Neutral Citation Number: [2019] EWHC 3286 (Ch) Appeal Ref.:CH-2019-000163

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Monday, 18 November 2019

Before:

MR JUSTICE FANCOURT

Between:

KERIM RICHARD DERHALLI Claimant/Respondent

- and -

JAYNE RICHARDSON DERHALLI Defendant/Appellant

MR M. GLASER QC and **MS E. BETTS** (instructed by **Farrer & Co. LLP**) appeared on behalf of the **Claimant/Respondent**.

MR N. DYER QC and **MR N. DUCKWORTH** (instructed by **Charles Russell Speechlys LLP**) appeared on behalf of the **Defendant/Appellant**.

Hearing date: 18 November 2019

Approved Judgment

MR JUSTICE FANCOURT:

1 This is an appeal by Jayne Richardson Derhalli ("the appellant") against an order made in the County Court at Central London on 3 May 2019. The proceedings before the County Court related to divorce proceedings between the appellant and her former husband, Kerim Richard Derhalli, the respondent to this appeal. In those divorce proceedings, a financial remedy order was made by consent by Holman J at a hearing on 28 September 2016. The issues on this appeal are concerned with the true interpretation of that order.

2 The proceedings brought in the County Court by the respondent were for possession of the former matrimonial home, 5 St Mary's Place, Kensington, London W8 ("the home") and for the payment of mesne profits or damages for use and occupation at the rate of £5,000 per week. In those proceedings, preliminary issues were directed to be tried. The issues arose from the terms in which the appellant pleaded her defence of the claim. The preliminary issues directed were by reference to the following pleas:

> "(f) Upon its true and proper interpretation the purpose and effect of the Consent Order was and is to permit the Defendant to occupy the property until the sale thereof, alternatively so as to reasonably permit completion of any such with vacant possession therefore, but in any event not earlier.
>
> (g) Pending such a time the Defendant was and remains subject to a duty to pay for the outgoings upon the Property, but is not otherwise obliged to make any payments to the Claimant in respect of her use and occupation."

Those were the paragraphs in the defence and the preliminary issue was whether or not those assertions were justified as a matter of the interpretation of the consent order.

3 The circumstances in which the preliminary issues were considered at a trial by Judge Nigel Gerald were that the financial remedy consent order provided for the immediate sale of the former matrimonial home. The appellant had continued to live in the home with her daughters, aged twenty and twenty-two at the time when the respondent left the home. The parties separated with the respondent moving out at the end of 2014 and the respondent proceeded to rent another home for himself in London. Each of the parties to the divorce proceedings owned a separate country property.

4 The home did not sell for a considerable period of time. That was unexpected. The appellant continued to live in the property. About six months after the consent order was made, the respondent served on the appellant a notice to vacate the home within twenty-eight days or, alternatively, to pay a market rent for the home assessed at £5,000 per week. The appellant did not vacate the property and did not pay rent. The respondent, therefore, issued the proceedings before the County Court on 8 December 2017, claiming possession and damages for use and occupation at that rate.

5 The home was eventually sold on the market in March 2019 and the appellant moved out at that time in order to facilitate a sale with vacant possession.

6 Judge Gerald decided the preliminary issues in favour of the respondent. He, accordingly, declared as follows:

> "Upon its true construction the meaning and effect of the Consent Order is that on and from the date thereof the Defendant occupied St Mary's Place as a gratuitous licensee terminable on reasonable notice where-after she would be a trespasser liable to pay damages for use and occupation thereof until delivering vacant possession thereof, the court thereby rejecting the Defendant's construction thereof as pleaded in paragraphs 4(f) and (g) of said Defence."

The order of 3 May 2019 then recorded that there was no issue as to the reasonableness of the duration of the notice to vacate and, on that basis, ordered assessment of damages for use and occupation for the period from 21 April 2017 to 26 March 2019, to be listed for determination by a District Judge in due course. Judge Gerald gave further directions in relation to that anticipated hearing.

7 An appeal notice was issued by the appellant on 20 June 2019. That notice sought the variation of Judge Gerald's order to answer the preliminary issues in the following terms:

> "a. On its true and proper construction the purpose and effect of the Consent Order was to permit the Defendant to occupy [the home] until the sale thereof.
>
> b. Accordingly, the answer to [issue (f) of the preliminary issues] is 'yes'.
>
> c. The answer to [issue (g) of the preliminary issues] is 'yes'."

