



Case No: CH-2023-000181

Neutral Citation Number: [2024] EWHC 2549 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

7 Rolls Buildings,
Fetter Lane,
London,
EC4A 1NL

Date: 11th March 2024

Before:

MR NICHOLAS THOMPSELL, SITTING AS A DEPUTY
JUDGE OF THE HIGH COURT

Between:

BRIERLEY

Appellant

- and -

OTUO and OTHERS

Respondent

MR ADAM STEWART-WALLACE (instructed by Helix Law) appeared for the **Appellant**.
The **Respondent** appeared in person.

APPROVED JUDGMENT

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DEPUTY JUDGE THOMPSELL:

(1) INTRODUCTION

1. The matters before me today arise out of an appeal in relation to one aspect of a dispute between the parties arising out of a property partnership. I will refer to the appellant as "**the Claimant**" and the respondent as "**the Defendant**" as those are their principal roles in relation to this long action.
2. The history of this matter up to March 2021 is concisely explained in the judgment of Bacon J of 3 March 2021, (neutral citation number [2021] EWHC 644 (Ch)). It was already considered a long-running dispute at that time and since then there have been numerous further hearings relating principally to costs matters and to interpretation of further orders. By my count, the matter has already involved separate hearings or determinations, often more than one, before at least seven Masters, one Deputy District Judge, three Deputy High Court Judges, three High Court Judges, and one Judge of the Court of Appeal.
3. The background more particular to the matters before me are set out in Master Clark's judgment dated 21 April 2023, ("**the Clark 2023 Judgment**"), neutral citation number: [2023] EWHC 919 (Ch). At paragraphs 3 to 29, the Clark Judgment followed a hearing on 31 January 2023.
4. The matter before me today relates to an appeal by the Claimant. The Claimant wishes to appeal against an order made on 28 July 2023 by Master Clark, ("**the July 2023 Order**"), consequent upon the Clark 2023 Judgment. Master Clark held that the Claimant was unable to recover the costs and expenses of sale and enforcement on the properties referred to in these proceedings as 31B Oxford Road, Putney and 311 Leigham Court Road, Putney. She ordered that an order for possession and sale over these properties made by way of a previous order of Nicholas Le Poidevin KC dated 2 August 2019, ("**the LePoidevin Order**"), was to be stayed.
5. Master Clark's reasoning was based substantially on principles explained in *Fisher & Lightwood's Law of Mortgage* at paragraph 55.6:

"In the absence of an express term, there is no implied obligation upon the mortgagor to pay the costs, charges and expenses so incurred by the mortgagee. Consequently, unless the mortgage so provides, they are not recoverable from the mortgagor personally (except if in the particular case he has become personally liable to pay them)."

"However, the costs are added to the secured debt and, both as against the mortgagor and other persons interested in the equity of redemption, they are added by the mortgagee to the amount due upon his security and must be paid as a condition of redeeming. With the principal and interest they form a single debt and are payable in the same priority."
6. Authority for these propositions is found in *Ezekiel v Orakpo* [1997] 1 WLR 340 and *Holder v Supperstone* [2000] 1 All ER 473.

7. The Clark Judgment relies also substantially on a decision reached in an earlier judgment also of Master Clark dated 8 April 2022, (“**the April 2022 Judgment**”). That followed a hearing in the same matter that was subsequently adjourned to 31 January 2023. In particular, the April 2022 Judgment held that six charging orders that she referred to as the “2012 claim charging orders” made in relation to the property at 311 Leigham Court Road, Putney had been discharged by the payment of the underlying debt, and all charging orders on 31B Oxford Road had been discharged by agreement. She considered that since the basis of the order for sale made in the LePoidevin Order was the 2012 claim charging orders, the order for sale under the LePoidevin Order could not stand. Accordingly, by her order dated 30 March 2022, (“**the March 2022 Order**”) (which was made after the hearing that was the subject of the April 2022 Judgment but before that judgment was handed down), she ordered amongst other things (at paragraph 3 of the March 2022 Order) that:

“The final charging orders dated 1 October 2015, (Master Price), 26 November 2015, (Deputy Master Cousins), and 11 February 2016, (Deputy Master Smith), all on 311 Leigham Court Road, Putney, SW16 2RX, are discharged.”.

8. The Claimant wishes to appeal against the primary finding that the costs and expenses are not recoverable and as a result against the consequent decision to stay the order for possession and sale.
9. Permission to appeal was granted in the following limited terms by way of order of Mead J dated 10 October 2023, (“**the Mead Order**”):

“The application for permission to appeal is granted but this permission does not extend to any appeal against the April 2022 judgment and associated order as referred to in the grounds of appeal. For the avoidance of doubt, the appellant may make argument as to the meaning and effect of the April 2022 judgment and associated order but may not appeal against them.”.

10. The Claimant enumerated various grounds of appeal, but I think I can deal with this matter by dealing with the Claimant’s key submission.

(2) THE CLAIMANT’S KEY SUBMISSION

11. Accepting that the Claimant may not appeal the April 2022 Judgment or the relevant order arising from it, the Claimant seeks to persuade the court that paragraph 3 of the March 2022 Order needs to be interpreted in the light of all the circumstances so that rather than merely discharging the charging orders with no further comment, a further term should be implied at the end of this to the effect that “*the discharge is subject to payment of the outstanding costs of sale*”, or some similar words.
12. The Claimant argues that this is necessary when one looks at the entire context of the arrangements which include the fact that the Claimant’s costs were under discussion and the clear intent of the Master to determine the issue of the Claimant’s costs at a later date rather than to do so now by default.

