Case No: QB/2015/0407

Neutral Citation Number: [2016] EWHC 2 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2016

Before :

MR JUSTICE DINGEMANS
- -

Between :

	Richard Parr	**Appellant and Defendant**
	- and -	
	Tiuta International Limited	**Respondent and Claimant**

- -
- -

Richard Alomo (instructed by **Charles Allotey & Co**) for the **Appellant and Defendant**
Lina Mattsson (instructed by **Watson Farley and Williams LLP**) for the **Respondent and Claimant**

Hearing date: 25 November 2015
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Judgment**Mr Justice Dingemans:**

1. This is the hearing of an appeal from the order of His Honour Judge John Mitchell ("HHJ Mitchell") sitting at Bromley County Court dated 7th August 2015. HHJ Mitchell had dismissed an application to discharge a charging order over the interest of Richard Parr ("Mr Parr") in 288 Pickhurst Lane, West Wickham, Kent BR4 OHT ("288 Pickhurst Lane").

The loan and charge

2. The relevant facts are not in dispute and I set them out below. On 5th August 2008 Mr Parr entered into a loan agreement ("the loan agreement") with Titua International Limited

("TIL"). On 19 December 2013 TIL entered into Creditors' Voluntary Liquidation, and the joint liquidators provide relevant instructions to the legal representatives. The loan agreement was to enable Mr Parr to purchase 57 Godwin Road, Bromley, Kent BR2 9LG ("57 Godwin Road").

3. The loan was in the sum of £180,000 and was secured by a charge ("the charge") over 57 Godwin Road. A total of £184,778.84 was advanced for the loan, legal fees and administration costs.

4. The following were material provisions of the loan agreement:

> "*6. Interest will be charged at 1.65 % per months. The first 7 months interest of £20,790 will be deducted from the loan. ...*
>
> *Should any part of the facility or rolled up interest or fees be outstanding 7 months from drawdown interest shall be payable on any sum so outstanding at the rate of 3.30 % per month with monthly capital rests until paid in full.*
>
> *Please note the payment of interest does not cover any part of the principal loan of £180,000. You will still owe the loan amount plus any unpaid fees and/or rolled up interest at the end of the term of the loan. ...*
>
> *8.... (c) a further fee of 0.25 % of the loan shall become due and payable by direct debit for each month that interest is not serviced within 7 days of the date on which it falls due.*
>
> *All fees unpaid are to be rolled up and repaid on repayment of the loan.*
>
> *10. The security for the loan will be a first legal charge over [57 Godwin Road]. ...*"

5. The following were material terms of the charge:

> "*1. The borrower hereby covenants with the lender to pay to the lender the facilities and to discharge all liabilities which now are or may at any time hereafter be due owing or incurred from or by the borrower to the lender or for which the borrower may be or become liable to the lender on any current or other account or in any other matter whatsoever (whether as principal or surety and whether alone or jointly with any other person or persons and in whatsoever name style or firm) TOGETHER with interest commissions banking charges and legal and other costs charges and expenses such interest being at such rate and computed and*

compounded in the manner set out in the facility letter both before and after any such demand or death.

2. 1. As continuing security for the payment and discharge of all sums covenanted to be paid and liabilities assumed as provided in clause 1 the borrower with full title guarantee hereby charges to the lender by way of first fixed legal charge the property ...

3. If the borrower shall pay to the lender all monies secured hereunder in accordance with the covenants herein contained the lender at the request and cost of the borrower will discharge this security".

The failure to pay and judgment

6.Mr Parr did not maintain his payments under the loan agreement. A notice of default was served on Mr Parr on 20th April 2009. Mr Parr made some further payments but he did not make payments in accordance with the loan agreement.

7.TIL commenced proceedings to enforce their security in the Bromley County Court. On 20 July 2009 Deputy District Judge Hay gave judgment as follows:

"*The Court orders that:*

1. The Defendant give the Claimant possession of 57 Godwin Road, Bromley, BR2 9LG on or before 31 August 2009.

2. The Defendant pay the Claimant £207025.06 being the amount outstanding under the mortgage.

3. This order is not to be enforced so long as the possession order is suspended."

8.It is not clear why paragraph 3 of the judgment was included because the possession order does not appear to have been suspended and as HHJ Mitchell said, this part of the order was clearly included by mistake. In any event TIL took possession of the property and it appears that they were in possession by November 2009 at the latest. There were difficulties in selling the property (including a purchaser who did not proceed, and a purchaser withdrew because of an adverse survey). In the event the property was sold for £240,000 on 21 July 2010. There were costs of £4,320 in selling the property. The running account shows that after the proceeds of sale were credited the sum of £57,774.72 remained outstanding under the loan agreement if the contractual rate of

interest continued to be applied.

The charging order

9. On 13th April 2011 Simon Engelman, then in-house solicitor for TIL, applied for an order imposing a charge on the interest of Mr Parr in 288 Pickhurst Lane "to secure payment of the amount owing under the judgment or order given on 20th July 2009". It appears that there was a first charge in favour of the Bank of Scotland, and cautions recording charges in respect of the beneficial interest of Mr Parr in 288 Pickhurst Lane in favour of Gascoine Pees Thames Limited, Lloyds Bank and Wilts Wholesale Electrical Company Limited. The application for a charging order was not defended and it is apparent from the evidence that Mr Parr had financial and other difficulties at the time. The amount reported to be owing was £77,044.81.

