Neutral Citation Number: [2022] EWHC 1530 (Ch)

Case No: HC-2017-000147 & 158

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 28/6/2022

Before:

MASTER CLARK

- -

HC-2017-000147

Between:

DAVID RAYMOND BRIERLEY — **Claimant**

- and –

(1) FRANK OTUO
(2) RUTH OTUO
(3) JASON ADU-GYAMFI
(4) JAYANA THENUARA — **Defendants**

HC-2017-000158

Between:

FRANK OTUO — **Claimant**

- and –

(1) DAVID RAYMOND BRIERLEY
(2) LISA-JAYNE BRIERLEY — **Defendants**

- -
- -

Adam Stewart-Wallace (instructed by **Helix Law**) for the **Claimant** in **HC-2017-000147** and the **First Defendant** in **HC-2017-000158**
Frank Otuo, the **First Defendant** in in **HC-2017-000147** and the **Claimant** in **HC-2017-000158** in person for himself and the **Second Defendant**

Hearing dates: 8 & 9 June 2022

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Approved Judgment

I direct that this approved judgment, sent to the parties by email at 2pm on 28 June 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This judgment deals with:

    (1) the first and second defendants' application dated 11 March 2022 ("the estoppel application"), seeking a declaration that the claimant is estopped by convention from resiling from his redemption statement dated 22 October 2021 filed and served pursuant to my order dated 20 September 2021 ("the September order");

    (2) the issue of whether, in determining the sum required to discharge all charging orders on the defendants' properties, unassessed costs are to be disregarded; and, if not, how they are to be treated – this is a point of principle which arises in relation to the September order.

Background

2. The background is set out in my judgment dated 8 April 2022, and, for convenience, I repeat the relevant parts here.

3. The claimant and the first defendant were former partners in a property development business in London. In 2012, the first defendant brought a claim (HC-2012-000134 – "the 2012 claim") that the claimant was in breach of an agreement dissolving the partnership between them. Various costs orders were made against the first defendant in that claim, which was ultimately unsuccessful.

4. These costs orders were secured by charging orders ("the 2012 claim charging orders") on the first defendant's interest in
    (1) 311 Leigham Court Road, Putney SW16 2RX, which is owed jointly by the first defendant and his wife;
    (2) 31B Oxford Road, Putney SW15 2LH, which is registered in their joint names, but has been held to be solely beneficially owned by the first defendant.

5. The 2012 claim was followed by a Part 8 claim (HC-2017-000147) by the claimant against the first defendant and his wife, as second defendant, to enforce the 2012 claim

charging orders on both properties, and seeking various declarations as to beneficial ownership of the properties.

6. The first defendant also brought a claim (HC-2017-000158) in January 2018 seeking declarations and an order for sale of 2 other properties held by the claimant and his wife on trust for the claimant and the first defendant:
(1) 5 Brading Road, London, SW2 2AP;
(2) 6 Maplestead Road, London SW2 3LX.
(referred to as "the freeholds")

7. Adverse costs orders were also made against both defendants in the claimant's 2017 claim, and against the first defendant only in the first defendant's 2017 claim, and in related insolvency proceedings against both defendants.

8. Following a trial of both claims, Nicholas Le Poidevin QC, (sitting as a deputy judge of the High Court) gave judgment for the claimant.

9. 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 4 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. The claimant's solicitors were given 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.

10. The order of 2 August 2019 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. These were, so far as relevant:

> "13. The Claimant's solicitors shall apply the proceeds of sale of 31B Oxford Road as follows:
> (i) to pay the costs and expenses of effecting the sale of that property;
> (ii) to discharge any other sum secured by any prior registered legal charge thereon;
> (iii) …;
> (iv) to reduce or discharge the First Defendant's indebtedness to the Claimant as secured by all and any charging orders (including accrued interest) made in favour of the Claimant upon the First Defendant's interest in that property, including, for the avoidance of any doubt, the amount due under all orders for costs made against the First Defendant in the Claimant's Claim or the First Defendant's Claim (including the order hereinafter made); and
> (v) to pay any surplus proceeds to the First Defendant.
>
> 14. The Claimant's solicitors shall apply the proceeds of sale of 311 Leigham Court Road as follows:
> (i) to pay the costs and expenses of effecting the sale of that property;
> (ii) to discharge any other sum secured by any prior registered legal charge thereon;

