Neutral Citation Number: [2021] EWHC 644 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No: CH-2017-000147**

BUSINESS AND PROPERTY COURTS IN ENGLAND & WALES

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 3 March 2021

Before:

MRS JUSTICE BACON DBE

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Between:

DAVID RAYMOND BRIERLEY **Claimant**

- and -

(1) FRANK OTUO **Defendants**
(2) RUTH OTUO

- -
- -

ADAM STEWART-WALLACE (instructed by **HELIX LAW**) for the **Claimant**

STEVEN WOOLF appeared on behalf of the **Defendants**

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JUDGMENT

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MRS JUSTICE BACON:

1. The first issue before me at this hearing is the application of the first defendant, made in an application notice dated 12 October 2020, for a payment made by him to the claimant's solicitors to be appropriated in a specific way. In order to understand the nature of the application it is necessary to summarise the history of the payment and why it was made.

Background

2. The application arises from a long-running dispute between the parties arising out of a property partnership. Over the years, the claimant has been awarded sums in excess of £450,000 in respect of his costs. The costs payments are due from the first defendant, who has brought the application before me today, and his wife who is the second defendant. The costs orders have been secured against four properties in London in which the defendants have various beneficial interests. For today's purposes, two of those properties are relevant: 31B Oxford Road, SW15, and 311 Leigham Court Road, SW16. Oxford Road is owned by the first defendant alone and is the family house. Leigham Court Road is held between the two defendants as tenants in common.

3. Following a hearing in May 2019, Mr Nicholas Le Poidevin QC (sitting as a deputy judge of the High Court) gave judgment for the claimant. His order dated 2 August 2019 made various declarations as to the beneficial ownership and interests in the Oxford Road and Leigham Court Road properties, and ordered the sale of all four properties. 311 Leigham Court Road was to be sold at a price not less than £810,000, unless otherwise agreed between the parties or otherwise directed by the court. 31B Oxford Road was to be sold at a price not less than £875,000, again unless otherwise agreed or ordered. It was ordered that the claimant's solicitors would have conduct of the sale of both properties. The other two properties were to be sold at auction, with the reserved prices specified in the order.

4. The order of 2 August 2019 then made specific provision for the way in which the proceeds of sale of the properties were to be applied to discharge the indebtedness of the defendants. In particular:

    i) The proceeds of the sale of 31B Oxford Road were to be applied to discharge the indebtedness of the first defendant alone, with any surplus paid to the first defendant.

    ii) The proceeds of sale of 311 Leigham Court Road were to be applied to discharge the indebtedness of both defendants, out of their respective shares of the sale proceeds.

5. Mr Stewart-Wallace, for the claimant, has said that the purpose of these provisions was to maximise the security available to the claimant. Mr Woolf, for the first defendant, did not dispute that.

6. The defendants subsequently entered into negotiations with the claimant as to the terms on which they could retain the family home in Oxford Road. That resulted

in a consent order made by Deputy Master Bowles on 12 March 2020. The order was drafted by the claimant and his solicitors, and was presented to the defendants on a "take it or leave it" basis. The defendants therefore had a choice either to accept the claimant's proposal, as embodied in the consent order, or to allow the sale of the house to go ahead as per the 2 August 2019 order of Mr Le Poidevin.

7. Clause 2.1 of the consent order provided that the defendants were to pay the claimant £250,000 by 5.00 p.m. on 2 March 2020. Clause 2.2 then continued as follows:

> "With the sum reducing or discharging the indebtedness of the first defendant to the claimant and, insofar as that sum may discharge that indebtedness, to reduce or discharge the indebtedness of the second defendant to the claimant."

8. If that was done – i.e. if the sum was paid to the claimant on those terms – then the remaining clauses of the order specified that the claimant was to remove the charges he held over Oxford Road and give the defendants vacant possession of that property.

9. The chronology of how the consent order came to be signed is of considerable importance, and was not entirely clear from the skeleton arguments but has become clear during the course of the hearing following further information provided by both counsel.

