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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH-2020-000274

Neutral Citation Number: [2021] EWHC 2181 (Ch)

The Rolls Building
7 Rolls Buildings
Fetter Lane
Holborn
London, EC4A 1NL

Friday, 28 May 2021

Before:

MRS JUSTICE BACON DBE

B E T W E E N :

ALI GURGUR — Appellant

- and -

(1) AMANDA REES
(2) ELAINE REES
(3) SIMON REES — Respondents

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MR M. WARWICK QC (instructed by Ronald Fletcher Baker LLP) appeared on behalf of the Appellant.

THE RESPONDENTS were not present and were not represented.

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# J U D G M E N T

MRS JUSTICE BACON:

1 This is an appeal from a decision of HHJ Hellman in the County Court at Central London, in a landlord and tenant dispute concerning a property in Stoke Newington, London. It raises the question of whether the court has jurisdiction to make a declaration as to the interpretation of a settlement agreement contained in a schedule to a Tomlin order. The judge held that he did have jurisdiction to do so, and made a declaration interpreting the agreement in favour of the respondents. He did, however, give permission to appeal.

2 The respondents have not participated in the appeal, saying that the appeal is now academic in light of subsequent procedural steps. I have therefore only heard submissions from Mr Warwick QC for the appellant.

**Background**

3 The appellant was the tenant, and the respondents were the landlords of 109 Stoke Newington, Church Street in London, a property consisting of retail premises on the ground floor, and residential accommodation on the first and second floors.

4 In September 2016 the respondents served a notice on the appellant under section 146 of the Law of Property Act 1925, specifying breaches of covenant under the lease and requiring the appellant to rectify them. The appellant did not do so to the respondents' satisfaction, and the respondents accordingly sought possession of the property in May 2017, alleging that the appellant had failed to keep the property in good repair, had failed to comply with statutory regulations and had made unauthorised alterations to the property. In addition, the respondents claimed damages for the costs of repairing the property and various heads of costs. The relief sought in the particulars of claim also included a claim to mesne profits from the date of service of the claim form until the date the appellant gave up possession.

5 On the morning of the trial a settlement was reached between the parties and drawn up in the form of a schedule to a Tomlin order, which was eventually submitted in final form to the court on 22 October 2018, approved by Judge Hellman on the same day, and then drawn up by the court on 25 October 2018. The Tomlin order provided in the usual way:

> "UPON the parties having agreed the terms set out in the schedule to this order, in settlement of these proceedings,
>
> IT IS ORDERED:
>
> 1. All further proceedings be stayed upon the terms set out in the schedule to this order, except for the purpose of carrying those terms into effect.
> 2. Both parties have permission to apply."

6 The schedule then set out the settlement agreement in terms that provided for the appellant to surrender to the respondents the first and second floor and garden to the premises, and such part of the ground floor as necessary to create a corridor to allow access to the upper floors. The respondents were then to convert the upper floors into a self-contained residential flat, following which it was agreed that they would grant the appellant a new 15-year lease of the ground floor and basement, save for the access hallway.

7 The settlement agreement then provided as follows:

> "4. The Defendant will make the following payments to the Claimants as a contribution to his liabilities under the existing lease and the Claimants' costs of the proceedings:
>
> > (i) a payment of £50,000 to be made by no later than 4 pm on 23 October 2018;
> > (ii) an additional £90,000 to be paid by 18 equal monthly instalments of £5,000 the first such payment to be made by 23 November 2018 and with each subsequent payment to be made on the 23rd of each month.
>
> 5. For the avoidance of any doubt in the event of any default on the part of the Defendant in the performance of the terms set out above, the Claimants shall be entitled to lift the stay imposed in these proceedings and assert their claim for possession based upon the forfeiture of the existing lease."

8 The appellant duly paid the sums required under clause 4 of the settlement agreement. In addition to those sums, the respondents said that the appellant was liable to continue to pay mesne profits in respect of his continued occupation of the premises. The appellant refused to do so, taking the view that the monthly instalments of £5,000 included ongoing mesne profits or rent.

9 The respondents therefore issued an application seeking, "An order that the [appellant] is obliged to pay a sum for use and occupation of the property known as 109 Stoke Newington Church Street, London, N16, pending the performance of the terms of a consent order approved by the court on 25 October 2018".

