Neutral Citation Number: [2022] EWHC 688 (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: 8/4/2022

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

Hearing date: 20 September 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 8 April 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:

Applications

1. This judgment deals with the issues arising in:
   (1) paragraph 1 of the first defendant's application notice dated 15 March 2021;
   (2) the first defendant's application notice dated 13 September 2021.

2. The relief sought in both applications is set out in a draft order entitled "Revised Orders Sought by the Application Notice dated 15 March 2021", filed shortly before the hearing. This relief does not differ materially from the orders sought in the two application notices.

Background

3. The background is conveniently set out in the judgment dated 3 March 2021 of Bacon J: *Brierley v Otuo* [2021] EWHC 644 (Ch), to which reference should be made. It can be summarised as follows.

4. 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.

5. These costs orders were secured by 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 joint names, but has been held to be solely beneficially owned by the first defendant.

6. The relevant charging orders for present purposes are those on 311 Leigham Court Road, securing a total of £175,865 plus continuing interest:
   (1) order dated 1 October 2015 of Master Price – securing the orders at (1) to (4) below for a total of £83,885 plus continuing interest;
   (2) order dated 26 November 2015 of Deputy Master Cousins- securing the order at (5) for £79,980.75 plus continuing interest;
   (3) order dated 11 February 2016 of Deputy Master Smith – securing the order at (6) for £12,000 plus continuing interest.

   I refer to them as the "2012 claim charging orders".

7. The position in respect of the 2012 claim charging orders is thus as follows

	Date of order	**Judge**	**Amount**	**Date of charging order on 311 Leigham Court Road**	**Master**
(1)	24 Jun 2013	Newey J	£8,333[1]	1 Oct 2015	Price
(2)	24 Sep 2013	Elleray QC	£30,000	1 Oct 2015	Price
(3)	14 Apr 2014	Strauss QC	£20,000	1 Oct 2015	Price
(4)	17 Feb 2015	Birss J	£13,000[2]	1 Oct 2015	Price
(5)	6 Jul 2015	Murray	£80,632.86	26 Nov 2015	DM Cousins
(6)	12 Nov 2015	CoA	£10,000[3]	11 Feb 2016	DM Smith
	Total		**£161,965.86**		

8. 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.

9. 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")

10. Adverse costs orders were also made against both defendants in the claimant's 2017 claim ("147"), against the first defendant in his 2017 claim ("158"), and in related insolvency proceedings against both defendants.

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

12. 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.

[1] £10,000 including VAT on the face of the order, but it would seem to be agreed that the claimant is not entitled to recover VAT from the defendants, reducing the amount to £8,333.33 – see the schedule of sums owed by the defendants at exhibit BR10 to the 10th witness statement of Brendan Rimmer, the claimant's solicitor

[2] £15,600 on the face of the order, but £13,000 exclusive of VAT

[3] £12,000 on the face of the order, but £10,000 exclusive of VAT

13. 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."

14. 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.

15. On 17 February 2020, Deputy Master Lloyd made two final charging orders on 311 Leigham Court Road against each defendant. The order against the first defendant secured a total of £142,374.88, apparently being the judgment debts (1) to (6) and (8) in

the table below (plus interest), together with continuing interest and the costs of the application. The order against the second defendant secured a total of £120,714.76, apparently being the judgment debts (3), (6), (7) and (8) (plus interest) together with continuing interest and the costs of the application.