10. On 20th July 2011 Deputy District Judge Harper made an interim charging order directing that Mr Parr's interest in 288 Pickhurst Lane "be charged with payment of £77044.81 together with any further interest becoming due and the costs of the application".

11. On 17th October 2011 District Judge Thomas ordered that "the charge created by the order made on the 20 July 2011 shall continue".

Mr Parr's application to discharge the charging order

12. By an application dated 20 October 2014, nearly 3 years after the charging order had been made final, Mr Parr applied to discharge the charging order over his interest in 288 Pickhurst Lane. The application was made pursuant to section 3(5) of the Charging Orders Act 1979. This provides: "*The Court by which a charging order was made at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order*".

13. The application was heard before HHJ Mitchell. The representation of the parties was the same as the representation before me. In a reserved judgment dated 7 August 2015 HHJ Mitchell dismissed Mr Parr's application.

No merger

14. Although it appears from the correspondence before me that there were a number of points that were taken on behalf of Mr Parr (which included suggestions that 57 Godwin Road should have been sold at a higher price, and that provisions of the Consumer Credit Act had been infringed) by the time that the application was heard before HHJ Mitchell there

were three main points being taken by Mr Parr.

15. The first point was that there was a merger of the covenant for repayment under the loan agreement and charge with the judgment by reason of the signing of judgment by TIL in the sum of £207,025.06. This was said to have occurred because, unlike many modern loan agreements (see *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481), the loan agreement did not provide for interest to continue after, as well as before, any judgment. Reference was made to the modern practice which many banks employed of entering judgment only for possession, and not for a money judgment, to avoid this problem. It was said that all of this meant that interest on the judgment sum accrued only at the rate of 8 per cent as a judgment debt pursuant to the provisions of the County Courts (Interest on Judgment Debts) Order 1991 and the Judgments Act 1838, and not at the contractual rate under the loan agreement. This meant that when 57 Godwin Road was sold, the debt would have been £207,025.06 and interest of £16,793.67, a total of £223,818.79, which was less than the proceeds of sale of 57 Godwin Road. This would have meant that there was no outstanding judgment sum and no charging order should have been made.

16. It is established that the entry of judgment may have the effect of merging the contractual right to interest in the judgment, see *Popple v Sylvester* (1882) 22 Ch D 98. However as a matter of construction of the covenant to pay interest the obligation to pay interest at the contractual rate may continue after judgment, see *Ex parte Fewings* (1883) 25 Ch D 338 at pages 349 to 350. It is common ground that it is an issue of interpretation of the relevant payment and interest clauses set out in the charge and clauses 6, 8 and 10 of the loan agreement. TIL submitted that, as a matter of construction of the loan agreement and charge, interest continued after judgment.

17. HHJ Mitchell considered the relevant provisions and in paragraph 24 of his judgment noted that the covenants to pay interest could have been more clearly drafted but concluded that the covenant in the loan agreement to pay the interest and fees on "*all liabilities which are now or may be at any time hereafter be due*" was wide enough to cover all liabilities whether under the agreement or any subsequent judgment debt, and that Mr Parr remained liable under the agreement for interest and fees after both judgment and the sale of the property.

18. In the oral submissions before me it became clear that TIL also relied on a further and distinct point, which TIL said had been taken before HHJ Mitchell. The point was that because TIL had a charge and was "*sitting on its security*", there could be no merger and interest would continue to accrue at the contractual rate in any event. Mr Alomo, acting on behalf of Mr Parr, fairly pointed out that HHJ Mitchell did not appear to have accepted this submission in his judgment, although HHJ Mitchell had referred to a relevant authority in his judgment in which the point was considered, and that it had not been raised in the Skeleton Arguments for appeal. Ms Mattsson, acting on behalf of TIL, referred to notes which made it clear that the point had been raised before HHJ Mitchell, and said that she had failed to refer to it in the Skeleton Argument because she

understood it to be common ground that some monies were due to TIL. In the event, and with the agreement of counsel, I directed both parties to lodge supplementary submissions to deal with the point. The parties exchanged submissions on 27th November 2015 and on 1st December 2015, and I will deal with the merits of this point.

19. In my judgment TIL was entitled to claim and receive contractual interest up to the point of the sale of 57 Godwin Road. This was because, until the sale of 57 Godwin Road, TIL was exercising its rights under the charge and, as noted in paragraph 4 above, the charge made express provision for the payment of "all liabilities" and made provision that that should be "TOGETHER with interest … computed and compounded in the manner set out in the facility letter". As Lord Davey said in *Economic Life Assurance Society v Usborne* [1902] AC 17 at 153 once the conclusion is reached that the property mortgaged is in such a form that it "*cannot be taken out of the hands of the mortgagee without payment of the principal and full interest, then the covenant has no more to do with than if it related to another subject-matter altogether"*.