**The disputed declarations**

10 The application was heard on 19 June 2020, during a period in which Practice Direction 51Z was in force, providing that all proceedings for possession brought under CPR Pt 55 were stayed for a period of 90 days from the date the direction came into force. That 90-day period was subsequently extended to 23 August 2020, and then to 20 September 2020. Neither party suggested that PD 51Z prevented the application from being heard. Following further written submissions from both parties following the hearing, however, the judge decided that the application was subject to the stay imposed by PD 51Z, and accordingly judgment was deferred until after the period of the stay had expired.

11 In his judgment of 30 October 2020 the judge noted at §§16–17 that the court did not have jurisdiction to make an order for payment of mesne profits as sought by the respondents. That was because a claim for mesne profits had been included in the particulars of claim and was accordingly caught by the stay in the Tomlin order which the respondents had not sought to lift.

12 Counsel for the respondents therefore sought to recast the application as seeking a declaration as to the appellant's liability to pay mesne profits following the settlement order. That raised the question of whether the stay in the Tomlin order would also preclude such a declaration. On that point the judge's analysis (at §27 of the judgment) was as follows:

> "In my judgment an application for a declaration as to the meaning and effect of the terms set out in the schedule to a Tomlin order is an application for the purpose of carrying those terms into effect. In order to carry a Tomlin order

> into effect, or put another way, to enforce it, the parties need to know what those terms mean. In case of doubt, they can apply to the court for clarification. To require them to start a separate action for this purpose would be cumbersome and inefficient. It better fits the overriding objective to deal with cases justly and at proportionate cost that the proceedings in which the Tomlin order has been made and in which the schedule to the Tomlin order can be enforced should be proceedings in which the court can give declaratory relief as to the meaning and effect of the schedule. I am therefore satisfied that I have jurisdiction to grant the Claimants declaratory relief."

13 As to the substance of the relief sought by the respondents, the judge had already noted that there was no express term in the settlement agreement providing for mesne profits (§17). Nor did either party contend that a term should be implied into the agreement either excluding or including a liability to pay mesne profits (§34). Furthermore, since the application (as reformulated) was to carry the terms of the settlement agreement into effect, the judge could not under that application determine whether there was a common law obligation to pay mesne profits arising *independently* of the settlement agreement. The judge held that he could, however, determine whether the settlement agreement should be construed as intending to exclude an obligation to pay mesne profits (§35).

14 As to that question, the judge considered that the agreement was not intended to exclude any such obligation. As he had already found, there was no express term excluding such liability, nor had he been invited to imply such a term. He considered that the language of §4 of the agreement made clear that the sums payable under the agreement were not referring to mesne profits, which counsel for the respondents had noted were not "liabilities under the existing lease" (§§37–38).

15 The judge emphasised, however, that (1) unless the respondents applied successfully to lift the stay, they were prohibited from seeking to enforce payment of mesne profits; and (2) he was not making any finding as to whether any mesne profits were in fact payable (§39).

16 The order of the court dated 9 November 2020 accordingly declared that:

> "(1) The Court has jurisdiction to grant a declaration as to the meaning and effect of a settlement agreement contained in the schedule to the Tomlin order approved by the Court on 25 October 2018 ('the Settlement Agreement').
>
> (2) The parties did not agree to negative any obligation of the Defendant arising independently of the Settlement Agreement to pay mesne profits for his use and occupation of the property known as 109 Stoke Newington Church Street, London N16 0UD."

17 The present appeal is brought against both of those declarations.

**The position of the Respondent**

18 On 10 November 2020 the respondents issued an application to lift the stay in the Tomlin order in order to enable them to pursue their claim for mesne profits. In light of that application the respondents contend that the present appeal is wholly academic.

19 I do not think that that is right. The application to lift the stay has not been determined; indeed on 5 May 2021 it was adjourned generally by HHJ Hellman, apparently for reasons unrelated

to the present appeal. As matters stand, therefore, the stay has not been lifted. The question of whether absent a stay the court can interpret the settlement agreement is therefore still a relevant question for the dispute between the parties, as is the substantive question as to the interpretation of that agreement.

**The grounds of appeal**

20 The appellant's grounds of appeal boil down to three submissions. The first is that the judge did not have jurisdiction to grant the declaration that he did. The second is that the judge should have refused to grant the declaration as a matter of discretion. The third is that the declaration was in any event wrong as a matter of substance.

**The jurisdiction issue**

21 The jurisdiction issue raises the question of whether the court is able to give a declaration as to the interpretation of a settlement agreement embodied in a Tomlin order, where that declaration does not concern the specific enforcement of the settlement agreement or one of its terms, but does concern the meaning and effect of the agreement.