10. The starting point is that on 27 February 2020, after the consent order had been provided to the defendants but before it was agreed by them, the defendants' solicitors sent the claimant's solicitors an email saying that they had been instructed to remit the sum of £250,180.25 to satisfy a set of orders charged to their interests in the four properties. The email then set out a list of orders, with the relevant amounts that were to be discharged listed alongside each order. These included not only costs orders against the first defendant, but also orders against the second defendant. The effect of the email therefore, in plain terms, was that the sum was proposed to be remitted on the basis that it would be applied to the costs orders of *both* defendants in the amount specified in the email. The underlying effect of that proposed allocation – as was common ground before me, albeit not stated explicitly on the face of the email – was to extinguish the debts of the second defendant so that her share of the beneficial interest in the Leigham Court Road property would then be unencumbered.

11. The next day, 28 February 2020, at 10.05 a.m., the claimant's solicitors replied:

> "The negotiations have now run their course and this is a take it or leave it offer it is of course entirely a matter for you to [sic] whether you accept it or not."

12. The claimant's position was therefore that he was only willing to agree to the consent order as drafted, and was not prepared to renegotiate the way in which the sum of £250,000 would be allocated as between the various debts. That was

therefore an unambiguous rejection of the defendants' proposals set out in the 27 February email.

13. A little less than an hour later, at 11.01 a.m., the first defendant again asked for the consent order to be amended incorporating the details of the various orders that were being discharged as set out in his solicitor's email of the previous day. At 11.29 a.m. the claimant's solicitors again refused. They said explicitly that the defendants' proposals would make "no commercial sense", and concluded that:

> "for obvious reasons given the last 10 years of litigation, our client will take no risks in his dealings with you and would rather just sell your properties with the risk of recovering slightly less but being assured that he will be paid these sums."

14. At 11.59 a.m. the defendants' solicitors responded to that email saying merely:

> "Please arrange a courier to deliver keys today or pick at KHF will be better. Signed consent order to follow shortly."

15. One hour later, the claimant's solicitor sent another email saying they awaited receipt of the signed consent order and funds prior to the release of the keys to Oxford Road. They confirmed that they would instruct the courier "As soon as the requisite steps are completed in full and as per the draft order". Their email continued:

> "We await the signed consent order and the details of the firm that Frank and Ruth Otuo have instructed to remit the funds on their behalf as per the terms of the draft order."

16. The consent order – as is now common ground before me – was finally sent on 28 February 2020 after this correspondence, although the precise time is not known. That was a Friday.

17. On the following Monday, 2 March 2020, the claimant's solicitors wrote to the defendants' solicitor noting that the signed consent order had been received from the defendants and that the amount to be remitted was £250,000 as per the consent order. The letter continued:

> "Matters are now agreed between our respective clients … you will note the amount we have agreed you will send us under the consent order is £250,000, and the terms are as stated within the consent order.
>
> Accordingly, we will accept payment of the sum of £250,000 by you in accordance with the enclosed consent order. Please pay the sum of £250,000 due under paragraph 2.1 of the enclosed consent order by no later 4pm 2 March 2020.
>
> … Upon receipt of the sum of £250,000 from you in cleared funds in accordance with the consent order [we] will provide you with the countersigned copy of the consent order that we are now

> holding, and we will also file the same with the court and pay the appropriate filing fee."

18. The defendant's solicitors replied on the same day:

> "Further to your emailed letter of 2nd March and our various correspondence and conversations in pursuance of concluding the matter today. I can confirm that the transfer of £250,180.25 has been remitted to your client account. Please find attached the proof of payment. I can also confirm that the keys should be delivered to the following address …"

19. The next day, 3 March 2020, the claimant's solicitor sent a letter to the defendants acknowledging receipt of the funds, noting that it was £180.25 in excess of the sum agreed under the terms of the consent order, and remitting £180.25 to the defendant. The letter continued:

> "We will apply the agreed sum of £250,000 pro rata to all of the outstanding debts that your clients have with our client and we would expect to provide a recalculated account of all your clients' numerous debts within around 7–14 days."

20. Mr Stewart-Wallace confirmed on instructions that the reference to applying the sum "pro rata to all of the outstanding debts" of the defendants was an error. The letter was not intended to suggest that the sum would be applied *pro rata* to both the first and the second defendant's debts, and was not intended to vary the consent order or to indicate that the sums would be appropriated in a way different to that set out in clause 2.2 of the consent order.

21. In any event, the first defendant replied objecting to the appropriation of the funds in the way set out by the claimant's solicitors, saying that the funds should be strictly applied to discharge the orders in the way set out in the 27 February 2020 email.