13. In seeking to persuade the court of this, the Claimant drew the court's attention to the general summary of principles provided by the Court of Appeal in *Pan Petroleum AJE Limited v Yinka Folawiyo Petroleum Co Limited* [2017] EWCA Civ 1525, ("**Pan Petroleum**"), at [41] to [44], as the appropriate guidance for the court to consider when it was determining the construction of court orders.
14. To summarise these briefly, to determine what an order means: terms should be restrictively construed and an order must be clear and unequivocal for a party to be found as having broken the terms of the order; and the words in the order are to be given their natural and ordinary meaning, construed in their context, including their historical context, and with regard to the object of the order.
15. Lord Sumption in giving the judgment of the Privy Council in *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6 ("**Sans Souci**") at [13] added a further gloss:

“The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve.”
16. I accept it is unlikely that the Master intended when making paragraph 3 of the March 2022 Order intended to close down the question of the rights of the Claimant to costs of sale. I accept also that these costs were still under discussion. Nevertheless, I consider that it is stretching the principles of interpretation far too greatly to import into the Master's order at paragraph 3 a provision that at best substantially alters the plain English meaning of that order, and at worst completely negates it.
17. The Claimant argued in the alternative two meanings for the proposed additional wording that should be added to paragraph 3 in the Claimant's submission.
18. The first was that he proposed the additional words subject to payment of costs of sale or something like that should be regarded as creating a condition precedent, ie, the discharge was not effective until the costs of sale had been paid. This approach would completely negate the plain meaning of paragraph 3. If the court were to accept that the plain words of an order could be so radically amended, this would put all litigants, not to mention the Land Registry, on guard for hidden meanings in an order that can only be construed by looking at the proceedings leading to the order. This runs totally contrary to the principle of finality that ought to apply to court orders.
19. The Claimant's second proposed meaning for his proposed additional words was that it would be a condition subsequent. This meant that the order would still discharge the relevant charges but this matter could be reversed if the costs of sale once determined were not discharged. This is slightly less offensive to the principle of finality but still in my view involves doing violence to the plain meaning of the March 2022 Order and goes far beyond what might be allowable by the principle of interpretation. There is no ambiguity in the March 2022 Order and even if I follow *Sans Souci*, there is nothing in the judgment leading to the order that would lead one

to conclude that the Judge was meaning to do anything other than discharge the charges.

20. The April Judgment was all about the matter of determining the application by the Defendant for a discharge. It said nothing about the costs of sale and I cannot accept the Claimant's invitation to say that the fact that the judgment did not deal with the costs of sale is a reason for assuming that the plain words of the order need to be changed in order to accommodate that matter.
21. As I consider that the March 2022 Order must stand as drafted, except for one further argument, there is no possible challenge that I can see to the reasoning of the Master in the Clark Judgment. The charging orders were discharged by the March Order. The effect of this inevitably was that the order for sale also ceased to have effect, and with it the basis for the Claimant's entitlement to costs of sale.

(3) THE ARGUMENT BASED ON PARAGRAPH 14

22. I should, however, address a separate argument that was based on paragraph 14 of the LePoidevin Order which, read in isolation, appeared to give a separate legal basis for the Claimant's entitlement to costs of sale. However, read in its proper context, it was clear that this did not create any freestanding entitlement. The judge was merely rehearsing the normal provision that the entitlement to costs come as a consequence of the charging order. I therefore dismiss that argument, also, as did Master Clark.

(4) CONCLUSION

23. Given my findings on these two fundamental grounds of the Claimant's case for appeal, I do not think that it is useful for me to address individually the specific grounds of appeal that were put forward by the Claimant. The Claimant based its entire argument on the two points discussed above. Having found against the Claimant on these two points I do not think there is anything more that I need to say. I invited the parties to address me on any of the specific grounds if they thought it useful for to do so in the light of my findings and neither party took up this invitation.
24. I will just add, however, that I have reached the conclusion above with some reluctance. The Claimant has been disadvantaged by the way these orders have been made and I am quite sure that if Master Clark had realised at the time of the April 2022 Judgment, or the March 2022 Order, the point of law that she had realised by the time of the Clark Judgment, she would have made a different provision in her order to deal with the Claimant's costs of sale. This is evident from the draft order that she produced at one point.
25. Nevertheless, the fact that she might have done something different had she been aware of a legal principle that had not been explained to her in the course of the hearing that led up to the Clark Judgment, cannot be a reason to interpret the order that she did make in a way that is clearly different to the plain meaning of that order. Mr Otuo quoted to me a statement made by of Beatson LJ in the Court of Appeal judgment in *JSC BTA Bank v Ablyazov* [2013] EWCA Civ 928, [2014] 1 WLR 1414 at [5] that was cited with approval by Lord Clark when the same case came to the Supreme Court (see *JSC BTA Bank v Ablyazov* [2015] UKSC 64 at [17]:

“In para 5 of his judgment in the Court of Appeal Beatson LJ said that the context in which the scope of the Freezing Order falls for decision is one in which a court might be tempted to stretch legal analysis to capture what are seen as the merits or lack of merits of the case before it, but it is important not to succumb to that temptation. I agree.”

26. The Claimant was aware of the decision in *Holder v Supperstone* and if only the consequences of that decision had been thought through earlier and pursued by the Claimant at the time of the proceedings leading to the April Judgment, the Claimant may have been in a much better position.
27. Given the restrictions on permission to appeal contained in the Meade Order, I cannot re-open the March 2022 Order or the April 2022 Judgment and for the reasons I have given I cannot change the meaning of the March Order as the Claimant wishes me to do. As the March 2022 Order must stand as written and there is no fault in Master Clark's logic, the July 2023 Order must stand and the appeal must be dismissed.

(This Judgment has been approved by Deputy Judge Thompsell.)

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