(iii) to divide the remaining proceeds of sale into two equal shares to answer the respective interests therein of the First Defendant and the Second Defendant;

(iv) out of the First Defendant's share:

a. to pay all sums required to reduce or discharge his indebtedness as secured by all and any charging orders (including accrued interest) made in favour of the Claimant upon the First Defendant's interest in that property, including, for the avoidance of any doubt, the amount due under all orders for costs made against the First Defendant in the Claimant's Claim or the First Defendant's Claim (including the order hereinafter made); and

b. to pay any surplus proceeds to the First Defendant;

(vi)(*sic*)out of the Second Defendant's share:

a. to pay the amount due under all orders for costs made against the Second Defendant in the Claimant's Claim or the First Defendant's Claim (including the order hereinafter made); and

b. to pay any surplus proceeds to the Second Defendant."

11. The first and second defendants were also ordered to pay the costs of both claims (and applications made by them in those claims) on the indemnity basis, and to make an interim payment on account of those costs of £90,000.

12. On 17 February 2020, Deputy Master Lloyd made 2 final charging orders against Leigham Court Road:

(1) charging the interest of the first defendant with payment of £142,374.88, the amount due under various orders, including the 2 August 2019 order; and

(2) charging the interest of the second defendant with payment of £120,714, the amount due under various orders, including the 2 August 2019 order.

These charging orders therefore only secured the £90,000 ordered on account of costs. It did not secure the remaining unassessed costs ordered to be paid by the 2 August 2019 order.

13. On 2 March 2020, the parties reached an agreement (recorded in a consent order sealed on 12 March 2020 of Deputy Master Bowles – "the consent order") under which the claimant agreed to accept £250,000[1] ("the settlement sum") in part payment of the sums owed to him, in return for which he agreed, so far as relevant, to remove his charges and restrictions on 31B Oxford Road and to cease its sale.

14. On 13 October 2020, the first defendant applied, pursuant to CPR 47.7, for an order that unless the claimant commenced detailed assessment proceedings within the time specified by the court, all or part of the costs to which the claimant would otherwise be entitled would be disallowed. The costs orders in respect of which the unless order was sought included those ordered by the 2 August 2019 order.

15. That application was dismissed by Meade J on 11 December 2020, but in doing so, he granted permission to make a further application if no Bill of Costs had been served by 15 February 2021.

[1] In fact, £250,180.25 was paid and accepted.

16. On 3 March 2021, Bacon J held that the effect of the consent order was that the settlement sum would first reduce or discharge the first defendant's debt; and only if that debt were discharged (i.e. extinguished) would the sum be applied to the second defendant's debt.

17. On 19 March 2021, the claimant served a Bill of the Costs of the 2017 claims in a total of £207,848.90. A default costs certificate ("the DCC") for that sum was entered on 8 April 2021.

18. On 21 May 2021, I made an interim charging order charging the first defendant's interest in Leigham Court Road with payment of £233,844.79, being the sum due under various orders, including the DCC.

19. On 20 September 2021, I made an order including that:
    (1) the claimant file and serve a redemption statement setting out the total sum required to discharge all charging orders on the first defendant's properties, identifying in respect of each charging order:
        (i) the date of the charging order;
        (ii) the property;
        (iii) the debt (including interest) secured by charging order;
        (iv) any sums received in payment or part payment of that debt.
    (2) the first defendant file and serve points of dispute in response to the redemption statement.

20. This order reflected my conclusion that, having paid the claimant the settlement sum (and thereby discharged the charges on Oxford Road), the defendants were entitled to redeem the charges on Leigham Court Road, and, for that purpose to be provided with the sum required to do so; and to the extent that the redemption sum could not be agreed, for that sum to be determined by the court.

21. The claimant filed and served a redemption statement dated 22 October 2021 ("the first redemption statement") in tabular form. This included the following:
    (1) Sum due on all charging orders minus payments: £201,991.08
    (2) Costs of enforcement and sale: £44,375.56
    (3) "Total sum to redeem charges including costs of enforcing charges and sale": £246,366.64.