22 Mr Warwick says that the court has no jurisdiction to do so. In support of that proposition he referred me to a number of authorities as to the effect of a stay of proceedings. In particular, he relies on the comment of the Chancellor in *TFS Stores v Designer Retail Outlet Centres* [2020] 4 WLR 99, §36, that, "A stay means what it says. If the proceedings are stayed, nothing can happen in court at all."

23 It seems to me, however, that those authorities do not address the point in issue in this case. The judge correctly found in the present case that the stay in the Tomlin order meant that he could not decide whether the respondent was entitled to mesne profits in respect of its occupation of the property, that being caught by the stay. But the terms of the stay in the present case contain the usual Tomlin order provision that the provisions were stayed *except for* the purpose of carrying those terms (i.e. the terms of the settlement agreement) into effect. The question before the court was therefore not the effect of the stay as such, but rather the effect of that exception.

24 The judge found that in order to give effect to the terms of the settlement agreement, the parties needed to know what those terms meant. Accordingly, the judge considered that an application for a declaration as the interpretation of a settlement agreement fell within the scope of the exception to the stay.

25 That conclusion was in my view entirely correct. There is no doubt whatsoever that the court has jurisdiction to interpret the terms of a settlement agreement contained in a Tomlin order for the purposes of giving effect to the agreement. The Court of Appeal did so in *Wallace v Brian Gale* [1998] 1 FLR 1091. More recently the House of Lords did so in *Sirius International v FAI General Insurance* [2004] UKHL 54. As set out in §18 of the judgment in *Sirius*, the settlement contained in a Tomlin order is to be construed as a commercial instrument, the aim of the enquiry being to ascertain the contextual meaning of the relevant contractual language, looking at the text under consideration and its relevant contextual scene to determine what a reasonable person would have understood the parties to have meant.

26 Mr Warwick attempted to distinguish these cases as being ones in which the court was being asked to enforce a particular term of the Tomlin order, as opposed to an application for a declaration that is not bought as part of a specific enforcement application. But the case-law

does not support such distinction. Certainly, when an action is brought for specific enforcement of a term of the agreement, the court may well have to interpret that particular term, but that does not mean that the court cannot give a declaration where no specific enforcement order is also sought.

27 The *Sirius* case itself is one where the issue being determined was solely one of construction of the agreement. While that was described as a "preliminary issue", no further context to that was given in either the judgment of the House of Lords or the judgments of the lower courts, and it was not suggested in any of the judgments that the circumstances in which the determination of construction was sought were of any relevance to the power of the court to make that determination.

28 The point emerges even more clearly from *Wallace*, where the matter came before the court by way of a summons seeking a number of orders. By the time of the hearing the only remaining issue in dispute was the part of the summons that sought a declaration as to whether certain costs fell within the terms of the Tomlin order. As noted by Judge Humphrey Lloyd QC at first instance, the issue raised by the application therefore concerned the meaning of the relevant provision of the agreement in the Tomlin order, which he proceeded to determine. The same point was made by the Court of Appeal, which noted that the issue was, "one purely of interpretation", and the Court of Appeal upheld the judge's conclusion on that point save for a particular point of clarification.

29 Mr Warwick says that this was legitimate because the applicants in *Wallace* brought the case pursuant to the liberty to apply, and they were therefore seeking declaratory relief as an ancillary matter to enforcement of the Tomlin order. But it is clear from the first instance judgment that this was not the case. By the time the case reached the court there was no remaining application to enforce any specific term of the agreement; all that was sought was a standalone declaration, as in this case, as to the interpretation of the agreement.

30 The high point of Mr Warwick's case was a comment by Andrew Smith J at §12 of his judgment in *Novoship v Mikhaylyuk* [2015] EWHC 992 (Comm), where the judge questioned whether an application for a declaration as to the interpretation of a settlement agreement could properly be brought without starting a new claim. It should, however, be noted that this point was apparently raised by the judge of his own motion, and not suggested by either party. The comment was also *obiter* since the judge found that he did not have to decide the point, because in any event the application was ancillary to an application to discharge or vary a freezing order, which he said the relevant party was entirely entitled to seek.

31 In my judgment it is clear from the case-law that the court does have jurisdiction to interpret a settlement agreement in a Tomlin order, on an application by one of the parties to the agreement for a declaration as to the meaning and effect of one or more provisions of that agreement. The standard provision in a Tomlin order makes clear that the stay operates except for the purpose of carrying into effect the terms of the settlement agreement. An application for a declaration by one of the parties seeking to resolve a dispute as to the effect of one of the provisions of the settlement agreement is an application made for the purpose of carrying into effect the terms of the agreement.

