Neutral Citation Number: [2023] EWHC 85(Ch)

Case No: HC-2017-002878

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2023

Before :

DEPUTY MASTER TEVERSON

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Between :

(1) CHARLES-ARGYLE PROPERTY MANAGEMENT LIMITED **(2) JOANNE CHARLES ARGYLE**	**Claimants**
- and -	
(1) BOSTON MEADOWS PROPERTY COMPANY LIMITED **(2) RUSSELL EGAN-WYER**	**Defendants**

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Dov Ohrenstein (instructed by **Warners Solicitors**) for the **Claimants**
Thomas Braithwaite (instructed by**Thackray Williams Solicitors**) for the **Defendants**

Hearing date: 25 October 2022

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Approved Judgment

This Judgment will be handed down remotely at 11am on Friday 20 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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DEPUTY MASTER TEVERSON

DEPUTY MASTER TEVERSON :

1. This is my reserved judgment following the hearing before me on 25 October 2022. The hearing took place in the context of a claim for accounts relating to two property joint ventures referred to in the claim form as “the Lyons Crescent Venture” and “the First Choice Venture”. The hearing was listed pursuant to paragraph 1 of the Order of Deputy Master Nurse dated 27 June 2022 to determine Issues 1, 2 and 3 as set out in the List of Issues attached to that Order. It was directed that those issues should be listed before me, if available. Those issues were directed to be determined in advance of the taking of an account at which Issues 4 to 22 would be determined in accordance with such directions as might be given at the hearing to determine Issues 1, 2 and 3.

2. On 31 January 2020 I handed down judgment following a trial of issues that needed to be determined in advance of the taking of the accounts. The background facts are set out in that judgment.

3. In outline, the Lyons Crescent Venture involved the conversion of an office building in Tonbridge known as Lyons House into 14 flats. Lyons House was purchased in the name of the First Defendant (“BMPC”) at the end of July 2012. It was converted into 14 flats. The last flat was sold early in October 2013.

4. The First Choice Venture involved the purchase of First Choice House, Gatwick Approach, Crawley for £2.5m by BMPC on 29 November 2013. First Choice House was a disused office building. It has to date been converted into 92 flats; 37 in phase 1 of the development and 55 flats including a caretaker’s flat in phase 2. 37 flats have been sold. 55 flats including the caretaker’s flat remain unsold. 54 of the unsold flats are being let or marketed for letting on Assured Shorthold Tenancies.

5. The Second Claimant (“JCA”) was introduced to the Second Defendant (“REW”) by REW’s business partner, John Hawker (“JH”) to whom JCA was married. REW agreed to accept JCA as a joint venture partner. This was on the basis that JCA was to be treated as an investor and not to be involved in the management of the property.

6. JCA invested through the First Claimant (“CAPM”) a company acquired for her off the shelf. JCA has at all times been the sole director and shareholder of CAPM. It was agreed that JCA’s investment in the Lyons Crescent Venture would take the form of an interest free loan made through CAPM and that on completion of the project the loan would be repaid and that JCA would be entitled to 50% of the profits.

7. The Lyons Crescent Venture was successfully carried out. JCA was repaid what she put in by way of loan capital through CAPM and £330,000 representing her share of the profits.

8. In October 2013 JCA agreed to invest in the First Choice House Venture. JCA through CAPM was treated by REW as having invested a total of £735,000 into the new venture. First Choice House was acquired for £2.5m in the name of BMPC.

9. It was initially agreed that the profits would be split 69/31 as between REW and JCA respectively.

10. The profit share of JCA was later reduced to 25% and that of REW increased to 75%.

11. The first phase of the development was completed in around October 2015. On 19 October 2015 REW transferred £630,000 representing the balance of capital contributed by JCA through CAPM and £370,000 profit share into CAPM's bank account in a single payment of £1m. This payment was made at a time when JCA had informed REW that she would be happy to agree a 50/50 share of profits pertaining to First Choice House with her husband JH.

12. On 18 January 2016 REW transferred £830,000 into JCA's savings account stating that she had now received all £1.2m of her half of the 25% that she and JH were entitled on the profits from Phases 1 and 2. REW said that JCA was not entitled to any rents receivable from any of the flats already let in Phase 1 and none from any future rents from Phase 2.

13. For the reasons set out in paragraphs 41 to 54 of the judgment, I determined that the account should proceed on the basis that JCA had a 25% share. I held that JCA had not irrevocably gifted half her share to JH in October 2015.

14. In paragraph 56 I stated there was no doubt that the joint venture partners including JCA had benefitted considerably from the work and effort put into both ventures by JH. I said that in taking the account for First Choice House there was scope for inquiring whether the amounts paid to JH for management and project work reflected a fair and just payment or remuneration for his services.

