IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST
(ChD)
Neutral Citation Number: [2022] EWHC 2831 (Ch)

Case No: BL-2022-000367

The Rolls Building
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Fetter Lane
London
EC4A 1NL

Wednesday, 30th March 2022

Before:
THE HONOURABLE MR JUSTICE MICHAEL GREEN

B E T W E E N:

ERSIN MUSTAFA
NURSHEN ERSIN

Claimants

and

ASAD SHAMIM CHAUDHARY

Defendant

MR P LETMAN appeared on behalf of the Claimant
MR G ROSEMAN appeared on behalf of the Respondent

JUDGMENT
(Approved)

MR JUSTICE MICHAEL GREEN:

1. This is an application by the claimants, who are husband and wife, to have a charge removed from a property at 143 Farmilo Road, Walthamstow, London E17 8JP. The charge is in favour of the defendant, Mr Asad Chaudhary, and the application is opposed.
2. What is a little confusing about this application is that there are ongoing proceedings in the First-Tier Property Tribunal (Land Registration), in which the claimants are seeking to remove a number of charges registered against different properties of theirs, including this property, the subject matter of this application. In other words, they are seeking to accelerate the process in relation to one property, whereas the underlying substantive dispute will not be tried for some time in the First-Tier Tribunal.
3. Accordingly, the defendant says that the application is an abuse of process. Furthermore, the defendant has said that there is no jurisdiction and/or other credible reason for making it and additionally, that any such order will prejudice the defendant's security.
4. Mr Gideon Roseman appeared for the defendant; Mr Paul Letman for the claimants.
5. Mr Letman said that the defendant's position will remain secure because the amount of the debt secured by the charge will be placed in a joint account in both solicitors' names pending the resolution of the First-Tier Tribunal proceedings. The claimants wish to re-mortgage the property but say they can only do so if the defendant's charge is removed. Moreover, Mr Letman says that all they are trying to do is effectively preserve the property which will be to the benefit of the defendant.
6. The order they seek is, however, quite categoric and open ended: it requires the removal of the charge immediately, together with undertakings on their part to place the sum of £41,666 which they say is the secured amount, into an escrow account, pending determination of the underlying dispute. However, there is no requirement on the face of the draft order to seek any such refinancing and as will appear, there is no existing offer of refinance available to the claimants.
7. It seems to me that the draft order might potentially leave the defendant wholly exposed and such an order could never be made in those terms. Mr Letman said that it was just a question of drafting and that suitable conditions could be attached to the order, obliging the claimants to refinance and not to sell etc. It may be necessary to consider that in due course.
8. Turning to some of the background: The case has a very long history which included a criminal trial of the claimant's son for forging the defendant's signature on the removal of charges. He was acquitted of those charges, but the same allegations are effectively pursued in the proceedings before the First-Tier Tribunal.
9. The property in question is not the claimants' home or anything like that; it is an investment property on which the claimants, as I understand it, receive rent. The present or first mortgagee is the Bank of Ireland and their mortgage had matured in November 2020 and the claimants said that they needed to refinance the property as a result. They say that the property is worth around £600,000 although that was as of August 2021. The current loan outstanding is apparently £232,000 and the claimants, when they first started thinking about this application, were intending to borrow and indeed had an offer to lend from Gatehouse Bank PLC in the sum of £352,000. That bank has said that it would only lend on the basis that it had the sole registered charge on the property.
10. However, the claimants' evidence is that that offer actually expired on 15 February 2022, but that the claimants are now actively seeking a new mortgage offer. Their brokers apparently told them that they will only be able to borrow if the defendant's charge is removed. If new finance is not secured soon, the claimants say that there is a risk that the

Bank of Ireland might take possession proceedings.

11. The claimants have offered to place the amount of £41,666 that they say is secured by the defendant's second charge into a joint account, held by the parties' solicitors, pending the termination of the dispute and they also offer the usual cross undertaking.

12. The claimants' underlying case in the First-Tier Tribunal is that there was an agreement in July 2008 that the defendant should be entitled to a third share in a property development being carried out in Northern Cyprus by the first claimant and his son, in return for the defendant agreeing to discharge his charges over certain properties in the UK, including the property in question in this application. The case turns on whether the DS1 document, whereby the second charges were discharged, was forged or not. There has been a joint-expert handwriting report and that concluded that there is strong evidence that both the defendant's signature and that of the attesting witness on the DS1 document were forged, although "the evidence is not quite up to the virtually certain range".

13. It does seem to me somewhat extraordinary that against that backdrop and the ongoing litigation in the First-Tier Tribunal, that the claimant should think fit to bring in a new claim in the High Court and make this application for relief. That is exactly the same as they are seeking in the First-Tier Tribunal and is yet to be determined.