8 Permission to appeal was granted by Arnold J by order of 21 June 2019. As I have explained, the issue on this appeal turns on the meaning and effect of the consent order.

9 The surrounding circumstances that relate to the interpretation of the order are common ground. These include that the divorce had been acrimonious, that the parties were wealthy, the house was valuable (it eventually sold for £5.9 million, albeit that was significantly less than the price at which it had first been marketed). The consent order is a matrimonial settlement, as its terms made clear, to resolve disputes about assets and money and to provide a clean break for the parties on their divorce. The home was registered in the respondent's sole name. It had been acquired during the parties' marriage. The respondent had moved to live elsewhere in London and the appellant remained in the home, as her home in London, with her two daughters, one of whom was at university by that time and one of whom had recently started employment in London.

10 The relevant terms of the consent order are the following. First, a recital which explains that, after consideration of the documents lodged by the parties following an agreement reached at a meeting at solicitors' offices on 6 June 2016, which was perfected outside court on that day, Holman J, sitting in private, made a financial remedy order.

11 The relevant clauses of the consent order are the following:

> "12. The parties agree that the terms set out in this order (including the recitals, agreements, undertaking and the orders of the court) are accepted in full and final satisfaction of –
>
> a. all claims for income;

b. all claims for capital, that is payments of lump sums, transfers of property and variations of settlements;

c. all claims in respect of each other's pensions;

d. all claims in respect of the contents of their properties and personal belongings including but not limited to furniture, artwork, jewellery and motor vehicles with the precise allocation of those chattels to be agreed or determined in accordance with paragraph 13 below;

e. all claims in respect of legal costs including those of the divorce/dissolution proceedings;

f. all claims against each other's estate on death; and

g. all other claims of any nature which one may have against the other as a result of their relationship, howsoever arising, either in England and Wales or in any other jurisdiction.

13. The parties agree that the chattels in Stonelands, St Mary's Place, St Raphael's Lodge, and 5B Cliveden Place (or the replacement rental property) which belong to the applicant or the respondent, shall be divided on the following basis:
…
g. And further, it is agreed that on the occasion of the valuer attending:
(1) Stonelands – the applicant or her solicitor (not both) may be in attendance;
(2) St Raphael's Lodge and St Mary's Place – the respondent or his solicitor (not both) may be in attendance.

14. The parties agree that they will each retain the assets in their respective sole names and that neither of them has any legal or equitable interest in the property or assets currently in the sole name or possession of the other, and neither of them has any liability for the debts of the other, except as provided for in this order. In particular, it is agreed that the respondent shall retain Stonelands.

20. The parties agree that with effect from 7 June 2016 the Respondent will be responsible for paying the outgoings on Stonelands.

21. The parties agree that with effect from 7 June 2016 the applicant will discharge the outgoings on St Mary's Place and St Raphael's Lodge. To the extent that the respondent makes any such payments on the applicant's behalf after 7 June and before the transfer of the standing orders and direct debits in relation to St Mary's Place and St Raphael's Lodge (which the respondent will arrange to be transferred to the applicant's sole bank account as soon as practicable) then such payments will be netted off against the lump sum payable in accordance with paragraph 36(b) below.

23. The parties agree that (save as provided in paragraph 13g(2) above) the respondent shall provide the applicant with at least 24 hours' advance notice of an intention to attend St Mary's Place and will endeavour to accommodate the applicant by going there at a convenient time for her.

24. The parties agree that the respondent shall have exclusive occupation of Stonelands and the applicant shall not return there save as provided in paragraph 13g(1) above and on one occasion, on a date to be agreed, to collect her chattels in accordance with paragraph 13 above.

25. In addition to paragraph 13g(2) above the parties agree that the respondent shall have access to St Raphael's Lodge on two occasions on dates to be agreed between the parties:
a. to inspect the parties' possessions and chattels which are situated there; and
b. to remove such of those possessions and chattels as it is agreed he shall retain.

26. The parties agree that the transactions and lump sums payable in accordance with paragraphs 36, 42 and 43 will not be adjusted for any reason including, but not limited to, any reduction or increase in asset values, exchange rate fluctuation, or further investment by the respondent in Marketspringpad Holdings or Invstr Ltd (save, for the avoidance of doubt, in relation to any netting off pursuant to paragraphs 17 or 21).