16. The total of the assessed costs orders (without interest) in 147 and 158 secured by charging orders against the defendants at the date of Deputy Master Lloyd's order was:

	Date	**Claim**	**Judge**	**Amount**	**Person liable**
(1)	3 Jan 2017	158	Mann J	£3,666.67[4]	D1
(2)	17 Mar 2017	158	Newey J	£8,333.33[5]	D1
(3)	27 Nov 2017	147	Master Clark	£3,000	D1 & D2
(4)	9 Mar 2018	135-SD-2017	DDJ Holmes-Milner	£5,500	D1
(5)	7 Aug 2018	357-2018	DJ Lambert	£3,250	D1
(6)	12 Nov 2018	147	Hildyard J	£20,000	D1 & D2
(7)	4 Jul 2019	28-SD-2019	DJ Lambert	£2,750	D2
(8)	2 Aug 2019	147 &158	Le Poidevin QC	£90,000	D1 & D2
	D1 - sole			**£21,150**	
	D1 - joint			**£113,000**	
	D1 - total			**£136,150**	
	D2 - sole			**£2,750**	
	D2 - joint			**£113,000**	
	D2 -total			**£115,750**	

17. In February 2020 the parties were negotiating a part payment by the defendants which would enable the defendants (rather than the claimant) to sell 31B Oxford Road. The claimant's solicitors sent to the defendants' solicitors a draft consent order under which the claimant agreed to accept £250,000 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.

18. Clause 2.1 of the recital to the order provided that the first and second defendants were to pay the claimant £250,000 by 5pm on 2 March 2020, in part payment towards outstanding monies owed to the claimant under the Charging Orders. "Charging Orders" was defined as the charging orders in favour of the claimant on all 4 properties.

19. Clause 2.2 continued:

> "With the sum reducing or discharging the indebtedness of the first defendant to the claimant and, insofar as that sum may discharge that indebtedness, to reduce or discharge the indebtedness of the second defendant to the claimant."

20. On 27 February 2020, the defendants' then solicitors sent the following email to the claimant's solicitors:

[4] £4,400 on the face of the order
[5] £10,000 on the face of the order

> "In lieu of concluding the draft Order, I have been instructed by Mr and Mrs Otuo to remit the sum of £250,180.25 to strictly satisfy the following Orders charged to their beneficial interests in the following properties: [the 4 properties]
> a. Order of Mr Edward Murray dated 6 July 2015 for £80,632.90 - Amount due with interest to 27 February 2020 is £110,338.40;
> b. Order of Mr Le Poidevin QC dated 2 August 2019 £90,000 – Due £93,823.78;
> c. Order of Hildyard J dated 12 November 2018 £20000 – Due £26,802.60;
> d. Order of Master Clark dated 27 November 2917 £3,000 – due £3,530.53;
> e. Order of Newey J dated 01 June 2013 £8,333.33 – Due £12,800.62;
> f. Order of DJ Lambert dated 4 July 2019 – Due £2,884.32."

21. The orders of Mr Le Poidevin, Hildyard J and Master Clark were all orders under which the second defendant was jointly liable with the first defendant, and the order of DJ Lambert was made against the second defendant only. If, therefore, the funds sent by the defendants had been appropriated to those debts, the second defendant's indebtedness to the claimant would have been fully discharged, and so her beneficial interest in Leigham Park Road would have become unencumbered.

22. This proposal was however rejected by the claimant's solicitors on 28 February 2020, who stated that the draft consent order was on a "take it or leave it" basis. The defendants then returned, on the same day, the draft consent order signed by them. The funds of £250,180.25 were sent on 2 March 2020.

23. On 3 March 2020, the claimant's solicitor sent a letter to the defendants acknowledging receipt of the funds, noting that it was £180.25 in excess of the sum agreed under the terms of the consent order, and remitting £180.25 to the defendant.[6] The letter continued:

> "We will apply the agreed sum of £250,000 pro rata to all of the outstanding debts that your clients have with our client and we would expect to provide a recalculated account of all your clients' numerous debts within around 7–14 days."

24. At the hearing before Bacon J, the claimant's counsel told the Judge on instructions that the reference to applying the sum "pro rata to all of the outstanding debts" of the defendants was an error. The letter was, he said, not intended to suggest that the sum would be applied *pro rata* to both the first and the second defendant's debts, and was not intended to vary the consent order or to indicate that the sums would be appropriated in a way different to that set out in clause 2.2 of the consent order.

