Neutral Citation Number: [2020] EWHC 1074 (Ch)

Case No: CH-2019-000311

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

7 Rolls Building
Fetter Lane
London EC4 1NL

Date: 5 May 2020

Before :

MR JUSTICE ZACAROLI

- -

Between :

PETER SINGH SANGHA	**Appellant**
- and –	
AMICUS FINANCE PLC (IN ADMINISTRATION)	**Respondent**

- -
- -

Marc Brown (instructed by **UK Law**) for the **Appellant**
Turlough Stone (instructed by **Brecher LLP**) for the **Respondent**

Hearing dates: 27 April 2020

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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.

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is an appeal against the order of Deputy District Judge Sharp dated 6 April 2018, in which she refused an application by the defendant, Mr Peter Singh Sangha ("Mr Sangha"), to set aside a possession order made on 27 January 2017 by Deputy District Judge Anthony in favour of the claimant, Amicus Finance plc ("Amicus"). The possession order related to a property at The Mount in Reservoir Road, Edgbaston, Birmingham ("The Mount"). I will refer to the proceedings in which the appeal is made as "the Mount Possession Action" in order to distinguish them from other related proceedings to which I shall refer below.

Background

2. On 30 July 2015, Amicus loaned approximately £550,000 to Mr Sangha, secured by a first legal charge over The Mount. The loan was repayable on 29 April 2016, but has not been repaid. Amicus issued possession proceedings on 21 October 2016. At the first hearing, on 7 December 2016, the matter was adjourned to enable Mr Sangha to obtain alternative finance.

3. At the adjourned hearing on 27 January 2017, Mr Sangha resisted a possession order being made on the basis it would inhibit his ability to obtain alternative finance. The judge, however, made an order requiring Mr Sangha to give up possession of The Mount by 1 March 2017.

4. Mr Sangha failed to give up possession, and Amicus applied for a warrant for possession. Mr Sangha applied to suspend the warrant for possession. That application came before District Judge Ingram on 27 September 2017, when the matter was adjourned to 4 December 2017. The stated purpose of the adjournment was, in part, to enable further evidence and submissions to be made in relation to the exercise of discretion under section 36(2) of the Administration of Justice Act 1970 and to consider whether the security was a fixed term mortgage or an all monies mortgage.

5. No further submissions or evidence were in fact provided by Mr Sangha. Instead, on 1 December 2017 he made an application to set aside the possession order under CPR Rule 3.1(7). That rule provides a power to vary or revoke any order made by the court.

6. Mr Sangha's evidence is that he had a conference with counsel on 30 November 2017, at which point he became aware that he had a potential defence to the possession proceedings, arising out of the matters I describe below. That defence was set out in a draft defence and counterclaim dated 1 December 2017.

7. At the hearing on 4 December 2017, District Judge Burns-Beech stayed Mr Sangha's application to suspend the warrant for possession (pending determination of the application to set aside the possession order) and stayed the possession order, in light of the last-minute application to set it aside.

8. The application to set aside the possession order came before Deputy District Judge Sharp on 6 April 2018, when it was dismissed.

9. The issues raised on this appeal have a close relationship with proceedings involving Amicus in relation to a different property, at 80 Broad Street, Birmingham ("80 Broad Street"). 80 Broad Street is owned by a company called Five Rivers 2 UK Ltd ("Five Rivers") of which Mr Sangha is the sole director and shareholder. On 21 August 2015, Amicus loaned approximately £990,000 to Five Rivers, secured by way of a debenture over 80 Broad Street. This was a fixed term loan of nine months, repayable on 20 May 2016.

10. There are in fact two other sets of proceedings. The first is an action commenced in the High Court by Amicus against Five Rivers and another company of which Mr Sangha is sole shareholder and director, Zara's Broad Street Ltd ("Zara's"). Amicus sought a declaration that it was not bound by a lease purportedly granted by Five Rivers to Zara's in respect of 80 Broad Street. I will refer to this as the "High Court Action". The second is an action commenced by Amicus against Fiver Rivers, seeking possession of 80 Broad Street. I will refer to this as the "Five Rivers Possession Action".