22. The statement also included amounts of interest (at the judgment rate of 8%) calculated for each of the periods between each payment made. This totalled £126,655.64, but this amount was not included in the total sum to redeem. Exactly the same figure for interest was stated to be due at the forthcoming hearing date of 13 January 2022, and this was obviously an error.

23. On 25 October 2021, the first defendant served a Request for Further Information ("the RFI") including:

> "4. Is the amount of £246,366.64, the amount needed to redeem 311 Leigham Court Road Streatham Hill London SW16 2RX?"

24. In their letter dated 26 October 2021, the claimant's solicitors refused to respond to the RFI, on the basis that the first defendant did not need the information sought to prepare his Points of Dispute.

25. The first defendant therefore on 5 November 2021 issued an application notice seeking an order for the claimant to answer the RFI. This was supported by a witness statement, also dated 5 November 2021, paragraph 6 of which states:

> "6. The redemption statement has in bold, capitals and underscore, "**TOTAL SUM TO REDEEM CHARGES INCLUDING COSTS OF ENFORCING CHARGES AND SALE £246,366.64**". On one view, it appears that this is, in the view of the Claimant, the totality of sums required to redeem the properties, however, the Claimant further has in a table below this "Interest Due at Date" i.e. 22 October 2021, as being £126,655.64. It is not clear from the redemption statement what sums on the various tables were put together to result in the figure of £246,366.64 and if that figure – the redemption figure, has in it, the amount of £126,655.64. The Part 18 Request simply seeks to clarify, if indeed, as I see it, £246,366.64 is the amount needed to redeem the properties in line with the specific requirement of the order to provide one "total sum" not "sums". I seek this simple clarification to ensure that both parties understand what the redemption figure is and that, there is no dispute as to the starting point for further reduction on that sum if, I should achieve a reduction on other charging orders within the redemption statement."

26. On 12 November 2021, the Claimant's solicitors wrote to the Court, copying in the first defendant. Their letter set out the last 8 lines of the above passage, then continued:

> "We confirm that the total sum required to discharge all charging orders on the First Defendant's properties (including 311 Leigham Court Road) is £246,366.64 as stated on the documents filed at court."

27. On 17 November 2021, the first defendant filed and served his Points of Dispute. These included the following:

> "These points of dispute assume that the figure of £246,366.64 provided by the Claimant pursuant to par. 2 of the order of Master Clark dated 20 09 2021 and confirmed by Helix Law on the Claimant's behalf by a letter to the court dated 12 11 2021 as being the total sum required to redeem the first Defendant's properties is the starting point to apply any reduction to this total sum in order for the court to rule on what the actual total sum required to discharge all charging orders on the first Defendant's properties is."

28. The Claimant served his Response to the Points of Dispute on 8 December 2021. It does not challenge the assumption set out in it.

29. On 22 December 2021, Costs Judge Nagalingam set aside the DCC.

30. On 12 January 2022, the Claimant's solicitor made his 14th witness statement ("Rimmer 14") , setting out that the DCC had been set aside, with the consequence that £104,702.90 of costs were now unassessed. They currently remain unassessed.

31. Rimmer 14 also set out the way in which interest had been calculated in the first redemption statement; and that the total figure owed by the First Defendant as at 22 October 2021 was £246,366.64 plus interest of £126,655.64, making a total of £373,022.28. Although it does not state the obvious fact that the interest is secured by the charges, it was clear that the Claimant was not waiving his claim to interest, and accordingly that the interest formed part of the sum payable to redeem the charges.

32. Finally, on 13 January 2022, the Claimant's solicitor produced a second redemption statement dated 13 January 2022 ("the second redemption statement"), reflecting the fact that the DCC had been set aside, with the following figures:
    (1) Sum due on all charging orders minus payments: £56,630.15
    (2) Costs of enforcement and sale: £69,126.56
    (3) "Base sum to redeem charges including costs of enforcing charges and sale": £125,756.71
    (4) Interest to 13 January 2022: £100,841.70
    (5) "Total sum to redeem charges including costs of enforcing charges and sale": £246,598.41

33. From this point onwards therefore it was on any basis clear that the Claimant required payment of the interest due for the charging orders to be redeemed. This was confirmed by the Claimant's counsel at the hearing on 16 February 2022[2] of the first defendant's application for an order that the Claimant answer the RFI.