38. The applicant undertakes to the court and agrees with the respondent to remove the notices registered in her favour against:
a. St Mary's Place forthwith upon the respondent's reasonable request so as to effect a sale or within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below; and
b. Stonelands within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below.

41. St Mary's Place shall be sold forthwith on the open market at the best price reasonably obtainable and the following directions shall apply:

a. The parties shall have joint conduct of the sale.

b. The selling agent shall be jointly agreed between the parties.

c. On sale, the gross sale proceeds shall be applied to meet the following:

i. The selling agent's commission;
ii. The legal fees; and
iii. Any capital gains tax.

With the remaining balance being the net proceeds of sale which shall be paid to the respondent, to be held in accordance with the provisions detailed at paragraph 40 above.

42. The respondent shall pay to the applicant a series of lump sums (that, by agreement, are not variable under section 31 of the Matrimonial Causes Act 1973) as follows:

a. £5,829,300 on the date 14 days after the date of decree absolute or six weeks after the date of this order, whichever is the later, such payment to be made offshore to the applicant's nominated bank account.
b. £2,257,732 on the date 14 days after the completion of the sale of St Mary's Place in accordance with paragraph 41 above. Such payment to be made onshore or

> offshore as the respondent elects (subject to paragraph 29).
>
> c. A sum equal to one half of the net sale proceeds of St Mary's Place (as defined at paragraph 41(c) above) on the date 14 days after the completion of the sale of St Mary's Place in accordance with paragraph 41 above. Such payment to be made onshore or offshore as the respondent elected (subject to paragraph 29)."

12 It is clear, in the light of those provisions, that the home was to be sold as soon as possible and that the appellant would have to move out of the home on completion of the sale, but that in the meantime she would pay all the outgoings for the property. Pursuant to the consent order, or the prior agreement, £600,000 had been paid to the appellant in June 2016, £5.8 million was paid after the decree absolute on 11 October 2016, and those monies were taken or remained offshore. A further £2.25 million was to be paid twenty-five days after completion of the sale of the home and half the net proceeds of sale were to be paid to the appellant within fourteen days of the sale.

13 In his judgment, Judge Gerald summarised the parties' cases. At paragraph 16 he said:

> "It is the claimant's case that he was entitled to serve those notices requiring possession because the effect of the financial order was that he was the absolute beneficial owner of St Mary's Place [the home], the defendant occupying as gratuitous licensee determinable on reasonable notice so that at any time after the making of the financial order he was entitled to determine that licence save that, unless and until the decree absolute had been made, he would not be able to obtain possession by reason of the defendant's home rights under the relevant Family Law statutes."

At para.17, he summarised the appellant's case as follows:

> "The defendant's case is that although there is no express provision within the financial order, as a matter of its proper construction she was entitled to remain in occupation of the property rent free until the sale and that her, as it were, right of occupation was not determinable so that she could not be removed."

14 In paras. 23 and 24, Judge Gerald identified two matters about which the consent order was silent. The first was the nature of the appellant's continued occupation of the home. The second was the absence of any express obligation on the appellant to vacate the property upon sale. He observed that it was obvious, as well as being common ground between the parties, that the sale would be with vacant possession and that, implicit in that, was an obligation on the appellant to vacate at some stage prior to completion. Thus, although the consent order did not contain any express provision as to vacation by the appellant, the Judge had no difficulty in construing the consent order, or implying a term, requiring her to do so at some stage prior to completion.

15 Prior to making observations about those matters, Judge Gerald had expressed his conclusions in para 22 as follows:

> "The effect of the financial order is that from its date onwards the defendant occupied St Mary's Place as a gratuitous licensee which licence was terminable on reasonable notice such that on expiry of that notice she would be constituted a trespasser and liable to pay for use and occupation of the property until she vacated it."

16 In the following section of his judgment, Judge Gerald then advanced various reasons for that conclusion that he had reached. The reasons that he gave were the following.

17 First, the consent order was a full and final settlement between the parties but did not appear to be a full and final settlement of future claims in relation to working out the terms of the consent order.