22. I understand that following that correspondence the first defendant said that he would make the present appropriation application, and the claimant maintained that the appropriation should be on the terms of the consent order.

23. It appears that at some point around the end of April 2020 the £180.25 was remitted back from the defendants' solicitors to the claimant's solicitors. That is shown on a bank statement, which is in the bundle although the document is barely legible. The entirety of the figure of £250,180.25 therefore currently remains with the claimant's solicitors in their client account.

The present application

24. The first defendant duly brought the present application, with his primary case being that the court should order the payment of £250,180.25 made to the claimant's solicitors to be applied strictly in accordance with the 27 February email.

25. His alternative application is that the court should order the sums paid to be applied *pro rata* to the outstanding debts of the defendants, as set out in the claimant's solicitor's letter dated 3 March 2020. That is the letter that, as I have just noted, Mr Stewart-Wallace confirmed was incorrectly drafted.

26. There are two issues arising from this application. The first is the question of the basis on which the funds were remitted to the claimant's solicitors. Put shortly, did the first defendant appropriate those funds in a particular way, or did he agree that the funds should be allocated as per the terms of the consent order? The second issue is the construction of the consent order.

The basis on which the funds were transferred

27. There was initially a dispute between the parties as to the effect of the correspondence. This seems to have arisen at least partly from a misunderstanding as to the date on which the consent order was sent by the defendants to the claimant. That chronology has now been resolved and is as set out above. On that basis, the analysis is straightforward and is now essentially agreed.

28. As the chronology above shows, after receipt of the consent order drafted by the claimant the defendants sought to specify that the funds should be applied in the way set out in the 27 February 2020 email from their solicitors. That allocation was, however, rejected by the claimant who said in terms that the offer set out in the consent order was put forward on a take it or leave it basis and that the negotiations had come to an end. After further correspondence in similar vein, the consent order was then signed by the defendants, and the sum was transferred on that basis. Nothing in the defendant's correspondence at the time of remitting the sums stated that he was going back on the consent order that he and his wife had signed and was making a payment to the claimant on the basis of a different appropriation or allocation of the funds.

29. On that basis, Mr Woolf this morning quite properly accepted that the sum remitted by the defendants must be allocated on the basis set out in the consent order, which post-dated the 27 February email, and that the terms of the consent order will therefore prevail if they are inconsistent with the terms in that 27 February email. He submitted that the consent order is in fact entirely consistent with the 27 February email, but that raises the construction issue which I will address separately.

30. The starting point is therefore that the consent order represents the final agreement between the parties as to the allocation of the £250,000, and that was the basis on which the sum was transferred to the claimant. On that basis, nothing turns on the authorities as to appropriation (although I note for completeness that the relevant legal principles on this point are not disputed as between the parties).

31. Mr Woolf did nevertheless point to the fact that the sum transferred was in excess of the sum set out in the consent order, by a figure of £180.25. The total sum transferred was therefore the sum that was referred to in the 27 February email. The first defendant clearly hoped that sending this sum would encourage the claimant to accept the appropriation set out in the 27 February email. However,

on a proper analysis, there was no basis on which at that point he could demand that allocation if it was different to the terms of the consent order which he had subsequently agreed.

32. In those circumstances, whether the additional amount was £180.25 or any other figure, the claimant was entitled to say that it had received the required figure of £250,000; the remittance was plainly intended to satisfy the consent order; the remittance did not come with any conditions attached that were inconsistent with the consent order; and the claimant was therefore going to allocate the funds on the basis set out in the consent order with the additional amount returned to the first defendant.

Construction of the consent order

33. The key disputed question is therefore whether the consent order should be interpreted as providing for some of the sum remitted to be allocated to extinguish the debts of the second defendant, as the first defendant contends, or whether it should be allocated in priority to the first defendant's debts as the claimant contends.

34. The relevant clause of the order is clause 2.2. Mr Woolf says that the clear interpretation of that clause is that the sum (which is the £250,000 sum referred to in clause 2.1) will reduce the indebtedness of both defendants. Mr Woolf contends that this is the only sensible interpretation of the clause, since it refers to the second defendant in circumstances where it was known that the sum available would not discharge the first defendant's debt. The only reason for referring to the second defendant in those circumstances, he says, was that the claimant accepted that the settlement sum would indeed extinguish the second defendant's debt. That, he says, was the first defendant's overriding objective in entering the settlement agreement and the context in which that agreement has to be seen.