11. In his draft defence and counterclaim, Mr Sangha contends as follows:-

   i) He caused Five Rivers to purchase 80 Broad Street with the intention of Zara's operating a bar and nightclub from it. In order to complete refurbishment works at the property, Mr Sangha arranged bridging finance with Amicus.

   ii) At a meeting on 17 July 2015 at Amicus's offices, Mr Sangha told "Iain" of Amicus that Zara's was to occupy 80 Broad Street and that Five Rivers had already granted Zara's a lease for that purpose. He also explained that it was intended that, when Zara's had commenced trading, either it or Five Rivers would obtain a term loan in order to repay any bridging loan from Amicus.

   iii) Iain, on behalf of Amicus, indicated that it had no objection to these arrangements. Alternatively, in offering to lend money to Five Rivers secured on 80 Broad Street, Amicus impliedly represented that it had no objection to the lease to Zara's.

   iv) Iain also said that Amicus would only lend about £1 million on the security of 80 Broad Street, and asked whether Mr Sangha could offer any other property by way of security.

   v) Mr Sangha offered The Mount, which he said was valued at about £800,000. As a result, Amicus lent just under £1 million to Five Rivers, secured on 80 Broad Street, and just over £500,000 to Mr Sangha, secured on The Mount.

vi) Mr Sangha was induced to obtain finance from Amicus by the representations made in relation to the lease to Zara's. Had those representations not been made, neither Mr Sangha nor Five Rivers would have entered into loans with Amicus or put up the two properties (The Mount and 80 Broad Street) as security.

vii) The representation was untrue, as evidenced by the stance taken by Amicus in the High Court Action, in which it pleaded that the lease between Five Rivers and Zara's is a sham and that any right Zara's has to occupy 80 Broad Street is not binding on Amicus.

viii) The representation was made fraudulently alternatively carelessly.

ix) Mr Sangha was entitled to, and did, rescind the loan agreement and the charge over The Mount.

12. The High Court Action came on for trial in October 2018. In a reserved judgement handed down on 30 November 2018, HHJ Pearce concluded that the lease of 80 Broad Street from Five Rivers to Zara's was genuine and had been entered into prior to the execution of the debenture in favour of Amicus. The judge also dealt with the question whether the lease had been mentioned at all in the meeting of 17 July 2015, and concluded that it had not been. If that finding of fact is correct, then the case of misrepresentation advanced in Mr Sangha's draft defence and counterclaim would be bound to fail.

13. In the Five Rivers Possession Action, Amicus seeks possession of 80 Broad Street on the grounds that the loan made from Amicus to Five Rivers fell due for payment in full in May 2016, but remains unpaid. Five Rivers' defence and counterclaim raises materially the same points as are raised in Mr Sangha's draft defence and counterclaim in the Mount Possession Action. The action was commenced in the County Court at Birmingham, but transferred to the High Court on 16 July 2018. It was then stayed (by order of Deputy Master Henderson dated 3 September 2018) pending resolution of the High Court Action. The stay was lifted by order of Deputy Master Bartlett on 26 September 2019. By order of Fancourt J dated 20 December 2019, the case management conference in the Five Rivers Possession Action was ordered to be heard at the same time as Mr Sangha's appeal in the Mount Possession Action.

14. Amicus has indicated an intention to apply to strike out the parallel misrepresentation defence in the Five Rivers Possession Action on the basis of the finding of fact of HHJ Pearce that the lease to Zara's was not mentioned at the meeting on 17 July 2015. It is accepted on this appeal, however, that I cannot form a view on the outcome of that application and must proceed on the basis that Five Rivers has at least some prospect of success in its misrepresentation defence and, accordingly, so would Mr Sangha if he was permitted to defend the Mount Possession Action.

