, but before it was heard, sadly the first defendant died, on 29 December 2021. No grant of representation has been taken out to his estate, and it is said that the estate may be insolvent, in which case it is unlikely that anyone will apply for a grant. At the hearing, the claimant applied for an order that the second defendant represent the estate of the first defendant under CPR rule 19.8(2)(b). This was not opposed on behalf of the second defendant, and I said I would make the order accordingly.
4. As I have said, the claimant and the company applied for the company to be joined as second claimant in these proceedings. This was on the basis that the company would benefit from the performance of the orders the subject of this application. The defendants do not consent to this. But neither did they advance any cogent argument against it. In my judgment it will be of assistance to have the company before the court, and I will make the order for joinder as requested.

Background

5. By way of background, the claimant had sued the first defendant (his father) and the second defendant (his brother) in a proprietary estoppel claim relating to the family farm. The claim related to assurances made by the first defendant to the claimant over many years, in reliance upon which the claimant had worked on the farm at low wages, rather than striking off on his own. The farming business was carried on by a company, the second applicant, which had a tenancy of (most of) the farmland. In his judgment, Birss J held that the proprietary estoppel claim was made out. After considering the circumstances of the case, he held that the equity raised in favour of the claimant should be satisfied in such a way that the claimant ended up with 46% of the land but 52% of

the company, and the second defendant and their sister each having 27% of the land but 24% of the company. There were further hearings about the steps that would be needed to reach that position. The final order was made on 14 February 2019.

St Frideswide's Farm

6. The present application concerns part of the land which was being farmed, known as St Frideswide's Farm, which lies just to the north of Oxford. Unlike the rest of the land farmed by the company, this land was owned by Christ Church College Oxford, and let on an agricultural tenancy to the first defendant. In fact, however, the first defendant had not farmed for some years, and farming was actually carried on by the company, apparently with the knowledge of the landlord college. The lease contained an absolute prohibition of assignment or parting with possession.
7. The order of Birss J of 14 February 2019 contained three paragraphs dealing specifically with this land:

“(8) The First Defendant shall use his reasonable endeavours to procure the consent of the landlord to an assignment of the tenancy of St. Frideswide's Farm presently held by him to the company (and if such consent is forthcoming to assign the same). If he is unable to procure such an assignment he shall use his reasonable endeavours to obtain the vesting of the tenancy in the Claimant by way of succession under the provisions of the Agricultural Holdings Act 1986.

(9) The First Defendant shall not take any steps to prevent the company from continuing to farm the land at St. Frideswide's

(10) The Company shall indemnify the First Defendant against any liability arising from its use of St. Frideswide's”.
8. It was common ground before me that on 7 September 2020, the landlord college and the second defendant, acting on behalf of the first defendant under a lasting power of attorney, entered into a deed by which the tenancy was surrendered to the landlord and the consideration of £63,000 was paid by the landlord to the tenant. (The second defendant's evidence is that the first defendant lost mental capacity in May 2020, so that everything done thereafter in his name must have been done by the second defendant.) It was further common ground that this sum was used to pay the defendants' legal costs of the original proceedings, thus relieving both of them of a substantial legal liability which they had incurred.
9. There was also evidence before me (but at this stage I make no findings) both that the landlord had been asked for its consent to an assignment of the tenancy to the company, which consent was refused, and that the landlord in August 2020 had served a notice to quit on the tenant, to expire in September 2021. In addition, it appears that the landlord has now relet St. Frideswide's to a different tenant, so that there is no question of the claimant or the company being able to farm the land.

Submissions

The claimant

10. The claimant complains that, by surrendering the lease of St Frideswide's Farm, the first defendant had breached paragraphs 8 and 9 of the order of Birss J. He complains further that the second defendant had procured those breaches by acting as the first defendant's attorney in doing so. This, he says, is potentially a contempt of court, but in any event constitutes a separate wrong at the suit of the claimant: *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), [116]-[131]. The claimant accepts that it is now impossible to restore St. Frideswide's to the position before the surrender, but he seeks an inquiry into the breaches, and also an order for specific disclosure to be given beforehand. The question of what remedy, if any, should be awarded if breaches of the order are found to have taken place should be left over to a yet further hearing.