18 Second, the order was intended to be binding as at the date on which it was made, 28 September 2016.

19 Third, he said, in para.32 of the judgment, the following:

> "By the defendant accepting and acknowledging that the claimant was the absolute beneficial owner of St Mary's Place, the legal consequence of that was that he had an unfettered right to occupation of it unless there was some contractual or other provision altering that otherwise unfettered right. In point of fact, at the time of the making of the financial order, the defendant was in consensual occupation of the property from which it follows as a matter of law that she was a gratuitous licensee which was determinable on reasonable notice. There is nothing in the financial order which expressly or impliedly purports to cut down the claimant's right of occupation or determination of the gratuitous licence."

That conclusion he reinforced by reference to para.38 of the consent order, which required the appellant to remove her home rights notices registered against the title to the property.

20 Fourth, the judge relied on para.23 of the consent order. He said in para.38 of his judgment that this really provided no assistance to the appellant. He says that it recognised that the claimant was entitled to occupy the property and, from what followed, it seemed to him that any reasonable reader of the order would conclude that the respondent was also entitled to bring about the termination of his former wife's occupation of the property on reasonable notice.

21 Fifth, and finally, Judge Gerald referred to para.21 of the consent order, a requirement for the appellant to discharge the outgoings. He held that this paragraph was of no real significance either, because it was impliedly limited to the period of the appellant's occupation of the home or, if it was not, it was simply an allocation to her of the risk of delay in selling the house.

22 Underlying Judge Gerald's conclusion, it seems to me, is a feeling, to which he gives voice in places in the judgment, that it would be unfair for the respondent to have to provide the appellant with rent-free accommodation up to a value of £5,000 a week, as claimed, for – as it turned out – a period of two and a half years before the home was sold. But, of course, the parties did not envisage such a delay in June 2016 when provisional agreement on the terms of the consent order was reached. It is common ground, on the appeal before me, that the parties expected the sale of the home to be achieved "relatively briskly". June 2016, it will be remembered, was the month in which the Brexit referendum took place, which it is now well understood had a significant effect on the market in London. But no one at the date of the consent order envisaged that the home would take a substantial period in which to sell.

23 The approach to the law that I have to consider in construing the consent order is uncontroversial on this appeal. The consent order, as such, can be construed as a contract between the parties to it, which was endorsed and given further legal effect by the order of the court. The law on interpretation of contracts is now too well-known to require lengthy restatement in this judgment. Judge Gerald referred in his judgment to Lord Neuberger's well-known judgment in *Arnold v Britton* [2015] AC 1619 at [15], in which he reviewed the speech of Lord Hoffmann in *Chartbrook Ltd v Persimmon Home Ltd* [2009] 1 AC 1101.

24 In *Arnold v Britton*, Lord Neuberger indicated that the meaning of the relevant clause in that case, which was in a lease, had to be assessed in the light of (1) the natural and ordinary meaning of the clause; (2) any other relevant provisions of the contract; (3) the overall purpose of the clause and the contract; (4) the facts and circumstances known or assumed by the parties at the time the document was executed, and (5) commercial common sense but (6) disregarding subjective evidence of any party's intentions. Lord Hoffmann, in *Chartbrook*, said that the meaning of a contract was to be assessed by reference to "what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean."

25 The conclusions that I have reached are the following:

26 First, the relevant factual background to the consent order is important. The appellant had been living in the home without the respondent for almost two years. She had been living there with her daughters. To that extent, the home remained the family home even though the respondent had left it. The respondent was settled elsewhere in London and in his country home. There were, at the date of the consent order, established living arrangements between the parties.

27 Second, the house was to be sold immediately as the consent order provided. It had, in fact, been marketed in June 2016 and might, therefore, have been expected to be sold at any time or after a relatively short delay.

28 Third, it was clearly implicit, as the judge rightly held, that the appellant was obliged to move out of the home to enable prompt completion of a sale with vacant possession.

29 Fourth, in those circumstances, summarised in points 1 to 3 above, the idea that after two years of separate living the appellant would be obliged to move out with the daughters of the marriage before a sale shortly took place, so that the respondent could move in or rent the house, seems a very peculiar idea indeed. It would inevitably cause further upheaval, for no apparent reason. If the status quo of the living arrangements was to be disturbed in that way, in the short term, one would expect to see express provision for it in a carefully drawn contract, but there is none in this case.

