Neutral Citation Number: [2021] EWHC 3418 (Ch)

Case No: CH-2021-000132

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
ON APPEAL FROM THE ORDER OF DEPUTY MASTER ARKUSH DATED 13 MAY 2021
CASE NUMBER PT-2020-000225
APPEAL REF: CH-2021-000132

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

Date: 17/12/2021

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

- -

Between :

(1) JAMES EDWARD LIDDIMENT
(2) PAUL JAMES GREENHALGH
(in their capacities as Joint Receivers over certain assets of Andrew William Hull)

Claimants/ Respondents

- and -

ANDREW WILLIAM HULL

Defendant/ Appellant

- and between -

(1) ANDREW WILLIAM HULL
(2) ABH MANAGEMENT LLP

Part 20 Claimants

-and-

(1) JAMES EDWARD LIDDIMENT
(2) PAUL JAMES GREENHALGH
(3) NUCLEUS PROPERTY FINANCE 1 LIMITED
(4) MICHAEL OLIVER

Part 20 Defendants

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- -

Emily Windsor(instructed by **Sheridans**) for the **Appellant**
Christopher Snell (instructed by **Knights Plc**) for the **Respondents**

Hearing dates: 8 December 2021
- -

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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Covid-19 Protocol: This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date for hand-down is deemed to be 17 December 2021.

Mrs Justice Joanna Smith :

1. This is an appeal from the order of Deputy Master Arkush ("**the Deputy Master**") dated 13 May 2021 ("**the Decision**") granting an order for possession in favour of the Claimants/Respondents ("**the Receivers**") in respect of farmland outside Waterlooville, Hampshire ("**the Land**"). The Defendant/Appellant ("**Mr Hull**") raises various grounds of appeal, all concerning the exercise of the Deputy Master's discretion under section 36 of the Administration of Justice Act 1970 ("**the Act**"), and he invites me to set the order for possession aside.

The Background to the Appeal

2. Mr Hull is the freehold owner of the Land, which is comprised of approximately 350 acres of buildings and farmland. Mr Hull's family have owned the Land since 1955 and it represents his whole working life and entire livelihood. The Land is a mixed use of commercial and agricultural property and, until recently, it included two small residential properties: a Keepers Cottage and Ludmore Farm House. Shortly before the hearing before the Deputy Master, the Receivers sold a portion of the Land together with the Keepers Cottage.

3. In 2018 and 2019, a company in which Mr Hull has an interest, ABH Management LLP ("**the Company**") entered into various facility agreements with, first, Nucleus Property Finance Limited and, later, Nucleus Property Finance1 Limited (referred to herein as "**Nucleus**") for a loan, amounting in total (on Mr Hull's case) to the sum of £3,746,893.36 ("**the Loan**"). The Loan was secured by a legal charge over the Land.

4. The specific details of the Loan are not important for present purposes, but suffice to say that from 21 October 2019, the Company defaulted on the Loan and Mr Hull defaulted on personal obligations he had undertaken in respect of the Loan and the legal charge.

5. On 3 December 2019 the facility agreement in place at that time was terminated by Nucleus on grounds of default and on 17 December 2019, the Receivers were jointly appointed over the fixed assets of Mr Hull. By a claim form dated 2 March 2020, the Receivers sought possession of the Land ("**the Proceedings**").

6. Following a stay of the Proceedings owing to the Covid 19 pandemic, Mr Hull filed a Defence and Part 20 Claim ("**the Defence**") on 21 January 2021, joining the Company as Part 20 Claimant and suing Nucleus and Michael Oliver ("**Mr Oliver**") as Part 20 Defendants to the proceedings. In the Defence, and in brief summary only, Mr Hull contended (i) that the default rate of interest in the legal charge and the facility agreement for the Loan was penal and so unenforceable; (ii) that his entry into a settlement agreement with Nucleus on 17 February 2020 had been as a result of fraudulent misrepresentation by Mr Oliver and pressure from Nucleus such that it "should be declared rescinded and of no effect", and (iii) that if the settlement agreement was valid, the level of debt owed by Mr Hull had been fixed by its terms as at 28 March 2020. These arguments were made against the background of the Loan having doubled in size by reason of interest and charges, notwithstanding the sale of some of the Land for the total sum of circa £1,414,000.

