Neutral Citation Number: **[2023] EWHC 759 (Ch)**

Case No: PT-2022-000922

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

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

Date: 10 March 2023

Before:

MASTER MCQUAIL

- -

Between:

CYNTRA PROPERTIES LIMITED

Claimant

- and -

(1) JULIE GILLBORN
(2) KEVIN PAUL MARTIN

Defendants

- -

- -

MR DANIEL SCOTT (instructed by **IBB LAW LLP**) for the **Claimant**
The **Defendants** did not attend and were not represented

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MASTER MCQUAIL :

1. This judgment follows a hearing on 9 March 2023. The claim is brought by Cyntra Properties Limited against Julie Gillborn and Kevin Paul Martin. The claimant company is a property developer and investor and owns property at 26-78 Cedar Drive, Sunningdale in Ascot. That property comprises two blocks of flats each of three floors, roof spaces above and garages. The claimant company was registered as proprietor on 4 July 2017. The defendants are each long leaseholders of second floor flats at the property. Crucially, that is the flats immediately below the roof space. The first defendant's long lease is of flat 50, the second defendant's is of flat 70. In each case the lease was a re-grant following the surrender of an earlier lease. The first defendant's lease is dated 5 May 2019, the second defendant's lease is dated 7 April 2011. Neither demises any of the roof space above the respective flats to the tenant.

2. The claimant obtained planning permission to build a further floor on top of each block of flats in November 2020 which will expire after three years. It is apparent that the long leaseholders are unhappy with that position. Some of the leaseholders alleged that the implementation of the permission would amount to a breach of restrictive covenant which led to proceedings in the Upper Tribunal whereby a modification of the covenant was sought under section 84.1 of the Law of Property Act. That was disposed of by a final order modifying the covenant made by the Tribunal in November 2021.

3. The defendants to these proceedings made applications dated 28 February 2022 to the Land Registry for registration as leasehold proprietors of the roof spaces above their flats. The basis of the applications would seem to have been the doctrine of encroachment by virtue of which a tenant may acquire leasehold title to other land of his or her landlord. The claimant says, and it must be right, that if the defendants are entitled to possessory title of the

roof spaces above their flats it is going to have a significant, possibly completely prohibitive, impact of the implementation of the planning permission.

4. There has been, and still is, a legal dispute between the claimant and the defendants about what is required for the doctrine of encroachment to operate and that has been set out in letters to which I will refer to shortly. The Land Registry was not at all speedy in dealing with the applications the defendants had made and the claimant, not having been notified of them formally, brought these proceedings in November 2022. These proceedings seek declaratory relief in order to determine that legal dispute with the defendants.

5. The defendants have neither acknowledged service, nor filed defences and as a result the claimant made a default judgment application on 6 January 2023. On 26 January 2023 the defendants withdrew their applications to the Land Registry but without making any concession that the applications would, or could, or should not succeed. On 7 February 2023 the claimant made application for determination of certain questions as preliminary issues should the default judgment route not succeed. On 22 February 2023 the defendants told the court by letter that they would not be defending the applications primarily because they did not wish to be made subject to any adverse costs order. Again, no formal or even informal concession was made. That leaves the claimant in a difficulty in terms of either implementing the planning permission or selling the property with any value attributable to that permission.

6. The primary application is for default judgment and I will only need to deal, with the second application if that matter does not go in favour of the claimant. The conditions prerequisite to a default judgment application in CPR rule 12.3 are clearly satisfied here. This is a case where because the relief sought does not fall under CPR 12.4(1) the claimant has had to make a Part 23 application for judgment. It is uncontroversial that where a claimant makes an application for a default judgment, the court is to give such judgment as

the claimant is entitled to on the claimant's statement of case. That uncontroversial statement was explained by Nicklin J in the case of *Suttle v Walker* [2019] EWHC 396 at [36]:

> " where judgment has been entered in default the court will proceed to determine the remedies that the claimant should be granted on the basis of the claimant's unchallenged pleaded case. Where the defendant has not disputed the claimant's case there is no need to adduce evidence, or for the court to make express findings of fact. Indeed, it would usually be disproportionate and contrary to the overriding objective to use court resources to do so. The claimant can legitimately be granted remedies, therefore, on the assumption that his or her case is correct. The court may depart from this general rule but only if it is clear that the claim is for some reason impossible or that any required legal threshold has not been met."