The defendants

11. The defendants object to all of this. They say that there was no breach of the order by the first defendant, as there already was a prohibition in the lease on the company farming the land, and so surrendering the lease could not "prevent" the company from continuing to farm the land. Then, even if it were a breach, it cannot be a contempt of court by either defendant, because there was no penal notice attached to the order. The proper way to raise these issues would be by way of a claim in tort against the second defendant under the principle established in *Lakatamia*, which would require the issue of a fresh claim form and particulars of claim, accompanied by the payment of the fee and followed by the usual procedural steps. In any event, they say that the second defendant, as agent of the first, simply cannot be liable for procuring a breach of the order, by analogy with the equivalent rule in the tort of procuring a breach of contract: *Said v Butt* [1920] 3 KB 497. Nor, indeed, did the second defendant realise that what was being done amounted to a breach of the order. They also say that, there being no express liberty to apply in relation to these paragraphs in the order, no such liberty can be implied in the circumstances of the case, but, even if there could be, the claimant has delayed too long before making this application. The claimant found out about the surrender between September and November 2020, but did not issue this application until December 2021.

Discussion

Was there a breach of the order?

12. I will deal with these points in turn. The company was in fact farming the land at the time of the original litigation. The fact that that may have been a breach of the lease (if, indeed, it was not consented to or acquiesced in by the landlord) does not affect that. The court order did not interfere with the operation of the covenant, if the landlord wished to seek to rely on it. But it was still an order. In my opinion the first defendant, acting by the second defendant, in surrendering the lease, took a deliberate and, indeed, cynical step which had the effect of preventing the company from continuing to farm the land. In my judgment, there was a clear breach of the order by the first defendant in surrendering the lease.

Is a separate claim needed?

13. Secondly, if there is a breach of an order by a person the subject of that order, then plainly the court may be asked for further relief in relation to performance of the order. For example, where there is an order to pay a sum of money, then even before it is paid

the court may be asked to make a charging order, an attachment of earnings order or a third party debt order. Or it may be asked to issue a writ or warrant, *eg* a writ of execution or a warrant of possession. If the original order was one that a person execute a document, but that person refuses, then the court may be asked to make an order under the Senior Courts Act 1981, section 39, that someone else sign on behalf of that person. If it is an order that a person do some other kind of act, for example to crystallise a debt, or to revoke a trust, then the court may, under section 37 of that Act, grant an injunction or appoint a receiver by way of equitable execution. There is no need to take any separate proceedings. This is all done in the same proceedings, and in relation to the particular order.

14. As I have said, the procuring by B of a breach of an order addressed to A has been held (in the *Lakatamia* case) to amount to a tort, so that it may be the subject of an independent claim. But in my judgment that is not exhaustive of the circumstances in which the court may consider the liability of B. Another possibility is that of proceeding against B in the original claim for contempt of court (as sometimes happens in relation to freezing injunctions). The absence of a penal notice on the order means merely that the court's quasi-criminal jurisdiction to punish contempt by committal is not available. It does not license the conduct itself. In *JSC BTA Bank v Ablyazov (No 14)* [2020] AC 743, the Supreme Court unanimously held that the breach of a freezing injunction could be the "unlawful means" in a civil claim for conspiracy to injure the claimant by unlawful means.
15. In principle, I see no reason why it should be necessary to start a fresh claim in respect of a wrong done by procuring a breach of an order when the court is already seised of the original proceedings and may in any event be asked to make other orders in respect of the execution of that order. The position is *a fortiori* when, as here, B is already a party to the litigation. If the matter is sufficiently complex and/or unclear, then an inquiry can be directed, together with any necessary pleadings, disclosure and so on: see CPR Practice Direction 40A, paragraphs 1, 5, 12.

The position of agents

16. I accept of course that in *Said v Butt* [1920] 3 KB 497, a case where the plaintiff sued the managing director of a theatre company which excluded him from a performance for the tort of procuring a breach of contract, McCardie J held (at 505-506) that

“ ... the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v Gye* (1) principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract.”
17. But, as it seems to me, this is because it is the duty of the agent or servant to act in the best interests of the principal or employer. Where the agent or servant does not act in good faith in the best interests of the principal or employer or deliberately acts in the interests of someone else (for example, his or her own interests), this exception to the tort of procuring a breach of contract does not apply: *cf Bromley Industries Ltd v Martin & Judith Fitzsimons Ltd* [2009] NZHC 1992, [30]; *Welsh Development Agency v Export*

Finance Co Ltd [1992] BCC 270, 295H. On the material before me, though obviously without deciding the point, there appears to be considerable scope to argue that that is the position here. In the same way, if, as here, there is a dispute between the parties as to whether the second defendant realised that what he was making the first defendant do was as a matter of law a breach of the order (*cf OBG Ltd v Allan* [2008] 1 AC 1, [39], per Lord Hoffmann), then that too can be the subject of the inquiry.