15. Between paragraphs 57 and 78 I dealt with a number of specific issues arising on the Defendants' accounts. In paragraph 79 I stated that an issue of principle arose as to whether CAPM and JCA were entitled to share in the rental income arising from lettings of unsold flats within Phases 1 and 2 of the development at First Choice House. I set out the submissions made in relation to this issue in paragraphs 81 to 83.

16. In paragraph 84 I stated:-

    "My conclusion that JCA is entitled to a 25% rather than a 12.5% profit share does not in my judgment entitle the Claimants to go back on the choice made by JCA in January 2016. Its consequence in my judgment is that in relation to Phases 1 and 2 the Claimants are to be treated as to a 25% rather than a 12.5% share on the same assumptions of the flats in Phases 1 and 2 having been sold as were used to calculate the 12.5% share."

17. The First Issue to be determined is whether I have already decided that the Claimants are entitled to a fixed profit of £2.4m.

18. The issue is not what I as the writer of the judgment subjectively intended but what a reasonable person having all the relevant background knowledge would have understood paragraph 84 of the judgment to mean.

19. In determining the First Issue, regard must be had to the terms of the Order made consequent upon the judgment. After the judgment was handed down on 31 January 2020 a further hearing took place on 11 February 2020 to deal with matters consequential upon the judgment including further orders and directions in relation to the taking of the accounts and costs. Following that hearing a supplemental judgment was handed down on 12 February 2020 dealing with the terms of the order and costs.

20. The Defendants were ordered to file and serve by 4pm on 28 April 2020 a revised draft account for each of the Ventures. In relation to First Choice House, the account was ordered to be a full account of the actual expenditure in relation to First Choice House. The revised draft accounts were served on 25 August 2020 following an unless order made on 17 August 2020. The Claimants' objections to the Defendants' draft accounts were also delayed. They were not filed until 11 April 2022.

21. In those objections, the Claimants' position in relation to the value of the 55 Flats unsold was stated to be "Disputed but irrelevant". It is stated "that the value of the flats is irrelevant in the light of Master Teverson's findings (jt para.84) that for phases 1 & 2 (including unsold flats) Cs are entitled to 25% not 12.5% profit share on the same assumptions as used to calculate the 12.5% profit share for which she received £1.2m and which REW said was still in the venture (Jt para 55)." Against the heading Expenditure, it is stated:-"(a) In the light of Master Teverson's findings at jt para 84, Cs' are entitled to a fixed profit of £2.4m on phases 1 and 2. (b) Cs' primary position is therefore that it is not necessary to determine the expenditure, in relation to those phases."

22. Mr Ohrenstein accepted it would have been better if the issue had been raised at the time of the first judgment. He submitted it was clear from paragraph 84 of the judgment that the remaining 12.5% was to be dealt with in the same way as the other 12.5%. He relied in particular on the second sentence of paragraph 84:-

    "Its consequence in my judgment is that in relation to Phases 1 and 2 the Claimants are to be treated as to a 25% rather than a 12.5% share **on the same assumptions of the flats in Phases 1 and 2 having been sold as were used to calculate the 12.5% share**" (emphasis added).

23. Mr Ohrenstein submitted that a notional value had been placed on the flats in January 2016 and REW had agreed that payment of £1.2m would be JCA's entitlement for 12.5% of phases 1 and 2 regardless of what rents were received or what prices might be obtained for any unsold flats. He submitted that whether the flats were subsequently retained for rental income, sold for more than anticipated or for less would be irrelevant as JCA and REW had agreed a fixed sum. He submitted that was extended to the other 12.5% share by the words in paragraph 84 "on the same assumptions of the flats in Phases 1 and 2 having been sold as were used to calculate the 12.5% share".

24. Mr Ohrenstein sought to meet the point why if there was a fixed share, a full account of expenditure had been ordered post judgment in relation to First Choice House. He submitted this was in order primarily to ascertain whether any secret profits had been made by the Defendants.

25. Mr Braithwaite on behalf of the Defendants submitted that the Claimants' position adopted in their objections defied common sense. He said it seemingly supposed the entire case could have ended 2.5 years ago, without any need for an account in relation to First Choice House because the Master had already decided that JCA's profit share was a flat £2.4m regardless of what the figures actually showed. He submitted the Claimants were making two glaring errors. First, they were wrongly supposing that the Master actually found that a 12.5% profit share was worth £1.2m. He submitted there was no such finding. He submitted it was true REW had paid

£1.2m to JCA as an advance of her profit share but the court never found that this figure represented anything other than the sum REW had chosen to pay. He submitted it was a provisional figure as REW had made clear to JCA at the time, He referred me to an email from JEW to JCA on 19 January 2016 at 16.48 in which REW stated:-

"As requested by you, you have also now been sent all £1,200,000 of your half share of the 25% that you and John Hawker are entitled to of the profits from Phases 1 and 2, net of all taxes and free to use from your company Charles Argyle PM Co Ltd. If there is an over or under payment of the Phase 1 and 2 profit we will send this to you or ask for a refund. I do not know which way this will go."