34. An estoppel argument was first raised by the first defendant in his skeleton argument for a hearing before Deputy Master Glover on 8 March 2022, in opposition to the admission of Rimmer 14 and to the claimant being permitted to rely upon the second redemption statement. This was followed by the formal application notice dated 11 March 2022.

Legal principles

35. The first defendant's skeleton argument sets out a well-researched and focussed review of the authorities as to estoppel by convention. However, the relevant principles were largely common ground.

36. A concise summary of those principles is found in the speech of Lord Steyn in *Republic of India v. India Steamship Co Ltd (No 2)* [1998] AC 878 at 913E-G at [42]:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption*: K Lokumal & Sons (London) Ltd v. Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd's Rep 28; *Norwegian American Cruises A/S v. Paul Mundy Ltd* [1988] 2 Lloyd's Rep 343; *Treitel, The Law of Contract, 9th ed. (1995),* pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

[2] I have reviewed the video recording of the hearing

37. More recently, in *Tinkler v HMRC* [2021] UKSC 39, [2021] 3 WLR 697, the Supreme Court approved, as a correct statement of the law on estoppel by convention in the context of the non-contractual dealings, the principles set out in *HM Revenue and Customs v Benchdollar Ltd* [2019] EWHC 1310 (Ch), [2010] 1 All E.R. 174 as amended by *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] Ch. 389.

38. These principles, as amended are,

    (1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be shared between them. This may be inferred from words, or conduct, or even silence, but there must be a "crossing of the line", sufficient to show an assent to the assumption.

    (2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

    (3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

    (4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

    (5) Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

Application of *Benchdollar* principles

Common assumption

39. In my judgment, the first redemption statement contained a representation that the total sum required to redeem the relevant charges was £246,366.64. That representation was not wholly unequivocal, because the statement included the interest calculations. One inference from their inclusion was that the claimant regarded interest as being payable, and since interest was secured by the charges, its payment would be required to redeem them. On the other hand, the total sum required to be paid did not include the interest amount.

40. However, the first defendant expressly raised the question of whether interest was to be added to the redemption figure in his witness statement of 5 November 2021, The response in the claimant's solicitor's letter of 12 November 2021 was unequivocal. Similarly, the first defendant set out his assumption in his Points of Dispute and this was unchallenged by the claimant in his response.

41. In my judgment therefore the letter of 12 November 2021 and the claimant's silence in response to the Points of Dispute did give rise to the common assumption that the total

sum required to redeem the charges was £246,366.64, thereby satisfying (1) and (2) of the *Benchdollar* principles.

Reliance

42. As to reliance, the defendants' position is that they relied upon the common assumption to estimate that the best outcome for the Claimant would be a redemption figure of £60,000, and having done so, agreed a loan of £60,000 with Ms Rachel Ogyaadu for that amount. This is set out in the witness statement dated 11 January 2022 of the second defendant, Mrs Otuo. She does not provide any explanation or breakdown of how the figure of £60,000 is reached.

43. Her evidence is confirmed in paragraph 84 of the first defendant's witness statement dated 24 May 2022, where he refers to an agreement in principle with Ms Ogyaadu in November 2021. Again, he refers to the best possible outcome in terms of the amount required to redeem the charges on Leigham Court Road as being at most £60,000 without providing an explanation or breakdown.

44. In his oral submissions, the first defendant sought to explain the figure of £60,000 by reference to the Points of Dispute. For present purposes, this can be summarised as follows. Of the total of £246,366.64 sought, the following sums are challenged
    (1) Costs of sale of and evicting tenants from 311 Leigham Court Road: £23,302.60
    (2) Costs of sale and enforcement - 31 Oxford Road: £7,158.67
    (3) "Costs to date that are unassessed in this application": £13,914.29
    (4) Interim charging order dated 21 May 2021: £139,844.79
    (5) Amount due to first defendant in respect of his share of proceeds of sale of freeholds on 16 November 2020, including interest at 8% pa from date of receipt to 13 January 2022 but not accounted for by the claimant: £16,982.63.