7. Insofar as was relevant to the claim for possession made by the Receivers, Mr Hull identified in the Defence that parts of the Land had already been sold and denied that the Receivers should be given possession of the remainder. In paragraph 20 he pleaded as follows:

> "It is denied that the Receivers should be granted a possession order as claimed at paragraph 5(29) or at all. Once the true level of [Mr Hull's] debt is known, he would invite the Court to exercise its discretion under section 36 of the Administration of Justice Act 1970 to adjourn the proceedings to allow him to refinance his debt and repay [Nucleus]".

8. Mr Hull joined the Receivers as Part 20 Defendants, but it is difficult to see what possible claim he could have against them in circumstances where they were not involved in either the facility agreement with Nucleus or the subsequent settlement agreement. I agree with Mr Snell that it would appear that, once the Receivers' claim for possession has been determined, Mr Hull has no sustainable extant claim against them on the face of the Defence and Part 20 Claim as currently pleaded.

9. At a hearing on 22 January 2021, Deputy Master Lampert ordered that (further to the filing of the Defence and further to Mr Hull "admitting that some sums are due and owing to [Nucleus] but the quantum thereof being in dispute") the Receivers' claim for possession of the Land be adjourned and re-listed with a time estimate of 90 minutes. The Order recorded that "[a]t the adjourned hearing the Court will consider the claim for possession and the Defendant's application under section 36(2) of the Administration of Justice Act 1970" and the parties were given permission to serve evidence on which they wished to rely at the hearing.

10. Mr Hull and Mr Liddiment then each served two witness statements in addition to their respective first statements which were already before the court.

Section 36 of the Act

11. Section 36 of the Act provides as follows:

> "(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
>
> (2) The court -
>
> (a) may adjourn the proceedings, or

> (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may-
>
> (i) stay or suspend execution of the judgment or order, or
>
> (ii) postpone the date for delivery of possession
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> for such period or periods as the court thinks reasonable."

12. Pausing there, it is common ground on this appeal (as it was before the Deputy Master) that the term "mortgagee" in section 36(1) of the Act includes receivers (see *Menon v Pask* [2019] EWHC 2611 per Mann J at [42]-[43]).

13. I also understood it to be accepted by both parties that the most common use of this section arises in the context of claims for possession of dwelling houses, the subject of a mortgage, rather than in circumstances where, as here, the claim is for possession of a substantial amount of agricultural land, which happens to include a residential property. However, it was not suggested by Mr Snell on behalf of the Receivers before the Deputy Master, or before me, that section 36 does not apply on this ground alone in a case such as this.

The Hearing before the Deputy Master

14. In her skeleton argument for the adjourned hearing, which took place before the Deputy Master on 13 May 2021, Ms Windsor, acting on behalf of Mr Hull, accepted that the allegations raised in the Defence (and recorded in paragraph 6 above) as to the interest and charges on the Loan could only be determined at trial; a proposition with which the Deputy Master agreed in the Decision at paragraph 5, observing that "…the Receivers seek only possession. The question of quantification of the debt will be a matter as between the lender, Nucleus Property Finance1 Limited and Mr Hull, and that will remain to be determined…".

15. Whilst Ms Windsor acknowledged in her skeleton argument that the Receivers were now seeking an immediate possession order, she maintained that Mr Hull was entitled to resist that order by reference to section 36 of the Act. At paragraph 12, she said this:

> "In this case, [Mr Hull] contends that as a result of the matters pleaded in his Defence and Counterclaim, the level of his debt as at February 2021 was £3,745,950: see paragraph 5 of his Second Witness Statement. Even under his alternative case, the level of debt would be approximately £4,786,000."