The judgment of DDJ Sharp

15. The deputy District Judge first noted that the ability to revoke, vary or set aside an order under CPR 3.1(7) is very different in nature from an appeal process, and the court must be careful to consider whether the application is an appeal by another route.

16. Next, she held that the possession order was a final order, noting that it makes no difference whether the final order was made without an adjudication by the judge of the merits.

17. She referred to the test to be applied under Rule 3.1(7) in cases concerned with an interim order, by reference to the decision of the Court of Appeal in *Roult v North West Strategic Health Authority* [2010] 1 WLR 487: namely, whether erroneous information was provided to the court at the time it made its order, or whether a subsequent event had destroyed the basis on which it was made. She also cited *Tibbles v SIG PLC* [2012] EWCA Civ 518 for the proposition that an order may be set aside where there had been a material change in circumstances or a manifest mistake on the part of the judge in the formulation of the order.

18. She noted the importance of finality, citing the judgment of Rix LJ in the *Tibbles* case at [39(i)]: "considerations of finality, the undesirability of litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all push towards a principle of curtailment of an otherwise apparently open discretion."

19. The judge noted that the thrust of Mr Sangha's case was that he had only appreciated, upon meeting with counsel on 30 November 2017, that he had a defence to the possession claim. She took into account the risk that Mr Sangha may lose his home, and yet succeed in establishing fraudulent misrepresentation, and thus the risk of inconsistent decisions. She also took into account, however, that Mr Sangha had been fully aware of the circumstances with regard to the lease which gave rise to the potential defence at the time when the possession claim was issued. She noted that, although he was unrepresented at the possession hearing, he had previously had the benefit of legal advice.

20. She concluded that there had been no material change in circumstances, nor had the judge been misled in some way, whether innocently or otherwise, as to the factual position. She stressed the importance of finality, even where there was ongoing litigation between the parties. She expressed a concern that to set aside the order would give carte blanche to a party who does not seek legal advice on receipt of a claim but later seeks to set aside an order with the benefit of legal advice.

21. Taking into account all the circumstances, she exercised her discretion in favour of dismissing the application to set aside the possession order.

Mr Sangha's grounds of appeal

22. In the grounds of appeal filed on behalf of Mr Sangha, drafted by his previous counsel, it was contended that the Deputy District Judge adopted an overly restrictive interpretation of the Court's power to vary or revoke its own orders under CPR 3.1(7). In particular, it was contended that:

    i) The judge adopted a too rigid dichotomy between interim orders and final orders which was not reflected in key authorities: namely *Forcelux v Binnie* [2009] EWCA Civ 854 and *Roult* (above); the judge was wrong to do so given that the rule itself is in broad and unfettered terms;

    ii) The judge elevated the importance of finality to an extent unwarranted by the terms of the rule, and paid correspondingly insufficient regard to the interaction with other related proceedings;

    iii) Further or alternatively, the judge gave undue weight to finality in the current proceedings and the perceived delay in the application, when the current proceedings were not entirely concluded and could be consolidated with other proceedings. The judge also gave insufficient regard to the risk of irreconcilable decisions.

23. Mr Brown, who appears for Mr Sangha, developed the first ground of appeal to include a contention that the Deputy District Judge had been wrong to characterise the possession order as a final order. Since this issue is of some importance in considering the test to be applied under Rule 3.1(7), I shall deal with it first.

Final or Interim Order

24. There is a clear distinction drawn in the authorities between a final order and an interim order. There has been some uncertainty as to whether Rule 3.1(7) applies at all to a final order, but there is no doubt that if it does apply, the circumstances in which the court would set aside a final order under the Rule are heavily circumscribed compared with those in which the court might set aside an interim order (see, for example, the discussion in *Madison CF UK v Various* [2018] EWHC 2786 (Ch) per Hildyard J at [33] to [46]).