35. Mr Stewart-Wallace also submits that the clause is clear and unambiguous, but to different effect to that contended by the first defendant. The effect and intention of the clause, in Mr Stewart-Wallace's submission, was to ensure that nothing could be paid in respect of the second defendant until the first defendant's debt was extinguished, reflecting the terms of the 2 August 2019 order of Mr Le Poidevin in relation to the distribution of the proceeds of sale of 31B Oxford Road. If the reference had simply been to the application of the £250,000 to discharge the first defendant's debts (without mentioning the second defendant), since some of those debts were joined and severable it might have been argued that some of that figure incidentally reduced the debt of the second defendant, which was not what was provided for in the 2 August 2019 order and was not what the claimant intended.

36. Mr Woolf replies that it should not be assumed that the consent order should mirror the terms of the 2 August 2019 order. Matters had clearly moved on, and the parties had agreed a consent order that effectively varied the 2 August order in respect of the sale of 31B Oxford Road. If that produced on its face a different result to that specified in the 2 August order, then so be it; the clear terms of the consent order should stand.

37. I agree with the claimant on this point. The first defendant's interpretation is, first of all, contrary to the clear meaning of clause 2.2. The plain and obvious meaning of that clause is that the sum of £250,000 will first reduce or discharge the first defendant's debt; and only if that debt is discharged (i.e. extinguished) will the sum be applied to the second defendant's debt. There is no basis whatsoever on which that clause can be read as permitting the second defendant's debt to be reduced – still less, completely extinguished – while the first defendant remains indebted to the claimant.

38. That interpretation is reinforced by a consideration of what a reasonable person would have understood the parties to the consent order to have meant. The first defendant clearly wanted to achieve a result whereby the second defendant's debts were extinguished by the payment, but it would have made no sense for the claimant to agree that, and the claimant explicitly did not agree that. The consent order was put forward as an alternative to the outright sale of 31B Oxford Road, which was the default position under the 2 August 2019 order. The 2 August order specified that the proceeds of sale of that property would be applied to reduce or discharge the debts of the first defendant alone, with the second defendant's debts remaining secured against her share of 311 Leigham Court Road. The intention and effect of these provisions in that order was to maximise the security available in respect of the defendants' various debts. By contrast, the effect of the different allocation proposed by the defendants would have been that the claimant lost the security of Oxford Road without having the payment of the debts secured by the 2 August order, while at the same time the second defendant's debts were extinguished, leaving her share of 311 Leigham Court Road unencumbered. That would have run completely counter to the careful allocation of the proceeds of sale of the various properties set out in the 2 August 2019 order, leaving the claimant in a far worse position. Essentially that point is made in the eighth witness statement of the claimant's solicitor Mr Rimmer dated 9 December 2020, at paragraph 24.

39. Nothing in the correspondence shows that the claimant was willing to do that and for the funds to be applied contrary to the order of priority set out in the 2 August 2019 order. On the contrary, as I have set out, the claimant's solicitors explained explicitly in their email of 11.29 a.m. on 28 February – before the consent order was signed and returned to them – that this would make no sense and that the claimant would rather in that case just sell the property.

40. The correspondence, therefore, shows clearly the intention of the claimant who drafted the order. It also shows in unambiguous terms that the first defendant repeatedly asked for the order to be amended to reflect the defendants' allocation proposals, that the claimant repeatedly refused for the reasons I have just explained, and that the defendants eventually signed the order in the terms that had been proffered by the claimant. Given that chronology, the suggestion that clause 2.2 should be interpreted in a way that corresponds to the amendment that the first defendant tried but repeatedly failed to obtain is, in my judgment, hopeless.

41. The first defendant has also suggested that clause 2.2 should be construed *contra proferentem*. That might arise for discussion if the clause was genuinely

ambiguous (i.e., capable of bearing two distinct meanings). But it does not arise where, as in this case, the meaning of the words is absolutely clear.

Conclusion

42. I therefore dismiss the first defendant's appropriation application. The claimant is entitled to appropriate the sum in the terms set out in the consent order.