16. During the course of the appeal, Ms Windsor informed me on instructions that Mr Hull intended to dispute these figures at trial, which she said were figures that had come solely from the Receivers. Be that as it may, however, the figure of £3,745,950 was provided to the Deputy Master as the accepted minimum figure that was due and owing by Mr Hull to Nucleus. As the Deputy Master recorded in paragraph 8:

> "It is not necessary for me to examine the loan documents or the question whether there is a right to possession that has accrued in favour of the Receivers today because in answer to questions put by me in the course of the hearing, Ms Windsor fairly accepted, first of all, that on any basis and by his own admission, Mr Hull owes at least £3.75 million to the lenders and, secondly, that he has, in consequence, no defence to the claim for possession."

17. Ms Windsor accepted before me that I must proceed on the same basis, subject to her argument (to which I shall return in a moment) that the Deputy Master was wrong to state that Mr Hull had no defence to the claim without at the same time making any link to the fact that Mr Hull was relying on the full provisions of section 36 of the Act.

18. The only issue then remaining for the Deputy Master was whether to exercise his discretion under section 36 of the Act (see paragraph 9 of the Decision).

19. In summary, the way the Deputy Master approached this issue in his detailed *ex tempore* judgment was as follows:

    i) He rejected the submission made on behalf of Mr Hull that it was premature to exercise his discretion under section 36 of the Act pending the conclusion of the trial of what he referred to as "the counterclaim", relying on the decision of the Court of Appeal in *Household Mortgage Corporation v Pringle* [1997] 30 HLR 250 (paragraphs [16]-[25] of the Decision). Further, he concluded by reference to *Pringle* that this was a case in which it was appropriate to assume a minimum figure for the debt which took at face value the accepted amount of the debt as identified by Mr Hull (paragraphs [25] and [45] of the Decision).

    ii) He considered a submission made by Mr Snell on behalf of the Receivers by reference to *Barclays Bank Plc v Alcorn* [2002] EWHC 498 (Ch), to the effect that section 36 was not applicable to the facts of the case because section 36 "can only be exercised in respect of the whole of the mortgaged property and it cannot apply in respect of part only" (paragraphs [28]-[34] of the Decision). However, as I shall return to in a moment, ultimately he chose to determine the issues before him "as if Hart J's decision in *Alcorn* did not apply".

    iii) He considered the evidence from Mr Hull in seeking to determine whether Mr Hull was likely to be able "to raise and settle the sums necessary to pay the [Receivers] within a reasonable period of time" (paragraphs [35]-[42] of the Decision), concluding that "I am bound to reach the conclusion that he has failed, and failed by rather a long way, to demonstrate any likelihood of being able, within a reasonable period, to pay the sums due under the mortgage" (paragraph [42] of the Decision).

20. In the circumstances, the Deputy Master declined to exercise his discretion under section 36 of the Act. Instead he granted the possession order in respect of the Land as sought by the Receivers (excluding those parts of the Land that had already been sold). Although he refused permission to appeal, the Deputy Master stayed the order for possession until the final determination of Mr Hull's application for permission to appeal, provided that such application was filed within an identified time frame.

21. Mr Hull filed an Appellant's Notice on 3 June 2021, identifying five grounds of appeal ("**the Grounds of Appeal**"). His application for permission to appeal was granted by Zacaroli J on 30 July 2021. By a further order of the same date, Zacaroli J ordered that the possession order of 13 May 2021 was to remain stayed and was not to be enforced pending the final determination of the appeal against his order.