25. Mr Stone, who appeared for Amicus, referred me to *Salekipour v Parmar* [2017] EWCA Civ 2141 where, at [64], Sir Terence Etherton MR noted that in *Roult* (above), at [15], Hughes LJ distinguished between, on the one hand, decisions of an essentially case management nature and some non-procedural but continuing orders which may call for revocation or variation as they continue (such as an interlocutory injunction) and, on the other hand, a final order disposing of the case "in whole or in part".

26. Mr Brown does not contend that a possession order is an interim order, but he does not accept that it is a final order. He submitted that it is a hybrid form of order which does not fit naturally into either category. He relied on *Forcelux* (above) in which the Court of Appeal concluded that a possession hearing was not a "trial" for the purposes of CPR Rule 39.3. I do not find this decision to be of any assistance in this respect. The nature of the hearing at which an order is made is not determinative of the nature of the order made at it. An order may be final whether it is made on the merits after a trial or in default of compliance with orders or following summary judgment or strike-out: see for example *Prompt Motor Limited v HSBC Bank PLC* [2017] EWHC 1487 (Ch) per HHJ Matthews sitting as a High Court Judge, at [30].

27. Mr Brown pointed to the following features of the possession order in support of his submission: first, it did not dispose of the money claim (which was adjourned generally); second, the mortgagee retains the right to redeem the mortgage, and thus retain possession; and third, the mortgagee can seek a stay of execution.

28. In my judgment, none of these matters prevent the possession order being a final order. In its claim form, Amicus sought, among other things, possession of The Mount. The order of DDJ Anthony was a final determination of all rights claimed by Amicus in the proceedings so far as its claim to possession was concerned: there was no further decision of the Court required in order to establish Amicus's right to possession.

29. The fact that it also sought payment of the amount outstanding under the loan, but did not obtain judgment on that part of its claim, does not affect the finality of the order for possession: see *Roult* (above) per Hughes LJ at [16]:

> "This order was a final disposal of many of the issues between the parties. It was in no sense a case management order, and the fact that there remained other issues which did need managing towards future disposal does not alter that position…"

30. I also reject the submission that the possession order was not a final order because Amicus, in order to recover possession, still had to execute the order (unless Mr Sangha voluntarily complied with it). This does not affect the finality of the order any more than the finality of a money judgment is affected by the fact that the judgment creditor might have to execute against assets of the debtor before it recovers the money ordered to be paid. I do not think the position is different in relation to possession orders because of a statutory right to stay or suspend execution, or to postpone the date for possession (see s.85(2) of the Housing Act 1985).

31. Similarly, I do not accept that Mr Sangha's right to redeem the mortgage by paying the whole of the sum secured by it, and thus retain possession, affects the finality of the order. That does not alter the fact that a final determination (reflected in the possession order) has been reached as to Amicus's right to obtain possession.

32. Mr Brown was unable to point to any authority to support his contention that there was a third – hybrid – category of order in addition to final orders and interim orders. While it is correct to say that in none of the authorities cited was there an attempt to set aside a possession order under Rule 3.1(7), so that the question whether a possession order is a final order for the purposes of the Rule was not determined, it is has been at least implicitly recognised by the Court of Appeal on at least one occasion that a possession order is a final order. In the most recent Court of Appeal case cited by the parties in which Rule 3.1(7) was considered, *Daniel Terry v BCS Corporate Acceptances Limited* [2018] EWCA Civ 2422, at [75], for instance, Hamblen LJ gave, as an example of a final order which may be set aside under Rule 3.1(7) notwithstanding the importance of the principle of finality (to which I refer below), a possession order made in the absence of the defendant. In *Findlay*, Arden LJ, at [23] also appeared to assume that a possession order is a final order.

33. For the above reasons, I conclude that DDJ Sharp was correct to find that the possession order was a final order.

The test for setting aside a final order under Rule 3.1(7)

34. The most recent authoritative statement of the test to be applied under Rule 3.1(7) is to be found in the judgment of Hamblen LJ, giving the judgment of the Court, in *Terry v BCS* (above), at [75]:

> "In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 and *Gohil v Gohil* (No 2) [2015] UKSC 61, [2016] AC 849.