30 Fifth, it is true, as the respondent submits, that there is nothing that in terms expressly confers on the appellant a right to remain after the decree absolute, whereupon her "home rights" to occupy would come to an end. Both parties, however, must be taken to have known that until the decree absolute was pronounced the appellant did have a right to apply for further residential rights under s.33 of the Family Law Act 1996.

31 It was, initially, common ground that the consent order gave the appellant a right to continue living in the house for some time. As the argument developed, it became clear that that was only common ground up to the point in time of the decree absolute in the divorce

proceedings. Nevertheless, given that the appellant had a right to remain in occupation for some time at least after the consent order, the relevant question, which seems to me to be an open question of interpretation of the order, is for how long she would have a right to remain.

32 Sixth, the terms of the order, considered as a whole, do, in my judgment, strongly indicate that it was understood that the appellant could remain with her daughters until the home was sold. Clause 41 of the order gives both parties joint conduct of the sale of the home. If the order was based on an acknowledgement of the respondent's title to the house and his beneficial ownership, giving him the undisputed rights of ownership and occupation, such a joint clause would be a little surprising. Clause 23 of the order, which requires 24 hours' notice of intention to attend the home, clearly recognises the primacy of the appellant's residential rights. It is emphatically not a provision for joint occupation of the home, nor is it limited in time, unlike similar provisions in relation to the parties' other country properties. This right conferred by clause 23 was not for a single or for two visits only. It was unlimited in time and number. There seems to me to be no obvious end point to the right conferred, except the expected sale of the home. Clause 21, concerned with payment of the outgoings on the home, creates a semi-permanent arrangement. Standing orders of the respondent were to be undone and new standing orders of the appellant were to be put in place. It seems to be clearly contemplated that that obligation to discharge the outgoings would remain in place until the home was sold and was not time limited.

33 Seventh, the judge was impressed, instead of these provisions, with the fact that the respondent's beneficial ownership was acknowledged and that the appellant agreed to remove her notices at the Land Registry. If the home had been being retained *in specie* for the respondent's benefit, those would be strong points. But the judge seems to have overlooked a fundamental point, that this home was to be sold immediately and that the proceeds of sale were to be split. There was, therefore, no question of the respondent's paramount rights of ownership being given effect by the order, and the removal of the appellant's notices was self-evidently to facilitate the sale with vacant possession, and because such notices were no longer required as a result of the terms agreed and the impending decree absolute. In my judgment, the judge wrongly placed too much reliance on clause 14, which acknowledged that the appellant had no beneficial ownership.

34 Eighth, the judge was also wrong to conclude that the appellant was a gratuitous licensee before the consent order was made. Before and after it, until the decree absolute, the appellant had statutory "home rights" to remain in occupation. That position is now accepted on behalf of the respondent on this appeal. It is, therefore, accepted that the judge was wrong to conclude that the appellant was before the consent order a gratuitous licensee and therefore remained a gratuitous licensee after the consent order. The judge's conclusion that the appellant was a gratuitous licensee has no proper legal foundation. The relevant question is what rights she had as a result of the terms that were agreed in the consent order. That is a matter of the interpretation of the whole of the order in its relevant factual context. It does not start from any assumption that the respondent had better rights to the home than the appellant had. If the Judge's interpretation was right, the appellant would automatically become a trespasser on the decree absolute being pronounced, and liable to pay damages. Mr Glaser QC's assertion that a license was thereupon granted by the respondent to the appellant had no factual foundation at all.

35 Ninth, the overriding factors, in my judgment, are the provision for the immediate sale and the sharing out of the proceeds of sale and the fact that the appellant was, and had been, living in the house with her daughters, and the respondent had been living elsewhere. The

appellant's liability for the outgoings reflected an understanding that she was to continue to live there until the sale took place. The obvious answer to the question, when would the appellant's rights to occupy the house cease, is when it is sold and when she is obliged to move out, as the judge held that she would be at that stage.

36 The reality, of course, is that the parties did not foresee the long delay that took place. The idea that, in a short period before a sale was effected, the respondent would be able to require the appellant to move out and either move in himself or let the property, is so surprising in these circumstances that if that is what the parties really meant they would certainly have made some express provision for it. If the respondent was not intending to be able to move in or let out the home, then there was no reason for the appellant and her daughters to have to move out.