The Grounds of Appeal

22. Against that background, the Grounds of Appeal, in summary, are as follows:

    i) **Ground 1**: that the Deputy Master erred in law in concluding by reference to *Alcorn* that, where part of a mortgaged property has been sold, section 36 of the Act cannot apply in relation to the remaining part(s) of the property.

    ii) **Ground 2**: that in a "default" case such as this, where Mr Hull is proposing to pay off his debts through one lump sum payment, the Deputy Master should have concluded that section 36 of the Act required the court to establish the sums due under the mortgage before considering the appropriate exercise of its discretion and should therefore have declined to make any order under section 36 prior to the trial in these proceedings.

    iii) **Ground 3**: the Deputy Master wrongly repeatedly stated that Mr Hull had conceded that he had no defence to the possession claim, whereas in fact Mr Hull was relying on the full provisions of section 36 of the Act, which enabled the Deputy Master, amongst other things, to adjourn the possession claim to the end of trial without making an order for possession.

    iv) **Ground 4**: that when considering whether Mr Hull was likely, following the trial of this matter, to be able to pay the sums due to Nucleus through the restructuring of his debts, the Deputy Master should have taken into account the fact that Mr Hull would not be able to implement any refinancing options until after the trial, and that this time delay would affect the relevance of, and quality of, the evidence that Mr Hull would be able to provide to the court.

    v) **Ground 5**: that when exercising his jurisdiction under section 36, the Deputy Master failed to evaluate or take into account the finance offer that Mr Hull had procured from MSP Capital dated 4 February 2021.

23. Before turning to consider the Grounds of Appeal, I remind myself that an appeal court will only interfere with the exercise of the Deputy Master's discretion under section 36 of the Act (whether that discretion is exercised in favour of, or against, adjourning the proceedings or suspending execution of an order), if it was wrong in law, or was exercised on a wrong basis (because it took account of irrelevant matters or failed to take account of relevant matters) or was plainly wrong such that no reasonable judge could have arrived at that decision (see *Jameer v Paratus AMC* [2013] HLR 18 per Lewison LJ at [12]).

Ground 1

24. Ground 1 raises a question about the scope of the *obiter* remarks of Hart J in *Alcorn* as to the application of section 36 of the Act where a mortgagor does not remain in

possession of the whole of a property. Ms Windsor says this question has potentially far-reaching ramifications in any mortgage possession proceedings in which the mortgagor invites the court to exercise its discretion under section 36 and she maintains that, in light of the Decision, there is scope for confusion in numerous cases coming before the County Courts as to the extent to which Hart J's observations in *Alcorn* (as set out in paragraph [30] of the Decision) are to be confined to their own facts or are more generally applicable.

25. However, whatever the potential ramifications, the Deputy Master did not in fact rely on any principle drawn from *Alcorn* in deciding this case. Having set out a key passage from *Alcorn* in paragraph [30] and having concluded (i) at paragraph [31], that "Hart J considered that section 36 did not apply to a situation where the mortgagor does not remain in possession of the whole of the property" and that "[t]hat is the case here because part of the mortgaged property had already been sold"; and (ii) at paragraph [33], that "Hart J's judgment is either binding on me or is, at any rate, persuasive", the Deputy Master nevertheless went on to say this at [34]:

> "It seems to me, however, that I should not rest this judgment on that point because I can and should reach conclusions on the basis that I may have misconstrued Hart J's judgment or that another court may later hold that it did not represent the law. I shall therefore go on to consider the case as if Hart J's decision in Alcorn did not apply."

26. In the circumstances, the Deputy Master's observations in paragraphs [31]-[33] of the Decision as to the findings in *Alcorn* and as to their potentially binding nature are *obiter* and this Ground of Appeal is, as Zacaroli J identified when he granted permission, superfluous. I shall return in due course to Zacaroli J's observation that Ground 1 would need to be addressed in the event that Mr Hull is successful on other grounds.

