Neutral Citation Number: [2022] EWHC 742 (Ch)

Case No: PT-2021-000971

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

7 Rolls Buildings
Fetter lane, London
EC4A 1NL

Date: 30/03/2022

Before :

MR SIMON GLEESON

Sitting as a Deputy High Court Judge

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Between :

(1) QUAY HOUSE ADMIRALS WAY LAND LTD	**Claimant**
(2) QUAY HOUSE ADMIRALS WAY LTD	
- and -	
ROCKWELL PROPERTIES LIMITED	**Defendant**

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Joanne Wicks Q.C and Jonathan Chew (instructed by **Stephenson Harwood LLP**) for the **first and second Claimants**

Jonathan Seitler Q.C. and Harriet Holmes (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Written submissions between 10 and 14 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR SIMON GLEESON

Mr Simon Gleeson :

1. There are three issues before me today – an application for permission to appeal, an issue as to the timing of the payment into court ordered in respect of the claimants' application, and various applications relating to the costs of these interim proceedings.

Leave to Appeal

2. Leave to appeal should not be given if the outcome of the appeal would not affect the decision reached. The Claimants applied for the relief they sought on two separate grounds, and I decided both in their favour. One of these grounds was based on the interpretation of the terms of the contract before me, and the other was based on the exercise of the court's inherent discretion to amend the register. Since success on appeal on either of these grounds would leave the other standing, I would have to be satisfied that the defendant had a real prospect of success on both grounds before giving leave to appeal under CPR 52.6(1)(a). I can see no real prospect of success on the contractual interpretation ground. Consequently I reject the application under CPR 52.6(1)(a).

3. Mr Seitler, however, advances a second argument in favour of his being granted leave to appeal based on CPR 52.6(1)(b). This provides that leave to appeal may be granted where "there is some other compelling reason for the appeal to be heard".

4. His argument is that this case concerns the position where the inherent jurisdiction of the court is exercised to remove a restriction which has been bilaterally and consensually entered on the register. He says – correctly – that there is no existing authority covering this particular circumstance. He therefore argues that this is a case which "raises an issue which the law requires clarifying" (per Lord Woolf in *Smith v Cosworth Casting Processes Ltd* [1997] EWCA Civ 1099). The White Book commentary to CPR 52 is quite clear that where 52.6(1)(b) is engaged, the test of "real prospect of success" does not apply – in other words, if I am satisfied that this case raises an issue of law which requires clarifying, then I should give permission to appeal regardless of my assessment of the likelihood of success of that appeal.

5. The specifics of Mr Seitler's argument in this regard are as follows. There is authority as to how the court should exercise its jurisdiction to amend the register in cases where a unilateral notice has been entered either wrongly, or in circumstances where its validity is in doubt. There is no direct authority as to what the position should be in respect of the removal of an entry which, as entered, was properly entered as a result of a bilateral agreement between the proprietor of the title and the beneficiary of the restriction. He says that this is a wholly new case, requiring wholly new rules, and that in the absence of authority the issue should be decided by a more senior court.

6. My finding in this regard was that this was not in fact a new area of law, but was effectively covered by existing authority. I found that the question of how a restriction came to be made on the register was immaterial to the question of how the court should go about deciding whether the restriction ought to be removed or not. I held that, in a case such as this where the restriction complained of was validly entered, the question of whether to remove it would fall to be decided by the court in exactly the same way, and using exactly the same decision-making process, as any other question relating to the removal of a restriction. This would involve the application of what Morgan J in *Subhani v Sultan* [2017] EWHC 1686 (Ch), described as the "interim injunction"

standard, whereby the question of whether the restriction should be removed or not should be evaluated using an approach closely modelled on that set out in *American Cyanamid v Ethicon* [1975] AC 396. It is clearly correct that, in making this assessment, the circumstances in which a restriction was entered, including the question of whether it was entered unilaterally or bilaterally, and validly or invalidly, are issues which should be taken into account. However I do not accept Mr Seitler's argument that these circumstances should trigger the application of an entirely new jurisprudence. Put simply, I think the facts here are sufficiently covered by existing authorities. I therefore refuse his application for leave to appeal under CPR 52.6(1)(b) as well.

Payment into Court

7. My decision was that the restriction on the register which was the subject of the proceedings before me should be removed on a number of conditions, one of which was the payment into court by the Claimants of a sum of money. Ordinarily such a sum should be paid in within 14 days of the order requiring it being made – see CPR 40.11. The Claimants seek a longer period.

8. It was an integral part of the claimants' case that the removal of the restriction was a matter of considerable urgency to them. In these circumstances I can see no reason for delaying their payment into court. The basis for their request is that raising a sum of this size and arranging its safe transmission may take some time, so I am prepared to extend this to 28 days, but no longer.