25. The order was approved and sealed by the court on 12 March 2020 – I refer to it as "the consent order". I refer to the sum of £250,180.25 as "the settlement sum".

26. The first defendant's application dated 13 October 2020 heard by Bacon J sought, so far as relevant, orders that:
    (1) the settlement sum be applied in accordance with the defendants' solicitors' email of 27 February 2020; alternatively

[6] It is common ground that the defendants returned the £180.25 to the claimant, so that the total sum received by the claimant remained £250,180.25.

(2) the settlement sum be applied pro rata to all the outstanding debts under court orders charged to the assets of both defendants as set out in the claimant's solicitors' letter of 3 March 2020.

27. This application was dismissed by Bacon J. First, she held that the first defendant had agreed that the settlement sum was to be allocated in accordance with the terms of the consent order. She then dealt with construction of the order.

28. At para 37 of her judgment she held that the plain and obvious meaning of clause 2.2 was that the settlement sum would first reduce or discharge the first defendant's debt; and only if that debt was discharged (i.e. extinguished) would the sum be applied to the second defendant's debt.

29. The first defendant sought permission to appeal that order. Permission to appeal was refused in writing on 21 June 2021 by Newey LJ, who stated that it was plain that the Judge's construction of clause 2.2 was correct. He continued however

> "The evident intention was that debts of the appellant was to be prioritised and that indebtedness of the second defendant should be discharged only if and to the extent that she was also liable in respect of the indebtedness of the appellant which was being discharged."

30. It is difficult to reconcile this sentence (which is strictly obiter) with the primary finding that the Judge was right, and with the claimant's counsel's submissions as recorded by (and accepted by) the Judge:

> "The effect and intention of the clause, in Mr Stewart-Wallace's submission, was to ensure that nothing could be paid in respect of the second defendant until the first defendant's debt was extinguished, reflecting the terms of the 2 August 2019 order of Mr Le Poidevin in relation to the distribution of the proceeds of sale of 31B Oxford Road. If the reference had simply been to the application of the £250,000 to discharge the first defendant's debts (without mentioning the second defendant), since some of those debts were joined and severable it might have been argued that some of that figure incidentally reduced the debt of the second defendant, which was not what was provided for in the 2 August 2019 order and was not what the claimant intended."

31. Apparently encouraged by Newey J's comments, the first defendant made a further application dated 29 June 2021 seeking an order that the settlement sum, together with two other sums of £15,539.00 and £11,069.93 (paid by or credited to him) be allocated to certain costs orders (set out in a schedule to the application notice). The first two orders in the schedule are both orders under which both defendants are liable: Mr Le Poidevin's order dated 2 August 2019 for £90,000, and Hildyard J's order dated 12 November 2018, said to be £21,899 inclusive of interest.

32. There is no dispute as to the two additional sums relied upon by the first defendant: the claimant has credited the first defendant with a further £11,069.93, and is holding to the first defendant's credit the sum of £15,539, being his share of the net proceeds of the sale of the freeholds. Thus, the total paid by or credited to the first defendant is £276,789.18 = £250,180.25 + £11,069.93 + £15,539.00.

33. The first defendant's application was heard and dismissed by Jeremy Cousins QC on 15 July 2021 (reported on Westlaw 2021 WL 03039431), although it was not in the bundle before me.

34. As to the settlement sum, the Deputy Judge held that the first defendant was bound by the decision of Bacon J, and that the issue of how the settlement sum was to be appropriated could not be raised again. As to the other sums, which were not the subject of Bacon J's judgment, he held that the question of how those sums are to be accounted for was something properly to be dealt with at the accounting stage in the transaction which would be achieved when (i) 311 Leigham Park Road had been sold and (ii) all proceeds from it and expenses ascertained had been reached.