Ground 2

27. In support of this ground, Ms Windsor relies primarily upon the decision in *Pringle*, which I am going to have to examine in a little detail, given the parties' respective submissions about it, together with an extract from Fisher & Lightwood's Law of Mortgages at 29-44 (to which I shall return in a moment):

> "For the purposes of s.36, it is, in the absence of unusual circumstances, the remaining term of the mortgage which should be the starting point for determining a reasonable period. The question is whether it is likely that the mortgagor will be able to pay off both the current instalments and the accrued arrears over that period. **To answer that question, the court should at the outset resolve disputes over the calculation of the amount of arrears and the assessment of future instalments for their payment-off**"

28. In *Pringle*, the Court of Appeal was concerned with two sets of proceedings, a County Court possession action in respect of one property, Lythmere, and High Court proceedings (originally brought as a counterclaim in the possession action) challenging the validity of an arrangement between the plaintiff mortgage company and the

defendants which had enabled the defendants to swap their existing property, 9 East Street, for the more valuable property of Lythmere with the help of a combination of mortgage finance in respect of Lythmere and bridging finance in respect of 9 East Street to the total value of £290,000. The loan on Lythmere was for a period of 25 years; the loan on 9 East Street was intended to last for only 6 months until it could be sold. An integral part of this arrangement was that the plaintiff obtained valuations of both properties from valuers who valued Lythmere at £290,000 and 9 East Street at £270,000. It was argued in the High Court proceedings that the valuation of 9 East Street had been provided by the plaintiff mortgage company and amounted to a misrepresentation (a proper valuation of 9 East Street would have been £200,000) on which the defendants had relied in entering into the loan arrangements.

29. The Judge at first instance in the County Court possession proceedings made an order for possession of Lythmere in favour of the plaintiff mortgage company but suspended the order until the High Court proceedings were concluded. It was common ground that the defendants were continuing to make interest payments at £1,500 per month but the Judge imposed a condition that payments of interest at £2,000 per month should be made.

30. The Court of Appeal was thus concerned with the exercise by the first instance Judge of his discretion under section 36 of the Act, albeit in factually very different circumstances to those of this case. On page 256, Evans LJ noted that if the defendants were to succeed in their damages claim in the High Court proceedings, then on a best case scenario the amount of their outstanding mortgage might be reduced from £290,000 to £230,000.

31. Counsel for the mortgage company submitted that the sum presently due on the mortgage was £650,000, that there was no conceivable chance of the defendants being able to pay that sum within any period and that the pending High Court proceedings should be disregarded. Evans LJ expressed the view that it was not possible to identify a mortgage debt of greater than £290,000 without forming a view in the plaintiffs favour as to the likely outcome of the High Court proceedings and he went on at page 258 to formulate some principles as to the approach that should be adopted "where there are pending proceedings as already described". In particular:

> "1. I would hold that where the validity of the mortgage agreement itself is attacked, then the court should not prejudge that issue in any way.
>
> …
>
> 4. The fact is that there has been a mortgage advance of £290,000 and I would hold that that is what should be regarded as the mortgage debt for the purposes of section 36 pending the court's resolution of the dispute.
>
> 5. I would give effect to the judgment in *National Westminster Bank v. Skelton* by disregarding the fact that the damages counterclaimed in the High Court proceedings could reduce the figure of £290,000, perhaps by as much as £60,000, for the reasons already given. To take account of that potential reduction

> would be to allow the claim for unliquidated damages, a status which it does not have in relation to the mortgage debt for the purposes of section 36."

32. Pausing there, I agree with Mr Snell that in this passage, Evans LJ was making it clear that in exercising the discretion under section 36 of the Act the court may take the minimum sum that it considers available to it without forming a view in the plaintiff's favour. Here that was not the outstanding sum of £650,000 for which the plaintiff contended, but rather the sum of £290,000 which represented the actual amount of the loan. Arguably, the Deputy Master in the present case opted for an even more favourable figure, in that he assumed full success on the part of Mr Hull at the trial and was therefore prepared to operate on the basis of the figure which Mr Hull accepted he owed (see the Decision at paragraph [45]). Ms Windsor realistically accepted during her submissions that the fact that the Court of Appeal in *Pringle* took this approach did not assist her on the appeal.