20. Mr Alomo suggested that *Economic Life Assurance Society* had been decided by reference to a mortgage properly so called, and that there was a material difference between that a mortgage and a charge. I do not accept that the distinction makes any difference in this case, and I note that in *Ealing LBC v El Isaac* [1980] 1 WLR 932 at 937F Templeman LJ, when considering an issue about whether a right to interest provided by statute had merged in a judgment, referred to *Economic Life Assurance Society* and noted "*merger does not apply where there is an independent covenant, nor does it apply to a security as distinct from a contract*".

21. Mr Parr did not assert at the time that the effect of entering judgment on 20 July 2009 was to limit TIL's rights to those set out in the judgment at the time and that TIL would not have been entitled to rely on the charge. In any event such a submission would not have been well-founded, and it is far too late for him to make such a submission now given that 57 Godwin Road has been sold by TIL exercising its powers under the charge. In these circumstances there was no merger because of the wording of the loan agreement, the charge and because of the relevant circumstances showing that TIL was holding the charge as security until the sale of 57 Godwin Road. TIL was therefore entitled to contractual interest under the terms of the charge up until the point of the sale. In these circumstances there was, after the sale of 57 Godwin Road, a sum still outstanding to TIL. This conclusion means that it is not necessary to consider the issue of the construction of the loan agreement on its own.

The charging order was for too high a sum

22. Before me it became common ground that if contractual interest had been accruing up to the date of the sale, as at the date of the sale the sum of £57,774.72 remained outstanding under the judgment. The mistake made by Mr Engelman when he applied for the charging order in the sum of £77,044.81 was to have continued to treat interest as

accruing at the contractual rate after the sale. It is common ground that he could not do this because TIL did not continue to hold the charge after the sale, and because the judgment did not provide for contractual interest to be paid on the outstanding sums. The sum for the interim charging order should have been £57,774.72 and interest at 8 per cent which is £3565.38, at the time when the application was made. This finding was made by HHJ Mitchell and I agree with him, and it leads on to the third main issue.

Charging order ought to be varied

23. The third main issue was whether, in circumstances where TIL had obtained a charging order for an excessive sum, the charging order should be varied so as to reduce the sum. TIL submitted that Mr Parr's remedy was to have appealed against the incorrect sum and the jurisdiction under section 3(5) of the Act should not be used to circumvent an appeal, and that in any event it was too late to vary the order now.

24. HHJ Mitchell held in paragraph 16 of his judgment that when considering whether to grant an order under section 3(5) a Court had to take account of all the circumstances, noting that delay was not an absolute bar, section 3(5) might provide an alternative route to appealing, and a procedural error might justify a discharge. HHJ Mitchell also held that justice for the creditor required the court to consider the applicant's reasons for not appealing and for the delay.

25. In paragraph 25 of his judgment, HHJ Mitchell held that the order could only have been corrected by an appeal or by a hearing pursuant to CPR 23.11 setting aside the order. He went on to find that even if there was jurisdiction to set aside the sum he would not do so, because of the delay in making the application and his failure to explain the reasons for the delay.

26. There are obvious potential difficulties if judges set aside or vary orders made by judges of co-ordinate jurisdiction. I was referred to a number of authorities dealing with circumstances in which it is appropriate to set aside or vary an earlier order. These authorities establish that the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud.

27. It appears that one of the reasons why HHJ Mitchell did not vary to reduce the sum which had been over claimed by TIL was because Mr Parr had only asked that the charging order be discharged on the basis that there was an error in the amount secured by the charging order. Before me Mr Alomo took a more realistic approach, and accepted that if the order should not be discharged because it had been made for an excessive sum, then alternatively the order should be varied to the correct amount. Mr Mattsson submitted that I should not vary the order, because the figures would be corrected on the taking of an account and there was therefore no need to vary the order.

28. In my judgment the charging order should not be set aside because there was a mistake in the figures, and I therefore agree with HHJ Mitchell on the point that was argued in front of him. There are sums due under the judgment and these are secured by a charging order, Mr Parr did not make any objection to the making of the charging order, or make any timely application to appeal or discharge the order.

29. However in my judgment the charging order should be varied so that the correct amount is secured. The wrong figure was entered by Deputy District Judge Harper for the interim charging order, which was made final by District Judge Thomas. The wrong figure was entered because of the admitted error made by TIL. The fact that Mr Parr did not point out the error at the time does not mean that, in circumstances where I have power to vary the order, I should not correct the figure. Ms Mattsson says that the correct figure can be entered when the property is sold and an account is taken. This is not a reason to correct an admitted mistake, which was a mistake which arose because TIL supplied the wrong figures to the original Judge. The fact that the error might be corrected at a later time under a different procedure shows that delay, which might otherwise have counted against Mr Parr, should not be a bar to correcting the error at this stage. This is because the figures can be adjusted in the future and there are not accrued rights which are being affected by the variation.

Conclusion

30. In these circumstances I dismiss the appeal against HHJ Mitchell's refusal to discharge the charging order. I will allow the appeal to extent of varying the charging order to reduce the sum claimed so that the correct figure is shown.