35. Three things are clear from this passage. First, in relation to a final order, it is not sufficient to show that there was a change in circumstances or that the facts were misstated at the time of the original decision. Second, the importance of finality is a critical consideration in an application to set aside a final order. Third, the circumstances in which it might be appropriate to set aside a final order will be very rare.

36. Precisely what needs to be established (aside from the examples given by Hamblen LJ in the paragraph quoted above) in order to set aside a final order was not spelt out in *Terry v BCS*. In the *Prompt Motors* decision (above), HHJ Paul Mathews said, at [31] that he doubted whether anything less than fraud would do. In *Madison v Various* (above), Hildyard J, having noted the uncertainty in the authorities as to whether Rule 3.1(7) applies at all to final orders and concluding that it does, said that "it will be the truly exceptional case where it might be exercised."

37. Mr Brown submitted that the present case fell within the first of the examples given in the paragraph of Hamblen LJ's judgment quoted above, that is a possession order where the defendant did not attend the hearing as in the *Forcelux* and *Findlay* cases.

38. In *Forcelux*, as I have noted above, the Court of Appeal first determined that a possession hearing was not a trial, so that the stricter conditions for setting aside an order contained in CPR 39.3(5), where a party does not attend, did not apply. Those factors were, however, relevant as a matter of discretion where the case fell under the general case management powers in CPR 3.1(2)(m). The conditions in CPR 39.3(5) are that the applicant (a) acted promptly when he found out that the court had exercised its power to enter judgment or make an order against him, (b) had good reason for not attending the trial, and (c) had a reasonable prospect of success at trial.

39. *Findlay* was another case where the defendant failed to attend the hearing where a possession order was made against him. The claimant sought to argue that the decision in *Forcelux* was not binding because *Roult* (above) had not been cited. It was pointed out that, while *Roult* had decided that an order might be set aside under Rule 3.1(7) where the original order had been made on the basis of erroneous information or subsequent unforeseen events destroyed the basis on which the order was made, "it might not be justifiable for the power to be exercised where the order was a final order and there were no grounds for a proper appeal."

40. The Court of Appeal disagreed with that submission. *Roult* did not constitute binding authority which would have required the Court in *Forcelux* to reach some other conclusion, because, in the words of Arden LJ at [22]:

> "The key fact in *Forcelux* as in this case was that the defendant had not attended the hearing at which the order had been made. That was not the case in *Roult*, and the presence of CPR 39.3 indicates that a different approach applies in those situations: the court can set aside the order if it is it is satisfied that the conditions in CPR 39.3(5) are met and it does not have to be shown that there are proper grounds for an appeal. In the same way, the court has a wide power to set aside a summary judgment given in the absence of a party (PD24 paragraph 8)."

41. In the skeleton argument filed on behalf of Mr Sangha in April 2018 it was contended that the underlying rationale of *Forcelux* and *Findlay* is that "Rule 3.1(7) is available to ensure justice is done, especially in applications to final orders with a procedural flavour, and notwithstanding the order is one of possession. This offers a more compelling distinction between *Forcelux* and *Roult* than absence or attendance of a party." I reject that submission. As is clear from the passage from the judgment of Arden LJ in *Findlay* quoted above, the absence of a party at the time the original order is made is *the* critical distinguishing feature of that case, as in *Forcelux*, because very different considerations apply in those circumstances.

42. In oral argument, Mr Brown advanced a modified form of this submission. He contended that where a defendant attends a hearing, but does so "ineffectually", that is to be treated as non-attendance for the purposes of the application of CPR 39.3. Accordingly, it is an example (per Hughes LJ in the *Terry v BCS* case (above) at [75]) of the rare case where a final order might be set aside under Rule 3.1(7) notwithstanding the importance of finality.