Liberty to apply

18. I turn to the question of liberty to apply. The claimant cited two cases to show that there was an inherent liberty to apply in court orders, without the need to make it express. One was *Chandless-Chandless v Nicholson* [1942] 2 KB 321, CA. But that was a case of relief from forfeiture of a lease, where the forfeiture is but a security for performance of an obligation. The court had granted relief from forfeiture on terms to be performed within a certain time. The Court of Appeal unsurprisingly held that the court had power on application to extend the time for compliance, although there was no liberty to comply contained within the original order. In my judgment this case turns on the special nature of a provision for forfeiture and the equitable doctrine of relief from forfeiture. It does not assist me in the present case, which is not one of relief from forfeiture.
19. The other case was *Fritz v Hobson* (1880) 14 Ch D 542. This is more general than *Chandless-Chandless*. A motion by the plaintiff for an interim injunction was adjourned to the trial, at which the plaintiff was successful. The order adjourning the motion did not provide for the costs of the motion or give liberty to apply. The order at trial, including an inquiry as to damages, *did* include such liberty. The question was whether the trial judge could deal with the costs of the adjourned motion. Fry J held that he could.
20. He said:

“According to my understanding of the practice (and this is confirmed by the statement of the Master of the Rolls) all orders of the court carry with them *in gremio* liberty to apply to the Court. The judgment at the trial as drawn up reserves express liberty to apply. ... I can make the order which I am now about to make either under the liberty to apply reserved by implication in the order on the motion, or under the liberty expressly reserved by the judgment. ... ”
21. The defendants submitted that, whether or not Fry J was right in 1880, the notion that *all* court orders carry an implied liberty to apply did not represent the modern practice. For my part, whether or not it is right to imply liberty to apply in *all* orders for *all* purposes, I certainly consider that such liberty is implied for the purposes of enabling the party having the benefit of the order to complain that the party with obligations to perform under the order has not performed them, and to have the order modified to take account of what the performing party has done or not done since the order was made. If a defendant is ordered to convey a residential property to the claimant, but deliberately burns it down before doing so, the court must be able to deal with the changed situation. There is an important public interest in seeing that court orders are performed, either as intended, or as near as may be. Accordingly, I reject the notion that lack of express liberty to apply bars the claimant here, and requires the launching of a

fresh claim. The law is, or should be, about fashioning appropriate remedies for wrongs, not throwing procedural spanners in the works.

Delay

22. Lastly there is the question of delay. The defendants point out that CPR PD23A paragraph 2.7 provides:

“Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.”

A court order can normally be enforced without the need for further application for up to six years. After six years, no fresh action can be brought on the judgment, and no arrears of interest on a judgment debt can be recovered by execution: Limitation Act 1980, section 24; *Lowsley v Forbes* [1999] 1 AC 329, HL. Permission of the court to execute a judgment by writ or warrant is needed after six years: CPR rule 83.3(3)(a). However, it appears that no permission is needed, even after six years, where the judgment creditor applies for a charging order or third-party debt order: *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [24].

23. The delay here is about one year, in the context of litigation which started in 2016, came to trial in 2018, and which I had to deal with in 2020 only because the defendants were dragging their heels about complying with the order made two years earlier. We are now two years further on, so it is six years since the litigation began. I am bound to say that in these circumstances the complaint of delay does not lie easily in the second defendant’s mouth. If there were delay causing significant prejudice to the defendants, that would no doubt be a factor to take into account: *cf Jones & Pyle Developments Ltd v Rymell* [2021] EWHC 385 (Ch), [40]. But there is nothing of that kind here. All the defendants say is that the second defendant believed the proceedings to have been finalised, and had settled his costs bill in that belief. If that is a prejudice at all (which I doubt), it is certainly not a significant one. If the claimant is otherwise entitled to relief, I hold that he is not barred by delay.