7. I agree with Mr Scott that there is nothing in CPR Part 12 that expressly prohibits claimants obtaining declaratory relief in default. However, the case law indicates that there should at least be some caution exercised before a court should do that. Mr Scott took me to the judgment in *Goldcrest Distribution Ltd v McCole* [2016] EWHC 1571, which is a judgment of Master Matthews. The Master reviewed what Mr Scott described as the orthodox position found in the judgment of Buckley LJ in *Wallasteiner v Moir* [1974] 1 WLR where the Judge pointed to the longstanding practice of the Chancery Division that declarations not be made in default of a pleading, the rationale being that declarations are judicial acts which should be made once the court is satisfied by evidence.

8. Having reviewed the judgments in *Wallasteiner* the Master set out the approach to be adopted in the era of the CPR at [43]:

> "Whatever the experiences of the past, in the modern legal system, where the rules in the High Court should not be interpreted differently in the QBD and in this division, and the overriding objective (CPR rule 1.1) of doing justice at proportionate cost is to be observed everywhere, it would not be right to hold that declarations can never be given on default judgments. In my judgment, the better rule is that declarations should not be given without argument inter partes, save in the clearest cases. That is consistent with all the judicial statements to which I was referred except that of Buckley LJ. Even in relation to his views, the fact is that the rules of evidence today are more relaxed than they were in his time, and there is an even greater need to conserve precious trial time for those cases where it really is necessary. So long as a declaration can be given without injustice to those affected by it, the court should not be hamstrung merely by the fact that it is being sought on an application for default judgment."

9. What is clear from that is that caution must be exercised because there will never be inter partes argument, that any declaration made should proceed on the evidence and, the possibility of prejudice caused to third parties if declaratory relief is given should be borne in mind but the counterweight to those points is the need to conserve trial time for those who need it.

9. Coming to this application for default judgment, it is confined in its terms to the declaration sought by paragraph 12 of the particulars of claim:

> (1) a tenant must show 12 years of adverse possession of an area before they are entitled to claim that it has become an accretion to their lease;
> (2) a surrender of the lease (including a surrender and re-grant) causes time to start running again; and
> (3) in the premises neiterh the First nor Second Defendant is entitled to have the roof space above their flat registered as an accretion to their lease."

10. In this case, the defendants' claimed encroachment is onto the land of their landlord or into the roof space of their landlord and the manner in which a tenant may thereby acquire an accretion to their lease is described in a passage at [7-041] of *Megarry & Wade of The Law of Real Property* 9th edition:

> "if the tenant occupies other land belonging to the landlord but not included in the demise, after the expiry of the limitation period [the 12 year limitation period for recovery of land in s.15 of the Limitation Act 1980] that land is presumed to be an addition to the land demised to the tenant ("a mere extension of the locus of his tenancy"), so that it becomes subject to the terms of the tenancy. Although the tenant may acquire a title to it against the landlord for the remainder of the term, the tenant must give it up to the landlord when the tenancy ends. However, the presumption may be rebutted, e.g. by the tenant conveying the land to a third party and informing the landlord of this while the tenancy is still running."

11. The terms of the defendants' application to the Land Registry sought leasehold title only to the roof space, not freehold title, and so the question was whether the defendants have acquired proprietary rights by encroachment. There is no question that they have acquired, by extinguishment of their landlord's paper title, a complete and freehold title.