Costs

9. The application before me was, in essence, an interim application. The claimants, one of whom was the registered proprietor of a parcel of land, requested the removal of a restriction entered in the land registry in respect of that land, in order to progress their development project in relation to it. The defendant resisted the application on the basis that, although the project was on foot and should be proceeded with, the removal of the restriction was not necessary for that purpose. The claimants were therefore successful in their application for the court to order the removal of the restriction.

10. The starting point here is CPR 44.2, to the effect that the successful party must pay the unsuccessful party's costs. However, the Court of Appeal's relatively recent decision in *Wingfield Digby v Melford Capital Partners (Holdings) LLP* [2020] EWCA Civ 1647 has reasserted and amplified its earlier decision in *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 to the effect that this rule cannot be directly applied in interim proceedings (para 38), and that in such cases costs should usually be reserved.

11. I do not propose to engage in a definitional exercise as to what is meant by "interim" in this context – I think the issue can best be determined by examining what the Court of Appeal considered to be the basis for the distinction between the two approaches to costs.

12. The fundamental point made in *Wingfield Digby* was that the rule that the unsuccessful party must pay the successful party's costs is inapplicable in interim proceedings because of the difficulty of establishing who the successful party actually is (para 41). The point made in this regard was that where an interim injunction is granted, the "success" of the applicant is a provisional one, which may well be reversed when the

merits of the case are finally established. "Success" of this kind is temporary and reversible, and therefore should not be a ground for the making of an immediate costs order.

13. The question here is therefore as to whether these proceedings are of this kind. If they are, then costs must be reserved. If they are not, then I can consider whether to make some other costs order.

14. The claimants in this action succeeded on two alternative grounds. The second of these – the application for relief in the exercise of the court's inherent jurisdiction – is, I think, clearly in the nature of an interim application. Applications of this kind were described in this way by Morgan J in *Subhani v Sultan* [2017] EWHC 1686 (Ch), and in deciding whether to grant relief the considerations which he applied - and which I applied in my judgement – were those set out in *American Cyanamid v Ethicon* [1975] AC 396. I am aware that Mr Seitler's grounds of appeal are to the effect that I applied the wrong test in this particular case, and if he is successful in his appeal it may turn out to be the case that some different classification of this application may apply, and some different costs order might be made. However, given the approach which I have applied to this question, and given my refusal of Mr Seitler's application for leave to appeal on this ground, I must conclude that the only possible outcome as regards this ground is costs reserved.

15. That takes me to the Claimants' first ground. This was that, even if they were wrong in their primary contention that the PDMA had terminated, they were nonetheless entitled under the terms of that contract to require the defendant to remove the restriction. This, on its face, does not look anything like the sort of interim application that the court of appeal had in mind in *Wingfield Digby* – it appears to be a free-standing application, involving issues which would not be considered in the trial of the main action, and whose conclusion is immaterial to the thrust of the main action.

16. In order to see whether this is in fact the case, it is necessary to consider the circumstances of the application. The starting point is that the contractual provision which the claimants sought to uphold was not a simple commitment. It was an inchoate provision requiring the defendants to "… give all reasonable assistance … to facilitate the completion of any Funding Arrangement". In the ordinary course of events this term – or indeed the contract as a whole - could not have given rise to any obligation on the part of the defendant to remove the restriction (see para 39 of my judgement). The thing that gave rise to that obligation was the factual matrix to which that inchoate obligation was applied, and the core of that factual matrix was the fact that the claimants had purported to terminate the agreement. It was that purported termination which made it impossible to proceed with the funding unless the restriction was removed, and which justified the application. The order therefore had the effect of permitting the development to continue whilst the issue of whether the termination was valid or not was determined.

17. This seems to me to be exactly the sort of "holding the ring" approach which Morritt LJ described in *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 at para 12, and which was reasserted in *Wingfield Digby*. Consequently I do not see that I have any alternative but to conclude that, if this had been the sole ground of success, I would hold that the application was of an interim nature and would order costs reserved.

18. If costs reserved is the correct order for both grounds on which the claimants succeeded, it must therefore be the proper order as regards the whole of the costs of this application.

19. I can to some extent test this by considering whether such an order would create unfairness. The position of the claimants is straightforward – if they are successful in the main action, then they will (absent any other intervention) get their costs in this application. That seems just. The question is therefore as to the position of the defendant. If they are successful in the main action, would it be just for them to have had to pay the costs in this application in any event? To my mind, it clearly would not be. If the defendant is successful, then it will follow that the claimants should never have purported to terminate, and it is their consequences of that purported termination which created the necessity for them to bring this action. It would be quite wrong, in that circumstance, for the costs of this action to have been ordered against the defendant.

20. I am therefore satisfied both that I am required to order that the costs in this action be reserved, and that that order, in the specific facts of this case, results in an order which produces a just outcome between the parties.