Orders sought by the applications

35. In these circumstances, the substantive issues arising on the face of the application notices are:
    (1) Whether the 2012 claim charging orders are to be discharged on the grounds that the underlying debts secured by them have been paid:
    (2) Whether the final charging order dated 17 February 2020 of Deputy Master Lloyd (continuing the interim charging order dated 30 December 2019 of Deputy Master Arkush) be varied to reflect payments made against those charging orders by the first defendant.

Evidence in support of the applications

36. In his skeleton argument (at para 5), the claimant's counsel submitted that the applications were defective, in that they were not supported by any adequate explanation, evidence or documentation, and that they ought to be dismissed on this basis alone. In particular, the claimant relied on the fact that witness statement dated 14 September 2021 ("the September witness statement") was only served on the claimant on 16 September 2021 (2 working days before the hearing), with the clear implication that this was the only evidence served in support of the application.

37. Similarly, the claimant's solicitor, Brendan Rimmer, in his 13th witness statement dated 15 September 2021 ("Rimmer 13"), said that the first defendant had not stated the basis on which he requested the Revised Orders.

38. In fact, as accepted by the claimant at the hearing, the first defendant had filed and served by 13 May an unsigned witness statement dated 26 April 2021 ("the April witness statement") in support of the 15 March 2021 application.

39. As the first defendant pointed out in an email dated 17 September 2021 to the court, copied to the claimant's solicitors, the April witness statement and the September witness statement are almost identical in the content relevant to the matters I am deciding, the April witness statement containing additional evidence relating to matters which were ultimately determined in the SCCO.

40. I therefore reject the submission that the applications are plainly defective because they are not supported by any adequate explanation, evidence or documentation. Whatever criticisms are to be made of the first defendant for his late service of the September

witness statement, he was in my judgment plainly entitled to rely on the April witness statement, which had been filed and served in time.

41. In any event, the matters set out in both of the first defendant's witness statements are largely undisputed, being matters of public record: the costs orders made and their amounts. The September witness statement sets out his calculations of the interest due on each amount as at 2 March 2020[7], in order to calculate the total sum due as at that date:

	Date of order	**Judge**	**Amount £**	**Interest to 1 March 2020 £**	**Total due £**
(1)	24 Jun 2013	Newey J	8,333	4,361	12,695
(2)	24 Sep 2013	Elleray QC	30,000	16,651	46,651
(3)	14 Apr 2014	Strauss QC	20,000	10,215	30,215
(4)	17 Feb 2015	Birss J	13,000	5,759	18,759
(5)	6 Jul 2015	Murray	80,633	29,776	110,409
(6)	12 Nov 2015	CoA	10,000	0	10,000
(7)	3 Jan 2017	Mann J	3,667	868	4,534
(8)	17 Mar 2017	Newey J	8,333	0	8,333
(9)	9 Mar 2018	DDJ Holmes-Milner	5,500	856	6,356
(10)	7 Aug 2018	DJ Lambert	3,250	398	3,638
	Total		**182,716**	**68,884**	**251,600**

42. Both statements also set out his position as to the two undisputed amounts which he is entitled to be paid or credited with, totalling £26,608.93. The first defendant seeks to appropriate £1,419.75 to discharge the remaining debt due under the 2012 claim charging orders.

43. As to the remaining credit of £25,189.18, he seeks to appropriate that to satisfy the following costs orders:
(1) Hildyard J (against both defendants) - £21,889 with interest;
(2) District Judge Lambert (against Mrs Otuo) - £2,887 with interest;
making a total of £24,812.18, leaving a credit of £413.18.

44. None of the interest calculations are challenged by the claimant. Rimmer 13, which largely consists of argument, does not engage with them at all. I proceed therefore on the basis that they are accurate.

Discharge of 2012 claim charging orders

45. At para 33 of Bacon J's judgment, she set out the issue to be decided by her:

> "**Construction of the consent order**
> 33. The key disputed question is therefore whether the consent order should be interpreted as providing for some of the sum remitted to be allocated to extinguish the debts of the second defendant, as the first defendant contends, or whether it should be allocated in priority to the first defendant's debts as the claimant contends."