14. There are clearly issues in the First-Tier Tribunal as to how much was loaned by the defendant to the claimants and whether he was obliged to lend more. Be that as it may, there seems to be no doubt however, that the second charges were granted by the claimants to the defendant. The contentious issue is whether the charges over the property were discharged.

15. The question of re-mortgaging was first raised in November 2020 and the defendant's solicitors responded to that issue being raised by saying that they were amenable to re-mortgaging. However, they asked for copies of certain relevant documents so that they could assess the proposal; no such documents were forthcoming.

16. Then, in an email of 24 May 2021, the claimants' solicitors said that the entirety of the proceeds of the re-mortgage would be used to discharge the Bank of Ireland charge and to make improvements at the property. This does not now appear to have been their whole intention; they now intend to use the proceeds of refinancing also to pay their legal fees for this and the First-Tier Tribunal proceedings, as I understand it.

17. The matter was again raised in October 2021 and the defendant's solicitors on 1 November 2021 asked to see further documentation and information concerning the proposed re-mortgage and asking for details as to what the claimants proposed spending the money on. What they were requiring was for the balance of the refinancing to be placed in an escrow account, by way of some sort of security for their charge.

18. They also made the point in that letter that given the joint-handwriting experts' views supported the defendant's case of the forged DS1s that there was a serious risk of dissipation of the proceeds to the detriment of the defendant.

19. And now this application has been made, I think at the beginning of March, after the expiry of the offer from Gatehouse Bank. Mr Roseman said that the application was an abuse of process and, in any event, it should not succeed on the ordinary principles as to the grant of mandatory injunctions.

20. As to abuse of process Mr Roseman said that despite the defendant's solicitors asking for documentation and evidence, there is still no evidence of:

    (i) The current value of the property as opposed to its value in August 2021.

    (ii) Any correspondence with the Bank of Ireland, showing an imminent threat. The claimants say that they have been given

until 3 April as a grace period by the Bank of Ireland and Mr Letman showed me an email from the Bank of Ireland to that effect. However, there is no mention in that email of any threat of enforcement or possession proceedings starting imminently.

(iii) There is no evidence as to the monies that have been paid by the letting agents which is also a sum that the claimants were seeking to pay using the proceeds of the refinancing.

(iv) The claimants' actual financial position and that might also be relevant on the adequacy of their offer of the cross undertaking. It is now clear that the claimants actually reside abroad in Northern Cyprus where any judgment of this Court or of the First-Tier Tribunal, will be difficult to enforce. When I asked about available assets to support the cross undertaking, Mr Letman merely referred to the equity in the property. However, as will be seen, there is no guarantee that there is any equity in the property.

21. Furthermore, Mr Roseman submitted that the premise of the application which was the remortgage offer from Gatehouse Bank PLC has now disappeared because its offer has expired. The situation now is that the claimants wish to re-mortgage, but they have no offer. We are simply told that any re-mortgage offer will be conditional on the second charge being removed.

22. I have to say that this application does have all the hallmarks of an abuse of process where the First-Tier Tribunal is fully seized of this matter and will be deciding the very question that the claimants now seek to resolve by way of an interim injunction.

23. I take the point that the First-Tier Tribunal itself has no jurisdiction to make an injunction requiring the removal of the charge. Nevertheless, Mr Letman's point that if the defendant ultimately succeeded in showing that he is entitled to a charge then it can be restored, does not seem to me to be straightforward at all. If by then, the property has been re-mortgaged on the condition that no further charges are entered upon the property, how can the defendant's charge on that property be restored?

24. Mr Roseman also submitted that there is no jurisdiction to make the order sought. Mr Letman relied in his skeleton argument on the line of authority dealing with the removal of unilateral notices from the Land Register, such as cautions and restrictions, and said that this application is analogous to that. He referred to *Nugent v Nugent* [2013] EWHC 4095 (Ch) where Morgan J dealt with the statutory jurisdictions under the Land Registration Act in this respect. He then concluded that there was an inherent jurisdiction in the High Court to order the removal of a unilateral notice, and by way of interim remedy I should add. In that case it was a grandson's claim to propriety estoppel that he had sought to protect by the entry of the other notice on the register against his grandmother's home.

25. Mr Roseman made the valid point that that case was dealing with a unilateral notice not the actual proprietary interest, such as the charge in this case. In addition, it was a case of proprietary estoppel where the nature of the interest is still to be recognised by the Court. He also pointed out that before granting the injunction, Morgan J required the grandmother to show that she did not have available any other assets which she could use to pay her legal expenses. Mr Letman said that Morgan J made it clear that it did not matter the grandson did not then have a present proprietary interest.

