Neutral Citation Number: [2018] EWHC 1277 (Ch)

Case No: CH-2017-000298

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
(District Judge Fine)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 23 May 2018

Before:

MR JUSTICE SNOWDEN

- -

Between:

PRINCESS FOLAREMI AJONGBOLA SANTOS-ALBERT	**Claimant**
- and –	
ISIGUZO EUGENE OCHI	**Defendant**

- -

Mr. Andrew Nicol (instructed by **Carl Martin Solicitors**) for the **Appellant/Defendant**
Mr. Robert Brown (instructed by **Anthony Gold Solicitors**) for the **Respondent/Claimant**

Hearing date: 21 May 2018

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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 JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This is an appeal against an order made by District Judge Fine in the Central London County Court on 14 November 2017. The District Judge refused an application by the Defendant/Appellant, Mr. Ochi, asking her to vary or discharge amendments which she had made under the "slip rule" (CPR 40.12) to a final charging order which she had originally made on 15 June 2016.

The Facts

2. The background to the case is that the Claimant/Respondent, Princess Santos-Albert was the tenant of property owned by the Defendant at 144 Verdant Lane, London SE6 ("the Property") which she occupied between 2011 and 2013. The Property had damp, mould and other disrepair issues and the Claimant brought proceedings in the Central London County Court for damages. After a trial, on 8 April 2015 HHJ Wulwik found in favour of the Claimant and ordered the Defendant to pay general damages of £5,000 to the Claimant, together with two-thirds of the costs of the proceedings to be subject to a detailed assessment if not agreed. HHJ Wulwik ordered the Defendant to pay the damages of £5,000 together with an interim payment of £10,000 on account of costs by 4 pm on 5 May 2015.

3. The Defendant did not make the payment of £15,000 as ordered. On 15 May 2015 District Judge Silverman made an interim charging order over the Defendant's interest in the Property, charging that interest with payment of £15,000, together with any further interest becoming due and the costs of the application for the interim charging order.

4. The Defendant sought permission to appeal HHJ Wulwik's order, and pending a determination of such appeal the parties agreed that the hearing of the application for a final charging order should be adjourned. The Defendant's application for permission to appeal was refused by the Court of Appeal on paper on 18 January 2016.

5. Although a hearing was listed for an oral renewal of the application on 21 July 2016, the Claimant did not agree a further adjournment of the application for a final charging order. At a hearing on 15 June 2016 attended by both parties, District Judge Fine made an order which was originally drawn up in the following terms ("the Original Final Charging Order"),

> "1. The charge created by the order made on 15 May 2015 shall continue.
>
> 2. The interest of the [Defendant] in the [Property] stand charged with payment of the sum of £15,000 the amount now owing under a judgment or order given on 8 April 2015 by the County Court at Central London … together with any further interest becoming due and £408 the costs of the application.
>
> 3. The costs are to be added to the judgment debt."

6. The Original Final Charging Order was dispatched to the parties on or about 18 June 2016 and prompted a letter from the Claimant's solicitors to the court on 22 June 2016. That letter stated that the solicitor's attendance notes of the hearing recorded that the order which had been made was that the interim charging order be made final and that the interim charging order be amended to a charge to secure "all sums due under the order of 8 April 2015 and interest". The letter continued,

> "The order as drawn does not include the claimant's costs awarded under the order of 8 April 2015 in the charge. These have been provisionally assessed in the sum of £40,617.26.
>
> We respectfully request that the court exercises its powers under CPR rule 40.12 and amends the order drawn."

7. That letter was not copied to the Defendant. It appears that having received that letter, District Judge Fine exercised her power under the slip rule without notice to the Defendant so as to produce an amended final charging order which was dispatched to the parties on 12 July 2016 ("the Amended Final Charging Order"). The Amended Final Charging Order stated,

> "1. The Final Charging Order on all sums due under the order of 8 April 2015 and interest. [sic]
>
> 2. The interest of the [Defendant] in the [Property] stand charged with payment of the sum of the amount now owing under a judgment order given on 8 April 2015 by the County Court at Central London … together with any further interest becoming due. The Defendant shall pay the Claimant's fixed costs in the sum of £408.
>
> 3. The costs are to be added to the judgment debt."