[7] The April witness statement contains a virtually identical table, in which the total is £377 higher.

46. Her conclusion is at para 37:

> "The plain and obvious meaning of [clause 2.2] is that the sum of £250,000 will first reduce or discharge the first defendant's debt; and only if that debt is discharged (i.e. extinguished) will the sum be applied to the second defendant's debt. There is no basis whatsoever on which that clause can be read as permitting the second defendant's debt to be reduced – still less, completely extinguished – while the first defendant remains indebted to the claimant."

47. The first defendant submitted that the effect of this construction is to require his sole indebtedness to be discharged before any joint indebtedness with the second defendant is discharged. I accept that submission. Bacon J's construction requires the first defendant's sole debts to be discharged before any joint debts, as the effect of discharging joint debts would be to reduce the second defendant's indebtedness.

Abuse of process

48. The claimant's counsel submitted that the orders sought by the first defendant were essentially the same as the orders sought in his unsuccessful applications heard by Bacon J and Jeremy Cousins QC, in an attempt to pay off the second defendant's debts in priority to his own, thus hoping to deprive the claimant of some of his security over the second defendant's share of 311 Leigham Court Road.

49. This submission was the basis of further submissions (identical *mutatis mutandis*, to those advanced to Mr Cousins QC) that the first defendant was barred by cause of action and issue estoppel from making his applications and that doing so was an abuse of process.

50. I reject those submissions. It is clear from both the April and September witness statements (at paras 7 and 11 respectively) that the first defendant's position is that the settlement sum is to be applied to his sole debts, in accordance with the decision of Bacon J. This is confirmed by para 5 of his skeleton argument, where he states that he does not seek to allocate any of the settlement sum to the second defendant.

51. The defendant's position is therefore wholly consistent with Bacon J's order. He argues that the effect of the order is that, if the settlement sum is applied to his sole debts, and not to the joint debts of him and the second defendant, then those debts are virtually extinguished by that payment.

52. As to the additional sums, they do not fall within the consent order. Mr Cousins did not decide that the first defendant was not entitled to appropriate those sums to such debts as he chooses; and I accept the first defendant's submission that he is so entitled. Mr Cousins QC did conclude that this was a matter to be dealt with in the final accounting process once 311 Leigham Court Road had been sold. He did so because the relevant calculations were not "flagged up in comprehensible detail before any document that was placed before the court, depriving not only the court but also [the claimant's counsel] of the opportunity to consider how that should be analysed." As will be apparent from the discussion above, the evidence filed in the claims included the April witness statement in which those detailed calculations were set out. The claimant had therefore had ample

opportunity to consider and respond to them, and they were in evidence in the claims. It is unclear why this evidence was not drawn to the Deputy Judge's attention.

53. It follows from the above that the debts founding the 2012 claim charging orders were discharged by the payment of the settlement sum. If authority were needed for the proposition that a charging order cannot survive the payment of all the sums secured by it, it may be found in *Al-Khayat v Al-Khayat* [2008] CLY 286, [2007] 8 WLUK 107.

54. As to the appropriation of the other sums to the costs orders of Hildyard J and District Judge Lambert, I accept that the first defendant is entitled to do so. It does not however follow that the final charging orders (both dated 17 February 2020) of Deputy Master Lloyd should be varied to reflect those payments. Such a variation would serve no practical purpose, where the charging orders continue to secure substantial sums in excess of £100,000 against both defendants.

Conclusions

55. For the reasons set out above, therefore, I will order that the 2012 claim charging orders be discharged, but I refuse to vary the final charging order(s) dated 17 February 2020 of Deputy Master Lloyd.

56. Finally, I apologise to the parties for the time it has taken me to produce this judgment. This was due to events leading up and including a bereavement in late 2021.