43. Mr Brown contends that Mr Sangha's attendance was ineffectual because he did not take the point which, ten months later, he sought to take (namely the allegation of misrepresentation in relation to the lease of 80 Broad Street to Zara's).

44. Skilfully as this argument was deployed, I do not accept it. Attendance, or non-attendance, at a hearing is a simple, binary issue. Because it is a binary issue, it enables the court to impose straightforward conditions (being those in CPR 39.3(5): did the defendant act promptly after becoming aware that the order had been made, and what excuse did he have for not attending?).

45. In contrast, the concept of "ineffectual" attendance is inherently uncertain, and the requirements of Rule 39.3(5) do not fit easily with it. The first condition, prompt action, is tied to the point in time when the defendant finds that the court has exercised its power to make an order against him. That has no relevance to a case of so-called 'ineffectual' attendance, because the defendant by definition knows immediately that the court has exercised such a power. The requirement to demonstrate good reason for non-attendance also has no relevance. Any attempt to apply the provision by analogy would give rise to considerable uncertainty, and would undermine the importance of finality. In this case, Mr Sangha was unrepresented at the hearing, but that cannot sensibly be equated with "ineffectual" attendance. The notion of "ineffectual" attendance would appear, therefore, to relate to the failure to take the point which it is sought to take subsequently. To identify that as the touchstone for being able to set aside an order would, however, drive a coach and horses through the required focus on the importance of finality. As I point out below, the mere fact that a point was not taken at the original hearing would normally not be enough to set aside an interim order, let alone a final one.

46. In any event, even if the language of Rule 39.3(5) were to be stretched so as to fit the circumstances of a non-attending party, it is difficult to see how Mr Sangha could satisfy the conditions as to prompt action and a good reason for "ineffectual" attendance.

47. So far as prompt action is concerned, he delayed over ten months before making an application to set aside the possession order. Mr Brown contends that Mr Sangha acted promptly from the moment that he first became aware that he had a defence based on misrepresentation. He says that he first discovered this on 30 November 2017 in a conference with Counsel, and that his application was made the very next day. Mr Sangha relies on the same point to explain his "ineffectual" attendance at the possession hearing, coupled with the fact that he was unrepresented.

48. As Mr Stone pointed out, however, all of the facts which gave rise to the misrepresentation claim were known to Mr Sangha prior to the hearing when the possession order was made. By that time, he was aware that Amicus was disputing the existence of the lease from Five Rivers to Zara's and was contending that it had not been told about it. That is the information which Mr Sangha relies on to establish the falsity of the representation. As to the making of the representation in the first place, Mr Sangha was at the meeting in July 2015 when he contends that it was made, so necessarily knew of it at the time of the possession proceedings.

49. Mr Stone referred me to a number of examples of a court saying that Rule 3.1(7) could not be invoked, even in relation to interim orders, on the ground that the court was presented with erroneous information at the time of the original order, where the defendant knew or ought to have known of the facts at the relevant time: *Tibbles* (above) at [39(v)]; *Kojima* (above) at [24] (although he rightly pointed out that at [39], Briggs J said that an inadvertent failure to present relevant material would not be fatal, but would nevertheless be a "negative factor" against the exercise of discretion); and *Prompt Motors* (above) at [31].

50. So far as the reason why Mr Sangha's attendance was "ineffectual" is concerned, Mr Sangha has offered no explanation as to why he was unrepresented at the hearing. It is clear that he (or his companies) had legal representation two months prior to the possession hearing, because there is in evidence a letter from Amicus' solicitors to his (or his companies') solicitors in November 2016 challenging the validity of the lease to Zara's. Those same solicitors formally came on the record for Mr Sangha two months after the possession hearing.

51. As Mr Stone submitted, the application to set aside the possession order boils down to a wish to run a point based on facts and evidence which were known to Mr Sangha at the time *and* at a time when he and his companies were, or at least recently had been, legally represented.