8. On 11 July 2016 a final costs certificate was issued in respect of the costs order of HHJ Wulwik in the sum of £42,717.86. The Defendant's application for permission to appeal was finally dismissed by the Court of Appeal on 17 November 2016.

9. The Defendant still did not pay any of the sums which had been ordered to be paid by him, and so, about 10 months later, on 12 May 2017, the Claimant issued a Part 8 claim form seeking an order for sale of the Property. The brief details of the claim were,

> "1. On 15 June 2016 in claim number two LB 02153 in the County Court at Central London the Claimant was granted a final charging order to secure the sums due and interest under the judgment of 7 April 2015 and costs over the [Defendant's] interest in the [Property].
>
> 2. No payments have been made by the [Defendant] in respect of the judgment debt and costs and the balance due from the [Defendant] as at 28 April 2017 is £55,997.44 with interest accruing at a daily rate of £10.55.

….

4. The Claimant seeks an order for sale of the Property in the terms set out in the enclosed draft order.

5. Costs."

10. The Part 8 claim was supported by a witness statement that suggested, by inference rather than expressly, that the Amended Final Charging Order charged the Defendant's interest in the Property with the full amounts then owing under the judgment and order of HHJ Wulwik, including the amount of £42,717.86 certified due in respect of costs. On any view the evidence did not seek to suggest that the amounts secured by the Amended Final Charging Order did not include that amount.

11. As well as indicating an intention to contest the Part 8 claim for an order for sale of the Property, the Defendant issued an application on 12 July 2017 seeking that the amendment to the Original Final Charging Order of 15 June 2016 should be set aside and that such charging order should be discharged.

12. The evidence in support of the application complained that the Claimant's solicitors had asserted in the Part 8 claim that the sum due under the Amended Final Charging Order was £55,997.44. The evidence stated that the Defendant was challenging the Part 8 claim on the basis that the Claimant was not legally entitled to claim costs by reason of the fact she was a legally aided party and further that the Claimant's solicitors had sought to claim for costs of a legally aided party at private inter partes rates. The witness statement continued,

> "The Defendant is currently in the process of completing a re-mortgage of the property and is able to undertake to pay the correct sum charged under the Original Final Charging Order into the court without prejudice to his legal rights in relation to the disrepair claim with respect to which the 8 April 2015 order was made."

13. Before that application could be heard, the Defendant paid the sum of £55,997.44, together with further legal costs of £8,000, to the Claimant. The Defendant's Skeleton Argument for the appeal suggests that this payment was forced upon the Defendant because the proposed mortgage lender had indicated that the offer of finance to the Defendant would be withdrawn if the entry in respect of the Amended Final Charging Order was not removed from the title to the Property at the Land Registry, and the Claimant had not agreed to that without being paid the full amount claimed.

14. The application of 12 July 2017 came before District Judge Fine on 14 November 2017. After hearing argument from solicitors for both sides the District Judge gave a short judgment refusing to vary or discharge the Amended Final Charging Order. After setting out the background, she stated,

> "4. I have the note that I made of the order on 15 June 2016. It notes that I heard the solicitor for the claimant and the defendant in person. The court was satisfied as to service and the order made was a final charging order

> on all sums due under the order of 8 April 2015 and interest. The initial order, as drawn by the court staff and sent to the parties on 18 June 2016, did not reflect the order made in that it referred to the sum of £15,000, which was not the wording of my order. The claimant therefore apparently wrote to the court seeking the wording to be amended to reflect the order made and the order was, accordingly, amended. Today the defendant seeks to vary that order and/or have the order discharged.
>
> 5. With regard to the variation of the order, the order as amended under the slip rule reflects correctly the order made. Any variation at this stage would have to be by way of appeal."

15. District Judge Fine then considered what to do with the Amended Final Charging Order. She noted that the Claimant had accepted that the costs determined under the final costs certificate together with the £5,000 damages and interest and costs had been paid. The District Judge therefore ordered that the Amended Final Charging Order be discharged. She also ordered the Defendant to pay the Claimant's costs of the application to be assessed on the indemnity basis if not agreed, because she viewed the Defendant's application as "misconceived".