33. Having considered the applicable principles, Evans LJ then turned to consider the question of whether the defendants had shown that they were reasonably likely to pay sums due under the mortgage within a reasonable period. He observed that it was "not irrelevant" to this question to take account of the fact that the mortgage was secured over a period of 25 years and had 17 years remaining (see *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343). In circumstances where the evidence before the court was that a payment of £2,627.18 per month was required in respect of capital and interest on the loan, and given the Judge had exercised his discretion by reference to the lower monthly payment figure of £2,000, Evans LJ determined that the Court of Appeal was required to exercise its own discretion.

34. In doing so at pages 259 and 260, Evans LJ identified (i) that the value of the security was material; (ii) that the only available evidence from 1994 was that the security was worth £230,000 when the market was still low; (iii) that the total liability of £290,000 plus unpaid interest greatly exceeded the value of the security and that (iv) "in these circumstances a reasonable period extends beyond the prospective date of the final judgment in the Chancery Division proceeding. It is only then that it will be possible for the parties to consider the implications of that judgment and the future prospects for them both".

35. Ms Windsor prays this reasoning in aid in submitting that although the Court of Appeal asked itself what the minimum debt was likely to be, it did not follow from the fact that this minimum sum exceeded the value of the security that an order for possession had to be made. On the contrary, the Court of Appeal plainly took the view that they would make an interim order staying execution of the possession order on condition of monthly payments by the defendants of £2,750 pending the outcome of the High Court proceedings, particularly bearing in mind that the plaintiffs had themselves previously agreed to a monthly rate of £1,500.

36. Ms Windsor contends that the Deputy Master should, effectively, have taken the same approach in this case, by refusing to exercise his discretion under section 36 of the Act until after the trial in the proceedings and that in failing to do so, he erred in law. She submits that it will only be after the trial that Mr Hull will have clarity as to the true level of the lump sum that he will need to pay off. Further she submits that here the minimum amount of debt is not much higher than the value of the security, even

assuming that the valuation included in the Defence (and obtained during the height of the Covid 19 pandemic) is accurate. In fact, she says, the Land may now be worth considerably more than £4 million, although there is no evidence to that effect.

37. I reject these submissions and do not consider that the Deputy Master's decision to order possession (which he plainly had power to do pursuant to CPR 55.8) should be disturbed on this Ground, for the following reasons:

i) The Court of Appeal in *Pringle* plainly exercised its discretion having regard to the particular facts of that case. I agree with Mr Snell that this court cannot derive any general principles applicable in all cases from the exercise of a particular discretion on specific facts.

ii) It is important however, that the Court of Appeal in *Pringle* was prepared to exercise the discretion under section 36 of the Act in advance of trial, as the Deputy Master pointed out at paragraphs [18] and [23] of the Decision, even in a case where the validity of the loan contract was being attacked (which is not the case here, as the Deputy Master made clear in paragraph [24] of his Decision).

iii) In exercising its discretion, the Court of Appeal had regard to a minimum sum which it considered was owed and applied section 36 of the Act accordingly, as the Deputy Master correctly pointed out at paragraph [22] of the Decision.

iv) On the facts of *Pringle*, the Court of Appeal decided to order a stay of execution pending trial – particularly where instalments would be paid in respect of the outstanding debt. There is no suggestion that any instalments will be paid in this case, which is a case of default.

v) The particular advantages of leaving the parties to consider the implications of the judgment after trial appear to have been (on the facts of *Pringle*) that, at that point, there would be (i) up to date evidence as to the value of the security; (ii) an outcome on the defendants' claim which might (if they were successful) reduce their liability to £230,000, and (iii) a lengthy remaining term on the mortgage by reference to which *Norgan* principles could be applied. Whilst the first of these advantages might apply in this case, the others would not. Here a lump sum was due and owing immediately and on Mr Hull's own case, the minimum liability he could hope for was £3,746,893.36.