32 It may be that in most cases any declaration as to interpretation will indeed be sought as part and parcel of an application to enforce a specific provision of the agreement. In this case, the court arrived at the position that it did because it found that it did not have jurisdiction to make the order originally sought in the application, namely an order that the appellant was obliged to pay mesne profits. That is why counsel for the respondents sought during the hearing to

recast the application as seeking a declaration instead, and explains why the judge ultimately determined what was a standalone application for a declaration.

33 There is in my judgment no reason of principle why the judge should have refused that application as reformulated, in circumstances where the declaration ultimately made was, on its face, a declaration as to the effect of the terms of the settlement agreement.

34 It is also true that the application made by the respondents was not expressly brought as an application under the liberty to apply provision in §2 of the Tomlin order, for the purpose of giving effect to the terms of the settlement agreement. But that was in substance what the respondents ultimately sought, as explained at §27 of the judgment.

35 I therefore dismiss the appeal on the jurisdiction issue.

**The discretion issue**

36 The appellant's second ground of appeal is set as a matter of discretion the judge should have refused to grant declaratory relief because of the finality of a Tomlin order.

37 I reject that submission. It is apparent from that authorities that I have already cited that there is no presumption against interpreting a settlement in a Tomlin order, and therefore no basis on which I should interfere with the discretion of the judge to grant declaratory relief.

38 Mr Warwick referred to the case of *Community Care North East v Durham* [2012] 1 WLR 338, in which Ramsey J said that the case management powers in the CPR did not have any application to the terms of an agreement in the Tomlin order (§27). That case however concerned an application to vary the terms of the agreement in a Tomlin order, and it is notable that the judge drew a distinction between that and a case in which what was sought was an interpretation of the agreement incorporated in a Tomlin order. In relation to the latter the judge said at §28 that the court "obviously has the ability to interpret that agreement on well-known principles of interpretation, as set out in the *Sirius* case … and would have to do so when it was asked to take any enforcement action under the standard liberty to apply for that purpose in the Tomlin order."

39 As I have found, the judge found that in substance the respondents' reformulated application in this case was indeed an application made under the liberty to apply in the Tomlin order. If anything, therefore, the *Community Care* case supports the order made by the judge.

40 Mr Warwick also relied, albeit somewhat faintly, on a witness statement filed in March 2020 by counsel who had been representing the appellant at the time that the settlement agreement was made, setting out his understanding of the effect of the settlement agreement. That takes the matter no further because Mr Warwick fairly acknowledged that the statement was inadmissible as an aid to construction of the agreement. That being the case, I do not consider that it can have any relevance either to the question of whether the judge should have exercised his discretion to grant the declaratory relief sought.

41 I therefore dismiss the appeal on the discretion issue.

## Substance of the declaration

42 That leaves Mr Warwick's final ground of appeal, which is that the declaration was wrong in its substance, because a claim for mesne profits could only arise if the appellant's lease was forfeit, which the court had not decided.

43 That submission is misconceived, because the declaration did not find that the respondents were entitled to mesne profits – indeed as I have noted the judge emphasised at §§35 and 39 that he was not making any finding at all as to whether mesne profits were payable. Rather, the judge merely found that the settlement agreement did not preclude an obligation on the appellant to pay mesne profits independently of the agreement; put another way, the settlement agreement was not determinative of any such obligation.

44 If the appellant wishes to argue that mesne profits are not in fact due because the settlement agreement did not determine the possession claim (or indeed for any other reason), then that argument will remain open to him if the stay is lifted and if the respondents then pursue an application for the payment of mesne profits.

45 For completeness I note that the grounds of appeal included a final contention that the settlement agreement was intended to set out the parties' future rights and obligations in relation to the property until they entered into a new tenancy agreement, such that the judge was wrong as a matter of construction to declare that the parties did not intend to exclude an obligation to pay mesne profits. The sole basis for this contention, as set out in Mr Warwick's skeleton argument for the appeal, was the March 2020 witness statement which Mr Warwick nevertheless accepted was inadmissible as an aid to construction. Mr Warwick therefore rightly did not pursue this point at the hearing.

46 I therefore dismiss the third ground of appeal.

## Conclusion

47 The appeal therefore fails. I will hear submissions as to any consequential issues.

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**CERTIFICATE**

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***5 New Street Square, London, EC4A 3BF***
***Tel: 020 7831 5627 Fax: 020 7831 7737***
***civil@opus2.digital***