16. Finally, District Judge Fine observed that the Claimant should notify the court promptly by way of notice of discontinuance that the Part 8 claim for an order for sale was no longer being pursued. In fact, the order that was drawn up in this respect ordered the Part 8 claim to be dismissed.

The Grounds of Appeal

17. The Defendant has sought to appeal the order of District Judge Fine on three grounds,

> "1. The learned District Judge had wrongly held that she can lawfully allow the [Claimant], on whose application the charging order had been made, to vary the terms of the charging order subsequent to the interim charging order.
>
> 2. The learned District Judge had wrongly held that the [Defendant's] application to vary the terms of the charging order can only be made by way of appeal.
>
> 3. The learned District Judge had wrongly ordered the dismissal of the [Claimant's] Part 8 claim … during the hearing of the [Defendant's] application since the Part 8 claim was not fixed for hearing on that day"

18. On 27 February 2018, Norris J, having noted that the appeal should have been made to a Circuit Judge in the County Court, nonetheless gave permission for it to continue in the High Court. He granted permission to appeal in relation to grounds 1 and 2.

However he refused permission to appeal in relation to ground 3. Norris J considered that it was arguable that there was a sufficient alteration in the scope of the original order of 15 June 2016 that it should not have been made under the slip rule, and that the District Judge was accordingly wrong to refuse to set the amended order aside. He did note, however, that given that the judgment debt including the assessed costs had now been paid, the practical consequence of such an appeal were "obscure" but that it might be a factor when costs came to be considered.

19. On ground 3, Norris J refused permission to appeal on the basis that since the Defendant had paid everything that could possibly be due under the Amended Final Charging Order, the Part 8 claim was properly dismissed. He added that if the Defendant contended that he had paid the Claimant too much, then he remained free to commence a claim for repayment.

20. Before me, in addition to arguing the two grounds for which he did have permission, Mr Nicol, who appeared for the Defendant, sought to renew the application for permission to appeal in relation to ground 3.

The relevant law

21. The Court's jurisdiction to make a charging order arises under section 1 of the Charging Orders Act 1979. That provides,

> "(1) Where, under a judgement or order of the [court], a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order."

22. For present purposes I note that the Charging Orders Act distinguishes between monies which are "due" and monies which are to "become due" under the relevant judgment or order. It is also clear that there is jurisdiction to make a charging order in respect of both.

23. The Court's jurisdiction to amend an order under the slip rule derives from CPR 40.12 which states as follows,

> "1. The court may at any time correct an accidental slip or omission in a judgment or order.
>
> 2. A party may apply for a correction without notice."

24. In *Bristol-Myers Squibb v Baker Norton Pharmaceuticals (No.2)* [2001] RPC 45 at paragraph 25, the Court of Appeal stated, after consideration of a number of earlier authorities,

> "Those cases establish that the slip rule cannot enable the court to have second or additional thoughts. Once the order is drawn up any mistakes must be corrected by an appellate court. However it is possible under the slip rule to amend an order to give effect to the intention of the court."

25. Mr. Nicol also contended that the slip rule could not be used to make substantial amendments. By that I understood him to mean that it could not be used to make an amendment to an order the effect of which was very large. He based that contention on a sentence in paragraph 40.12.1 of the White Book which states,

> "Although not limited to errors by the court or court officers, the rule is limited to genuine slips *and cannot be used to correct an error of substance* nor in an attempt to get the court to add to its original order (e.g. to add a money judgment where none was sought, and none given at the trial)."
>
> (my emphasis)

No specific authority is cited in the White Book for that sentence, albeit that there is then a lengthy analysis of the authorities more generally.

26. The reason Mr. Nicol made that submission was that he complained that the effect (or at least the effect contended for by the Claimant) of the District Judge's amendment to the order of 15 June 2016 had been to add the £42,717.86 to the amounts secured by the Original Final Charging Order.