52. Accordingly, Mr Sangha would have considerable difficulty in satisfying the conditions in CPR 39.3(5) even if, which I have held they do not, they were to be applied by analogy to a case of "ineffectual" attendance.

Conclusions in respect of the grounds of appeal

53. For the above reasons, I do not accept that DDJ Sharp made any error in identifying the legal test to be applied.

54. She made no error of law in drawing a clear dichotomy between a final order and an interim order. If anything, the judge – in addressing questions such as whether there had been a material change of circumstances and whether there had been a misstatement of the factual position at the original hearing – was applying a test that was overly-generous to Mr Sangha, given her finding that the possession order was a final order. That, however, cannot afford a ground of appeal to Mr Sangha.

55. Importantly, she made no error of law in placing reliance on the need for finality and to avoid an appeal by another route. As I have indicated above, that is a consideration of central importance on an application to set aside a final order.

56. The remaining grounds of appeal are a challenge to the exercise of the judge's discretion. An appeal against an exercise of discretion can only succeed if it is established that the judge exceeded the generous ambit within which reasonable disagreement is possible, for example because the judge took into account or left out of account relevant or irrelevant material as the case may be.

57. The judge's exercise of discretion is challenged in this case on the basis that she gave too much weight to the importance of finality and to the delay, and correspondingly gave too little weight to the interaction with the other proceedings and the risk of inconsistent decisions.

58. These challenges, in my judgment, do not overcome the high hurdle for setting aside an exercise of discretion. It is not enough to contend that the judge should have balanced the relevant factors differently so as to come to a different conclusion.

59. As I have noted above, the authorities demonstrate that in applying Rule 3.1(7) to a final order, the need for finality is of central importance, and I discern no error of principle in the weight which the judge afforded to this factor.

60. As to delay, Mr Brown submitted that it was, in this case, of less relevance because there was no evidence that Amicus had acted in reliance on the possession order in the meantime, citing *Tibbles* at [42]. That passage, however, was dealing with the condition in CPR 39.3(5) requiring prompt action which, as I have indicated above, is not relevant here. While it would be an aggravating factor if Amicus had acted in reliance on the possession order, I do not think that is an essential requirement in order for delay to be considered a *relevant* factor in the exercise of discretion under Rule 3.1(7). There was no error of principle, therefore, in the judge taking it into account.

61. Mr Sangha does not contend that the judge failed to take into account the risk of inconsistent decisions or the fact that other proceedings, in which the misrepresentation claim would be determined, were going on in any event. She clearly did take these matters into account, but concluded that they did not outweigh the factors pointing the other way. Mr Sangha's complaint is that the judge gave them insufficient weight. Even if this were correct, it would not provide a basis for interfering with the judge's exercise of discretion.

62. In any event, I do not accept that the judge gave too little weight to these considerations. It is true that there is undoubtedly a connection between the Mount Possession Action and the Five Rivers Possession Action, in that the relevant secured loans related to the acquisition of 80 Broad Street and it is Mr Sangha's case that the misrepresentation allegedly made by Amicus induced him and his companies to enter into both loans. Nevertheless, the consequence of Five Rivers succeeding in its claim for misrepresentation would result (at best) in relief being granted in respect of the secured loan in respect of 80 Broad Street. This would be likely to demonstrate that Mr Sangha would have had a good defence to the Mount Possession Action. I do not think, however, that the possibility that the contention that he makes now in respect of secured loan over The Mount (that he does have a good defence based on misrepresentation) might be proved correct in proceedings relating to the other loan and other property, is such an important consideration that it should have tipped the scales in favour of setting aside the possession order. A fortiori, I do not consider that the judge's exercise of discretion can be challenged because she did not reach that conclusion.

63. In short, I do not think that DDJ Sharp's exercise of discretion fell outside the generous ambit afforded to her. She was entitled to conclude that the circumstances of this case were not "exceptional" so as to justify setting aside a final order.

64. For the above reasons, I dismiss this appeal.