vi) In all the circumstances, the Deputy Master was not wrong to conclude that the facts of this case are different from the facts in *Pringle*, that they are "all the stronger" because the validity of the mortgage as a whole is not in dispute and that he should consider a minimum debt for the purposes of engaging section 36 of the Act (paragraph [25] of his Decision) – which minimum debt had been accepted. This was, in my judgment, a decision that was open to the Deputy Master on the facts, it was consistent with the legal approach taken to a minimum sum in *Pringle* and it was also consistent with the *Pringle* approach of exercising the section 36 discretion in advance of trial.

vii) I reject Ms Windsor's submission that Mr Hull needs greater clarity as to what his liability is ultimately likely to be – the Deputy Master assumed the best

possible case in his favour and, as Mr Snell rightly points out, that case could only change at trial in a manner that was adverse to Mr Hull.

viii) Finally, I do not consider the extract from Fisher & Lightwood's Law of Mortgages at 29.44 on which Ms Windsor relied to be directly relevant in circumstances where it is plainly concerned with a different factual scenario: namely where there is a remaining term on the mortgage (as was the case in *Pringle*). Here the commercial lending facility was secured by the legal charge. The facility was in default such that the charge was immediately enforceable. There was "no remaining term of the mortgage" in respect of which an assessment could be made. Further, I note and agree with the Deputy Master's point on the final sentence of the extract (which Ms Windsor had emphasised in her submissions), that in any event, he had resolved any possible dispute over the calculation of the amount of arrears in Mr Hull's favour in any event (paragraphs [44]-[45] of the Decision).

Ground 3

38. Ms Windsor contends that the Deputy Master repeatedly stated in the Decision that Mr Hull had conceded that he had no defence to the possession claim, when in fact Mr Hull was relying upon section 36 of the Act. Thus in paragraph 11, the Deputy Master said this:

> "Mr Hull accepts that he owes at least £3.75 million to the lender. He accepts that he has no defence to the claim for possession. On that basis, I cannot see any good reasons why the Receivers should not be entitled to exercise their admitted legal right to possession without any further delay, and certainly without what would be a very extensive delay until the conclusion of a trial in relation to what sums are in fact due".

39. Ms Windsor accepts that this is a narrow point, but submits that in making remarks of this type, the Deputy Master appears to have misunderstood Mr Hull's case and/or pre-judged the issue of whether an order for possession should be made prior to even considering his section 36 jurisdiction. In other words, he appears to have decided that it was inevitable that a possession order would be made and so approached the exercise of his discretion under section 36 in the wrong way, failing to recognise that pursuant to section 36 the court has other options available to it, including, for example, adjourning the proceedings. Ms Windsor went on in her oral submissions to submit that this error affected the subsequent exercise by the Deputy Master of his discretion, although she did not identify how.

40. I am not persuaded by these submissions. Section 36 of the Act does not in fact provide a defence to a possession action and I cannot see that in recording that Mr Hull's position was that he had no defence, the Deputy Master was wrong. Furthermore, I agree with Mr Snell that the characterisation of the section 36 discretion (whether as a defence or otherwise) is irrelevant. The key question for the court is whether the Deputy Master approached the exercise of his discretion correctly. I can see nothing in the Decision to suggest that the Deputy Master in fact failed to exercise his discretion properly because he had already made the decision that a possession order was appropriate. Insofar as his early remarks might be regarded as overstating the position,

I consider that the Deputy Master is to be accorded a considerable degree of latitude owing to the fact that this was an *ex tempore* judgment in which it is not to be expected that he would express himself with the degree of precision that might apply upon detailed consideration following a reserved judgment.