27. I do not accept Mr Nicol's submission as to the meaning of CPR 40.12. Although CPR 40.12 uses the word "slip", its real purpose is to ensure that the order conforms with what the court intended, even if the error which has originally been made in drawing up the order is substantial. So, for example, if the court intended to order payment of £1,000,000 but in error the order drawn up by the court required payment of only £1,000, I do not doubt that the order could be amended under the slip rule, even though the financial difference between the order as drawn and the court's true intention would be very great. In my view, as stated in *Bristol-Myers Squibb*, the key requirement in every case is simply that the order should reflect the actual intention of the court. The limitation discussed in the authorities, and which I think is what is meant by the sentence in the White Book, is that there should genuinely have been an accidental error or omission: the slip rule should not be used to permit the court to have second or additional thoughts or to add a provision having substantive effect which was not in the contemplation of the parties or the court at the hearing.

Analysis

28. Against that background I turn to consider what in my view is the core question in this case: what was the true meaning and effect of the amendments that District Judge Fine actually made under the slip rule to the Original Final Charging Order?

29. District Judge Fine first corrected paragraph 1 of the order to reflect the fact that it was not the interim charging order that was being continued, but that a final charging order was being made. The wording of paragraph 1 in the Amended Final Charging Order is

itself incomplete and/or grammatically incorrect, but I do not think that is significant. The purpose and meaning of the paragraph is tolerably clear and gives effect to the clear intention of the District Judge to make a final charging order.

30. The main change for present purposes was to paragraph 2 of the order. As I have indicated, the interim charging order had charged the Defendant's interest in the Property with the payment of a total of £15,000 which had been ordered by HHJ Wulwik, together with any further interest becoming due and the costs of the application. By the time of the hearing on 15 June 2016 it would have been clear that the interim payment of £15,000 that was unpaid would have accrued interest over the intervening 13-month period under section 74 of the County Courts Act 1984 and the County Courts (Interest on Judgment Debts) Order 1991 (as amended). The base figure due under HHJ Wulwik's order as at 15 June 2016 would therefore not be £15,000, but an increased sum to reflect the accrued interest.

31. The removal of the out-dated figure of £15,000 is the only change that was made by the District Judge to the operative charging provisions of paragraph 2 of the Original Final Charging Order. This left the amount charged upon the Defendant's interest in the Property by the Amended Final Charging Order as,

> "the sum of the amount now owing under a judgment or order given on 8 April 2015 … together with any further interest becoming due …and fixed costs in the sum of £408."

32. I note in relation to that paragraph (i) the express reference to "the amount now owing"; (ii) the contrast with the express reference to "further interest becoming due"; and (iii) the distinction drawn in section 1(1) of the Charging Orders Act 1979 between monies "due" and monies "becoming due". Taking those points into account, in my judgment the ordinary and natural meaning of the Amended Final Charging Order was that it included the unpaid interest which had accrued on the £15,000 by 15 June 2016, together with any further interest that might become due after that date and fixed costs.

33. However, since no final certificate had been issued by 15 June 2016 in respect of the two-third of the costs of the action, no such amount was "now owing" as at that date, and it was therefore not included in the Amended Final Charging Order any more than it had been included in the Original Final Charging Order. Nor, for completeness, was a sum "due" which could possibly be thought to fall within paragraph 1 of the Amended Final Charging Order. Had it been intended to include such an uncertain future amount within the scope of the charging order, the charging order would have had to refer to costs "becoming due upon final assessment" or similar wording.

34. Accordingly, even if I had accepted Mr. Nicol's interpretation of CPR 40.12, I would not in any event consider that the amendment which District Judge Fine actually made under the slip rule could be characterised as substantial. The only change made was the removal of the number of £15,000 to allow for accrued interest.

35. It follows that although the letter written to the court on 22 June 2016 by the Claimant's solicitors seeking an amendment to the original order seems (on one view) to have requested that the court include within the Final Charging Order the two-thirds of the costs ordered to be paid by HHJ Wulwik which had not, by 15 June 2016, been assessed or agreed, it does not appear to me that District Judge Fine was persuaded to include

those potentially much larger sums which were not yet assessed or due, in any of the orders which she made.