    These sums total £201,202.98, so that if all the challenges are successful, the sum needed to redeem the charges would be £45,163.66. I turn therefore to consider the nature of those challenges.

Costs of sale of and evicting tenants from 311 Leigham Court Road

45. The amount shown in the various redemption statements produced by the claimant has varied considerably without any explanation being given:
    1st redemption statement dated 22 October 2021: £23,302.60
    2nd redemption statement dated 13 January 20211: £48,053.60
    3rd redemption statement dated 8 March 2022: £46,947.60
    4th redemption statement dated 24 May 2022: £37,852.60
    5th redemption statement dated 8 June 2022: £37,852.60.

46. The first defendant's challenge to liability for the costs of evicting tenants was rejected as being totally without merit by Penelope Reed (siting as a deputy judge) on 18 March 2022. Quantum remains challenged, but a substantial amount is likely to remain recoverable.

Costs of sale and enforcement - 31 Oxford Road

47. The first defendant disputes that this is recoverable from the proceeds of sale of Leigham Court Road, and asserts that in any event the claimant's claim to it was compromised by the settlement agreement reached in relation to Oxford Road.

"Costs to date that are unassessed in this application"

48. It was common ground that no order has been made in respect of these costs, so that they are plainly wrongly included.

Interim charging order dated 21 May 2021: £139,844.79

49. It is common ground that following the order setting aside the DCC, these costs are unassessed. The consequence of this is discussed below.

Amount due to first defendant in respect of his share of proceeds of sale of freeholds

50. It is also common ground that the first defendant is entitled to credit for a one half share of the proceeds of sale of the freeholds in the approximate amount of £15,000, although the precise amount put forward by the claimant has varied, without any explanation as to why. The first defendant is also seeking detailed assessment of the costs of sale.

51. The primary difficulty in the first defendant's case on reliance is that he did not solely rely upon the assumption that the total sum due was £246,366.64. He also relied upon his own views as to the likely success of the various challenges in his Points of Dispute. That meant that his decision only to seek £60,000 in funding was also based on his own views of the merits of those challenges. He did not therefore, in my judgment, rely on the common assumption as to the amount sought by the claimant to a sufficient extent to satisfy (3) of the *Benchdollar* criteria.

Mutual dealings

52. The defendants relied upon the provision of the Points of Dispute and the claimant's response to them as the mutual dealings between the parties. However, these were not, in my judgment, properly analysed, mutual dealings on the basis of the common assumption shared by the parties. They were the communications which gave rise to that assumption. The defendants' claimed reliance on the assumption in seeking only limited funding was a unilateral act on their part, in which the claimant took no part and of which he had no knowledge. I do not therefore accept that that reliance took place in connection with mutual dealings between the parties, so that (3) in *Benchdollar* is not satisfied.

Unjustness or unconscionability

53. The defendants relied upon both detriment to themselves and upon benefit to the claimant in support of their submissions that (5) of the *Benchdollar* criteria was satisfied.

Detriment

54. The defendants allege two types of detriment. The first was their (or the second defendant's) inability now to borrow the additional sums needed following the claimant's resiling from its position in the first redemption statement. Their evidence is that these additional sums would be about £80,000.

55. However, the first defendant's evidence as to the arrangement with Ms Ogyaadu is not in my judgment sufficient to show the detriment he alleges. He sets out that Ms Ogyaadu was willing to lend £60,000 in November 2021. He does not state that she would have lent more (or how much more) at that time, or whether the defendants (or Mrs Otuo) would have been in a financial position to assume liability for a greater amount. Indeed, although there was in the first defendant's oral submissions a

suggestion that the loan would be secured on Leigham Court Road, there was no detailed evidence as to the basis of the proposed arrangements.

56. There is therefore, in my judgment, no sufficient basis for concluding that the defendants forwent an opportunity to borrow more money, or that the amount they could have borrowed would have been sufficient to pay the additional sums required to redeem the charges, most importantly, interest.

57. The second type of detriment alleged was the defendants' omission to challenge the interest calculations in the first redemption statement. However, the defendants are not prevented from challenging those calculations, have in fact done so, and at the hearing the claimant's counsel stated that the first defendant "may have a point" in respect of the interest calculations. I do not consider that any relevant detriment has arisen in this respect.