12. By reference to the subparagraphs of paragraph 12 of the particulars of claim, firstly the claimant seeks a declaration that a tenant must show twelve years of adverse possession before being entitled to claim an accretion to their lease. There appears to be a dispute with the defendants on this issue given the terms of their solicitor's letter of 24 June 2022 which suggested that the twelve year period would only be applicable, to a true adverse possession claim under section 15 of the 1980 Act, but that letter does not suggest that any alternative period is applicable in the case of encroachment.

13. The defendants seem to rely on a comment of Charles J in the case of *Tabor v Godfrey* (1895) 65 L.J.Q.B. 245, which was referred to by Pennycuick V-C in the case of *Smirk v Lyndale Developments* [1975] 1 Ch 317. I accept Mr Scott's submission that the comment made by Charles J - "I do not think the statute of limitations has anything to do with the case" - was made in the context of asking the question: what title had been acquired by tenants after twelve years of occupation, not the question of whether adverse possession was necessary or the statute of limitation had application. The doctrine of encroachment means that a tenant adversely occupying his landlord's land does not achieve extinguishment of paper owner's title but instead acquires a leasehold interest.

14. It is, in my judgment, clear that a tenant must adversely possess the land for twelve years as a prerequisite to the doctrine of encroachment having application. That is clear from Pennycuick V-C's survey of the authorities in *Smirk* and the passage from *Megarry & Wade* to which I have already referred. It is clear also from the result of *Smirk*, itself overturned for different reasons on appeal, because there Pennycuick V-C dismissed the claim because the land had not been occupied for a twelve year period under a single tenancy. It was treated as uncontroversial also in the Court of Appeal decision of *Tower Hamlets London Borough Council v Barrett* [2005] EWCA Civ 923 in the judgment of Neuberger LJ.

15. The second declaration sought is that a surrender of the lease, including a surrender and re-grant, causes time to start running again. Again, the solicitor's letter of 24 June 2022 suggests that the determination of a tenancy is not fatal to a claim for encroachment if possession by the tenant has been continuous and if the original term date has not passed. The point is dealt with in the *Smirk* case. Pennycuick V-C held that where the presumption under the doctrine applies, the tenant acquires only an addition to the subject matter of his tenancy. By its nature that additon must necessarily determine with his tenancy.

16. In the *Smirk* case it was held that there had been a surrender and a new grant and therefore that, even though the tenant had held the additional land for 13 years, he had only held it for five years under the new tenancy and therefore could not rely on the doctrine. The Court of Appeal was in agreement with Pennycuick V-C on the law as to encroachment, even though his decision was overturned on the question whether what had taken place between tenant and landlord, which Pennycuick V-C held amounted to a surrender, was not, in fact, a surrender but a continuation of the original tenancy.

17. The third declaration sought is one that neither the first nor the second defendant is entitled to have the roof space above their flat registered as an accretion to their leaseholds. The pleaded case, once slightly clarified by Mr Scott, is plain that the first defendant's lease dates from 2019 and the second defendant's from 2011. Proceedings here were issued in 2022. I am satisfied that the law is that a tenant must show twelve years of adverse possession before being able to claim an accretion to their lease by encroachment and that a surrender, including a surrender and re-grant, means that time starts to run again.

18. It was submitted, and I accept, that there is no risk of injustice or prejudice to third parties by granting a declaration as to the first and second defendant's rights, or lack of them. If that were not to be done, the claimant would otherwise be in a position of considerable uncertainty. Applying the reasoning in the Goldcrest case, the material in the uncontradicted

particulars of claim, verified by statement of truth, is enough to enable the court to grant a declaration now. There is no realistic prospect of the court ever hearing inter partes argument in this case because the defendants have chosen not to defend the claim and I agree with Mr Scott that to proceed to a trial of a preliminary issue would be a triumph of form over substance and would be a waste of the time and resources of the court.

19. The declaration that I am prepared to make is one limited to the terms of paragraph 12(3), that being a declaration that neither the first nor the second defendant is entitled to have the roof space above their flat registered as an accretion to their respective leasehold titles. This judgment gives the reasons for that and I do not need to declare the reasons in the order that I make.