36. That interpretation of the Amended Final Charging Order is also consistent with the judgment of the District Judge on 14 November 2017. Although she referred in passing to the letter from the Claimant's solicitors, the only express reference that she made in her judgment was to the deletion of the £15,000 figure. That deletion is entirely explicable for the reasons that I have given. Accordingly, I see no reason to go behind what the District Judge said in her judgment to the effect that the Amended Final Charging Order was the order that she intended to make on 15 June 2016, or to suspect that this limited amendment was the product of any second thoughts.

37. Accordingly, in my judgment the District Judge was entitled to reject the Defendant's application, and the two grounds which are now raised by way of this appeal are unfounded.

38. The first ground appears to be a complaint that the court cannot make an alteration varying the terms of the charging order after making an interim charging order. I do not accept that as a general proposition, but in any event as amended and understood in the way that I have described, the Amended Final Charging Order did no more than was envisaged by the interim charging order. It simply brought up-to-date as at 15 June 2016 the amounts which were then owing and unpaid including interest from the date of the interim charging order to the date of the final charging order.

39. The second ground of appeal also fails because, as I have found, the amendments to the Original Final Charging Order were confirmed by the District Judge to be what she had intended, they were perfectly understandable, and I have no basis upon which to find that they were the product of any second thoughts or that they added any new substantive provision. The District Judge was right to conclude that any objection to the Amended Final Charging Order had to be by way of appeal.

40. Having said that, it would appear that the Claimant, at least by implication, overstated the scope of the Amended Final Charging Order in making its Part 8 claim. Whether the Claimant was actually entitled to seek an order for sale of the Property in reliance on the increased amount owed to her by the Defendant but not covered by the Amended Final Charging Order would have been a matter for the Defendant to raise at the hearing of the Part 8 claim. Bearing in mind that the Defendant had not, at that stage, paid a penny that he had been ordered to pay, it may well have been that such an unmeritorious submission would have been met with short shrift. The Claimant might have been permitted to seek to amend the Amended Final Charging Order to reflect the increased amount that had become due, or the order for sale could have included provisions directing the person having control of the sale to discharge the full amount of the judgment debt from the proceeds.

41. As it is, however, those matters are not relevant to this appeal. This appeal has arisen because the Defendant used the Claimant's characterisation of the scope of the Amended Final Charging Order as a basis to complain about the use of the slip rule by the District Judge which, on proper examination, had not in fact expanded the Original Final Charging Order to include any such larger amounts.

42. As to the renewed application in relation to the third ground, I agree with Norris J that, as stated, the third ground of appeal is hopeless. It plainly lay within the case management jurisdiction of the District Judge on 14 November 2017, when both parties were represented before her, to make orders dealing with a Part 8 claim which the Claimant had indicated it no longer wished to pursue. An appeal on the basis that the matter was not listed before the District Judge has no prospect of success.

43. Moreover, why the Defendant should wish to complain about an order dismissing an action against him entirely escapes me. In the course of argument, Mr Nicol sought to suggest that the concern of his client was that he was prejudiced by the Part 8 claim being dismissed rather than being discontinued by the Claimant as the District Judge had indicated it should be.

44. Mr Nicol suggested that dismissal of the Part 8 claim rather than it being discontinued might in some way inhibit or prevent his client from taking the course suggested by Norris J if he considered that he had been forced to pay too much, namely to bring proceedings for recovery of any overpayment. I see no reason why either the discontinuance or the dismissal of the Part 8 claim seeking an order for sale should in any way inhibit or prevent the Defendant from seeking to recover any alleged overpayment.

45. Further, and by way of confirmation of that view, Mr Brown, who appeared for the Claimant, readily confirmed that the Claimant would not seek to rely upon any such point if the Defendant were to bring separate proceedings seeking to recover any alleged overpayment. Mr. Brown did, of course, contend that there had been no overpayment, that the amount that was claimed in the Part 8 claim was the appropriate amount due, and he reserved the Claimant's rights to raise any other defences in relation to any such new claim.

46. I say nothing more about such matters other than that they simply reinforce my view that Mr Justice Norris was entirely correct to refuse permission to appeal on the third ground.

47. I therefore dismiss the appeal.