58. In the alternative, the first defendant suggested, in his oral submissions, that the fact that the interest would be recoverable if the claimant were permitted to claim it is a relevant benefit to him, giving rise to unconscionability. I reject that argument. In any case where a party has mistakenly entered into a shared assumption which it seeks not to be bound by, there will be a benefit to it in not being bound. This cannot be sufficient. The relevant benefit must in my judgment be conferred as a result of the position that the parties find themselves in, having acted on the shared assumption. This is shown by the following passage at [63] in *Tinkler*, for example:

> "Turning to the fifth and final principle in *Benchdollar*, it is not in dispute that HMRC's reliance was detrimental because, by reason of HMRC acting on the affirmed common assumption that a valid enquiry had been opened, it did not send another notice of enquiry to Mr Tinkler before the expiry of the 12 months' time limit on opening an enquiry into the 2003/04 Return. And if the enquiry were treated as invalid, the 30 August 2012 closure notice - by which HMRC were able to deny BDO's tax claim of over £635,000 (see para 13 above) - would also have to be treated as invalid. Correspondingly, Mr Tinkler would stand to gain some £635,000 if estoppel by convention could not here be established by HMRC."

59. In this case, there is no identifiable benefit to the claimant arising from the defendants' only seeking funding for £60,000 and not for the higher amount, and no corresponding disadvantage to the defendants.

Proportionality

60. Finally, the claimant's counsel submitted that if an estoppel arose, then the consequent relief should be proportionate to the detriment suffered; and that an all or nothing approach would be avoided if it were unconscionable. In support of this, he relied upon *National Westminster Bank v Somer International* [2001] EWCA Civ 970, [2002] Q.B. 1286.

61. *Somer* concerned the equitable defence of change of position in a restitutionary claim by a bank, which had mistakenly informed its defendant client that a credit of US$76,708.58 from a customer called Mentor had reached its account. In that belief, the defendant shipped goods to the value of £13,180.57 to Mentor. The defendant's chance of

successfully recovering payment for the goods was nil. In the bank's claim to recover the payment, the judge found that the defendant had suffered detriment and/or changed its position only to the extent of £13,180.57, and required it to repay the balance to the bank. This decision was upheld by the Court of Appeal, Potter LJ at [48] saying:

> "the payment sought was of such a size that it bore no relation to the detriment which [the defendant] could possibly have suffered and … it would be unconscionable for [the defendant] to retain the balance over and above the value of the goods shipped."

62. Whilst *Somer* was not a case concerning estoppel by convention, it illustrates the principle that when considering fairness and unconscionability, it is necessary to analyse the impact and influence of the common assumption, to the extent that there has been reliance on it. Even if, as they have not, the defendants had shown that they could have borrowed an amount sufficient to discharge the interest claimed, in addition to what was otherwise required, in the period November 2021 to January 2022, and were unable to do so from January 2022 onwards, this would not in my judgment justify relieving them from the obligation to pay interest. To do so would confer a windfall on them which would be disproportionate to the disadvantage suffered by them.

63. For these reasons, I dismiss the estoppel application.

Unassessed costs

64. The starting point is the 2 August 2019 order (the relevant parts of which set out at paragraph 10 above). This permits and requires the claimant to pay from the proceeds of sale of Leigham Court Road the amount due under all orders for costs in the 2017 claims, including the 2 August 2019 order itself. It is not in its terms, or, in my judgment, in its effect a charging order.

65. As set out above, the claimant delayed for some considerable period in seeking detailed assessment. Part of that period was when the claimant had not recovered any sums from the defendants, and was therefore reluctant to incur the costs of assessment. However, having received the settlement sum in March 2020, the claimant took no steps to commence assessment for a year, and, as noted above, the DCC then obtained was set aside in December 2021, so that those costs remain unassessed.

66. The parties' arguments focussed on the question of whether a charging order could be made in respect of unassessed costs. In my judgment it is not necessary for me to decide that question. The relevant charging orders (see paras 12 and 18 above) do not charge Leigham Court Road with unassessed costs. It follows that the total sum required to discharge all the charging orders on Leigham Court Road does not include unassessed costs.

67. I will hear further submissions from the parties as to the directions to be made consequent upon this conclusion.