Conclusion on objections in principle

24. I conclude that there is no procedural bar to the court dealing with the question of the breach of the order by the first defendant and the possible liability of the second defendant for that breach in this action, without the need to start a fresh claim. In my judgment the appropriate course for the court to take is to order an inquiry into the claimant’s losses from the breach, and into the second defendant’s liability for that loss. The main issues seem to me to be the following:

1. What loss has the claimant suffered by reason of the first defendant’s surrender of the lease of St Frideswide’s Farm?
2. Did the second defendant procure any such breach by the first defendant?
3. Did the second defendant know that the surrender of the Farm would amount in law to a breach of the order of Birss J?

4. Does the second defendant have any defence to the claim by the claimant for procuring a breach of the order of Birss J? I am thinking in particular of the applicability or otherwise of *Said v Butt*, but there may be other points too.
25. However, it is not for me to tell the parties what their respective cases are. I will direct that the claimant file and serve a short statement of its case on the claimant's losses from the breach, and into the second defendant's liability for those losses by 4 pm on 24 June 2022, that the defendants file and serve a short statement of their case in answer by 4 pm on 8 July 2022, and that the claimant serve any reply by 4 pm on 15 July 2022. Subject to the question of disclosure (which I deal with next), the provision of witness statements, and any other procedural matters, I will direct that the inquiry be listed before me, on the first open date after 7 October 2022, with a hearing time estimate of one day and pre-reading of two hours. There will be liberty to apply for any further directions that may be necessary, including variation of the existing directions. I will also direct that the parties file and serve witness statements complying with CPR Practice Direction 57AC for the purposes of the inquiry by 4 pm on 30 September 2022.

Disclosure

26. I turn now to the application by the claimant for disclosure from the defendants. Although the second defendant voluntarily provided some disclosure in response to this application, this was not a formal disclosure procedure. The claimant's application attaches a draft order. This includes a direction that the defendants provide the Claimant with specific disclosure by list, verified by their solicitors, pursuant to paragraph 5.11 and/or Section II of CPR Practice Direction 51U or otherwise of all and any documents relating to
- “3.1 the tenancy of farmland known as St Frideswide's Farm formerly held in the name of the First Defendant (as referred to in paragraph 4 of the judgment of Mr Justice Birss in these proceedings handed down on 11 June 2018);
- 3.2 any notice(s) or retirement in respect thereof;
- 3.3 any notice(s) to quit or any draft or attempted notice(s) to quit in respect thereof;
- 3.4 the surrender thereof;
- 3.5 the receipt, transfer and expenditure of any consideration paid by the College for that surrender;
- 3.6 the mental capacity of the First Defendant in the period 1 January 2019 to 31 December 2020, any power(s) of attorney granted by First Defendant to the Second Defendant and the management of the First Defendants' affairs by the Second Defendant; and
- 3.7 any alleged attempts to comply with, and any failure to comply with, paragraphs 8, 9 and 10 of the February 2019 Order.”
27. It further seeks a direction that
- “4. The documents to be disclosed under paragraph 2 of this order above [an obvious mistake for '3'] shall include but not be limited to: all communications

between the First and' Second Defendants, and between the Defendants or either of them or their agents and (a) the freeholder of St Frideswide's Farm or their agents relating to any of the issues referred to in 3.1 to 3.7 above and (b) their solicitors in respect of the issue referred to in 3.5 above."

28. Whilst I am satisfied that some disclosure will be necessary for the purposes of determining the issues arising on the inquiry which I have directed, I cannot be sure that these directions are all needed, or that no others will be needed. I will therefore adjourn this application over until 25 July 2022, by which time the statements of case will have been filed and served. I will then revisit the question *on paper only*, but inviting the parties to make any supplemental written submissions that they wish by 4 pm on 22 July 2022.

Conclusion

29. In the result I will make an order (i) appointing the second defendant to represent the estate of the first defendant, (ii) joining the company as second claimant, (iii) directing an inquiry into the claimant's losses and the second defendant's responsibility for those, but (iv) adjourning the disclosure part of the application until the parties have produced suitable statements of case. I would be grateful to receive an agreed minute of order to give effect to this judgment.
30. Finally, I apologise for the length of time it has taken to produce this judgment. The delay has been due to a series of unexpectedly urgent matters that came before me after the hearing and which had to be given priority.