26. I have not been shown any case where an actual charge has been removed by an interim injunction and it does seem to me, that that is a qualitative distinction that can be made with the line of authority dealing with unilateral notices.

27. I should add that Mr Letman also referred me in his skeleton argument, to *Thandi v Saggu* [2021] EWHC 2842 which seems to be the most recent in this line of authority. It was referred to for the proposition that the Court should not attempt to determine the underlying dispute and, in that case, Adam Johnson J granted an injunction for a unilateral notice to be removed. However in that case, there was a threat to the party's own home, which is not the case here. Also, there were, it seems, no extant proceedings specifically on that point.
28. In my view, there might be jurisdiction for the Court to grant an injunction in the form sought by the claimants, but I do not think that the unilateral notice authorities are analogous. Furthermore, I consider that the more stringent test that applies to the grant of a mandatory injunction should apply to this sort of application.
29. It is my view that the claimants come nowhere near satisfying the test required for the grant of a mandatory injunction in these terms. Mr Roseman referred me to *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354 and also *Forse & Ors v Secarma Ltd & Ors* [2019] EWCA Civ 215 and *NWL Ltd v Woods* [1979] 3AE 614.
30. It is clear that there is a higher threshold for mandatory injunctions, namely a high degree of assurance of a real prospect of success. That is because, and it in particular applies to a case where the resolution of the question at the interlocutory stage, as an interim stage effectively determines the outcome.
31. Given the joint experts' report in the FTT, I do not think that the claimants have satisfied this test. Furthermore, the fact that there is strong evidence of fraudulent conduct does not help in terms of the Court being satisfied as to the bona fides of this application nor as to the suggestion that the defendant would be in no worse position after the removal of his charge.
32. Mr Roseman showed me evidence that while the claimants had agreed back in 2008 that the defendant should not have his charges registered but kept in a drawer, the claimants then went ahead and sold two of the properties without reference to those charges that had been granted. That in my view, is evidence that there is a serious risk of dissipation by these claimants, and it is a risk of this application that they will seek to make themselves judgment-proof.
33. Mr Letman effectively submitted that there was absolutely no problem in this regard and the defendant was fully protected by the placement of the £41,666 in the joint account.
34. However, Mr Roseman said that this is not so. He is entitled, and I am not sure that this is disputed, to add his costs of the proceedings to defend the security and his expenses to his charge. He said those costs could well exceed £150,000 at the end of the day. The defendant is very concerned that there will actually be insufficient equity in the property to meet those costs. That is why he wants to keep his charge in place and why he says that the claimant should not be allowed to spend the refinancing on anything else.
35. Mr Letman said that he is not yet entitled to those costs, and it is absurd to suggest that the whole of the equity should be set aside just in case it is needed to meet those costs. He said if the property was sold by the Bank of Ireland, the defendant would only be entitled to the £41,666 and no more. Furthermore, he said that if they are not allowed to re-mortgage, any losses that the claimants will suffer as a result of a forced sale, will be irrecoverable from the defendant.
36. In my view, this is a legitimate concern of the defendant and a good reason why the order should not be made. If the charge is removed and the property refinanced, with the defendant only secured as to £41,666, he may very well be unable to enforce any order for costs. At the moment, he has security over the whole property, and I do not see why he should be forced to give that up, merely because the claimants say that they are having difficulty finding a re-mortgage with his charge in place. That is, quite frankly, the claimants' problem and I do not see that the defendant's security should be prejudiced,

particularly where that very issue is still a live one before the First-Tier Tribunal.

37. It does seem to me that the defendant will be prejudiced if his charge is removed and that damages might not be an adequate remedy if the claimants would be likely to take steps to make themselves judgment-proof.

38. If the relief is granted, the defendant will become merely an unsecured creditor of the claimants, who might very well turn out to have acted fraudulently against him. Against that, the claimants have produced very little evidence of prejudice. They say that damages would not be an adequate remedy if the property is repossessed, but I find that a difficult argument to run in relation to an investment property. I can see that it would have much more substance if it was their matrimonial home. As I said, in *Thandi v Saggu*, it was the parties' actual home where the notice was being removed from.

39. Furthermore, without any evidence as to the claimants' financial resources, I do not think that they have satisfied the burden of showing that this needs to be done.

40. In the circumstances, I am not satisfied that there is a strong enough case here or that damages would not be an adequate remedy. Furthermore, I do not think that damages would be an adequate remedy for the defendant as he would lose his security.

41. There is no evidence supporting the offer of a cross-undertaking and I am therefore going to dismiss this application and the claimants will have to pay the defendant's costs of it, unless Mr Letman seeks to persuade me otherwise.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.