37 Any suggestion that the appellant should have to pay rent also runs up against the provisions of paras.12 and 26 of the consent order, which provide for full and final settlement of all claims that may arise between the parties and for no adjustment for any reason of the agreed terms to be made at a later stage. The consent order did not leave space for a further dispute about money or rights in relation to the properties. The silence of the consent order on the appellant's right to continue to occupy is, therefore, in my judgment, only a literal silence, but the surrounding circumstances and the other terms of the order strongly indicate that the parties' agreement had the effect that the appellant was entitled to stay in occupation until the house was sold.

38 For these reasons, I respectfully consider that the judge erred in interpreting the consent order and that the reasons he gave for reaching the conclusion that the appellant was a gratuitous licensee are mistaken.

39 There is one further point with which I must deal, because the respondent, at a late stage but with the permission of the court, filed a respondent's notice to seek to uphold Judge Gerald's decision on a different basis, which the Judge himself did not find it necessary to rely upon. The respondent's notice states that the defendant (that is to say the appellant) sought to include in a draft of what became para.23 of the consent order words to the effect that she would have "exclusive occupation" of the home, and that the respondent refused to include those words and they were not included in the final consent order. The fact that those words were not agreed, or were deleted from an earlier draft, is therefore relied upon as evidence that the appellant was not to have any exclusive right of occupation of the home. The respondent relies on a recent decision in the Court of Appeal, *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88.

40 The letter passing between the solicitors on which the respondent relies is dated 9 August 2016, written by the respondent's solicitors to the appellant's solicitors. The relevant paragraph, referring to clause 23 of the draft, says:

> "The use of the phrase 'exclusive occupation' in relation to the property at St Mary's Place is not correct. It was never agreed. My client's wording accurately summarises the agreement reached and recorded at clause 21 of the Heads of Agreement."

41 My reaction to the content of the respondent's notice was that the respondent was seeking, impermissibly, to refer to the content of negotiations between the parties to support his interpretation of the consent order. That is, of course, as Lord Hoffmann and Lord Neuberger pointed out, something which is not permissible as an aid to interpretation of a

contract. In order to counter that point, the respondent relies on the *Bradstock* case. That was a case concerned with construing the terms of an IVA proposal and the matter in issue depended on a consideration of the meaning of a clause contained in the original proposal and the meaning of the contents of a subsequent deed of modification, which substituted a different clause in the original proposal. In order to understand the meaning and effect of the proposal, as modified, the court, therefore, had to refer both to the original proposal and the deed of modification, and the issue was what, if any, assistance the court could obtain from focusing on the original clause of the proposal that had been deleted and substituted by the different clause in the modification.

42 Briggs LJ, giving the main judgment of the court, held that, as a matter of principle, it might, in those circumstances, be possible to refer to a deleted clause if the fact of the deletion shows what it is that the parties agreed that they did not agree and there is ambiguity in the words that remain. In those circumstances, the deleted provision may be an aid to construction, albeit, as he said, one that must be used with care. The circumstances in that case, however, were such that it was necessary to refer to the document that contained the amendment as well as the original document in order to construe the terms of the amended proposal. In cases in which it is not otherwise necessary to refer to the negotiations, it seems to me that the principle identified by Lord Hoffmann and Lord Neuberger is that negotiating documents are not admissible as evidence of the meaning of a contract.

43 This is such a case. It does not depend on construing different documents, one of which modifies the terms of another. It is concerned with the interpretation of one consent order before which there were negotiations between the parties that led up to the making of the consent order. In my judgment, therefore, the correspondence on which the respondent seeks to rely is not admissible on this appeal.

44 In any event, even if it were admissible, there is nothing in the letter which I have just read that assists in interpreting the relevant provisions of the consent order. The amendment related to rights to access the home on notice as compared with the other properties that the parties owned. Given that the appellant was remaining in occupation but the respondent was accepted to have the right on notice to attend at the property, for proper reasons, it is not surprising that the parties could not agree that the use of the expression "exclusive occupation" was appropriate in relation to that property. Further, the issue that I have to decide on this appeal does not relate to the quality of the occupation of the appellant or, indeed, anything about the respondent's rights to access the home. It is solely concerned with the duration of the appellant's rights of occupation. I consider that the material that the respondent seeks to rely on does not assist one way or the other in resolving the question of interpretation on which I have already explained my conclusion.

45 In those circumstances, I allow the appellant's appeal and I will now hear counsel on what, if any, alternative declarations or orders should be made in place of Judge Gerald's order.

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