26. Secondly, Mr Braithwaite submitted that the Master was not in paragraph 84 of the judgment saying that the profit share should be calculated on the same assumptions that REW used when he came up with the provisional figure of £1.2m for 12.5%. He submitted that the point the Master was making was about rent and nothing else. He said this paragraph was the concluding paragraph to the section of the judgment where the Master rejected JCA's claim to income by way of ongoing rent.

27. I do not consider that my judgment and the order resulting from it ought to be read objectively as having decided that the Claimants are entitled to a fixed profit of £2.4m. Such a decision would have been incorporated into the order following judgment. Instead the court ordered a revised draft account to be filed by the Defendants including a full account of the actual expenditure. There is an evident inconsistency between the Claimants' assertion they have been awarded a fixed sum of £2.4m in relation to phases 1 and 2 of the development and a claim to be entitled to pursue a full account.

28. Insofar as it is necessary to go behind the Order and look at the judgment, paragraph 84 is the concluding paragraph of the section of the judgment that deals with the issue whether the Claimants are entitled to share in the rental income arising from the lettings of unsold flats within Phases 1 and 2 of the development at First Choice House. The first sentence of paragraph 84 states that the conclusion that JCA is entitled to a 25% rather than a 12.5% profit share does not entitle her to go back on the choice made in January 2016. The choice made in January 2016 was to be repaid her capital and receive what was then estimated to be 12.5% of the profits from Phases 1 and 2. It was made clear to her by REW this was on the basis that the Claimants would not be entitled to share in rental income from unsold flats. The second sentence of paragraph 84 is to be read in the context of the submissions made on behalf of the Claimants as recorded in paragraphs 82 and 83. The conclusion stated is that the fact that the Claimants have been held to be entitled to 25% rather than 12.5% does not entitle them to share in the rental income.

29. For those reasons Issue 1 is to be decided in the negative.

30. Issue 2 asks is the Claimants' share of the value of the unsold flats to be determined by sale or by valuation? If by sale what directions are appropriate? If by valuation, how is that to be determined?

31. On behalf of the Claimants it is submitted that a sale should be ordered otherwise the Claimants' money will be tied up indefinitely. It is submitted that the substantial costs

and uncertainty of the exercise of the court determining the values can be avoided by putting the flats on the open market.

32. An order for sale is opposed by the Defendants. The first ground of opposition is that no order for sale is sought in the Claim Form and no jurisdictional basis for such an order has been identified. It is submitted that this is a claim to a contractual profit share. I do not accept that submission. In my judgment the court has jurisdiction to order a sale under CPR 40.16 or its inherent jurisdiction where the purpose of the First Choice Venture was the development and sale of the flats.

33. It is submitted that as a result of the planning issue some 54 of the Flats are still being let out. The property was largely converted from office to residential use using "Permitted Development" legislation under the General Development Order in 2014. The Crawley Borough Council in around July 2016 refused to accept the lawfulness of these permitted development rights. It is said by the Defendants that the flats are un-mortgageable and so cannot easily be sold. It is submitted that the Claimants' interest should be valued at a much earlier date and if that is right, then an order for sale is pointless.

34. It is important to take into account the position of each of the parties to the First Choice House venture. The defendants are the party who put in the much greater share of capital. The Claimants were repaid their capital in January 2016. It is the Defendants who have since then been financing the venture. It is the Defendants who have the most to lose by a distressed sale of the property. Against this falls to be weighed the Claimants' complaint that her profit share remains locked in without being in receipt of any share of the rental income.

35. On balance, I do not consider that it would be right to make an immediate order for sale. The right course is instead to direct that the taking of the account be ordered to take place as soon as reasonably practicable. If there is unnecessary delay in the taking of the account an application to the court for an order for sale may be made.

36. It would not in my view be fair to order the property to be valued at a date prior to the planning issues coming to light. The valuation should however take into account the letting history and the rental income generated since the planning issues arose. It would not be right to select a valuation date where the value of the property might have been significantly impacted by Covid-19. Looking at all the circumstances, I consider the fairest course is to direct that the property be valued at its current value taking into account both the saleability of the flats and the investment value of the property without an individual sale of the flats.

37. Issue 3 asks in the event of a change in the planning position that allows phases 3 and 4 to occur in the future how should the Claimants obtain a share?

38. The possibility of the planning position changing allowing phases 3 and 4 to occur is a matter which can be taken into account in the valuation. The position of the Defendants is that this will never happen. The issue for the valuer is whether there remains any further hope or potential for development as originally envisaged.

39. I will hear the parties on further directions for the taking of the account and on issues 4 to 22 inclusive and any other consequential matters.