Ground 4:

41. Ground 4 proceeds on the basis that Mr Hull's position would likely improve at trial (a proposition I have already rejected). Further, that, as a matter of practicality, the Deputy Master should have appreciated, when considering Mr Hull's evidence as to his offers of finance, that it was simply not practical for Mr Hull to spend money in obtaining valuations and further documentation required by those offers in circumstances where the ultimate extent of his liability remained in issue pending the trial. Ms Windsor submits that in reality, Mr Hull will not be able to implement any refinancing options until after the amount of his debt is determined by the court at trial and Nucleus had released its charge and that "this time delay would affect the relevance of, and quality of, the evidence" that Mr Hull could provide to the Deputy Master, as the Deputy Master should have appreciated.

42. I reject this ground. Ms Windsor submitted that it was unfair to expect Mr Hull to obtain an up to date valuation of the Land and to spend money on legal fees a year or more prior to the trial. However, as she realistically accepted, the burden of getting through the gateway in section 36 of the Act lay firmly upon Mr Hull's shoulders at the hearing before the Deputy Master. It was incumbent upon him to satisfy the Deputy Master that he had realistic mortgage offers which made it likely that he would be able to settle his liability under the loan facility within a reasonable time. The Deputy Master was not so satisfied. I also agree with Mr Snell that the suggestion that after a trial Nucleus would release its charge and discharge the Receivers prior to payment of any sums found to be due and owing is wholly unrealistic.

Ground 5:

43. In paragraph [36] of the Decision, the Deputy Master said this:

> "36. Mr Hull states, at paragraph 8, that he can demonstrate to the court that he is likely to be able to raise and settle the sums necessary to pay the claimants within a reasonable period of time. He refers to some offers of finance and the only one Ms Windsor wished me to consider - but in fact I have considered all of them and it seems to me that the ones Ms Windsor did not refer to take the matter no further - was an offer from a company called Pluto Finance, which is exhibited to the witness statement at page F61."

44. Ms Windsor submits that notwithstanding the Deputy Master's confirmation that he had considered all of the offers of finance referred to by Mr Hull in his evidence (which included two offers from a company called MSP Capital, which I shall refer to as "**the MSP Capital Offer**"), it is clear from later paragraphs of the Decision that he cannot possibly have done so. She also says in paragraph 55 of her skeleton for this appeal, that the Deputy Master was wrong to say that the only offer he had been invited to consider was an offer from Pluto Finance ("**the Pluto Finance Offer**").

45. This Ground has given me pause for thought primarily because there is a dispute between the parties as to whether Ms Windsor in fact said to the Deputy Master during her submissions at the hearing that "the only [offer] Ms Windsor wished me to consider…was an offer from a company called Pluto Finance" (as he recorded in paragraph [36]). This is not a point that has been picked up in the Grounds of Appeal, although Ms Windsor did say in her skeleton argument for this appeal at paragraph 52 that the Deputy Master was wrong to say this.

46. Ground 5 is premised upon the failure on the part of the Deputy Master to consider the MSP Capital Offer, which Mr Hull contends was more favourable than the Pluto Finance Offer which the Deputy Master did consider. However, if Ms Windsor told the Deputy Master that she only wanted him to concentrate on the Pluto Finance Offer (as he appears to record in paragraph [36] of the Decision), then this ground of appeal must fail.

47. During the course of the hearing, I raised this with Ms Windsor who said that it was her recollection that she had taken the Deputy Master to the evidence of the relevant offers in the statements and exhibits of Mr Hull and that she had also directed the Deputy Master's attention to references to the various offers in her skeleton argument. She said that she had most certainly not directed his attention specifically to the Pluto Finance Offer only, although it was possible that she had got side-tracked when taking him through the offers themselves such that the Pluto Finance Offer was the only one they had looked at together. Ms Windsor said that her solicitor's note confirmed her recollection of events and that it would have been bizarre for her to invite attention only to one offer. Further she said that if she had understood the Deputy Master's *ex tempore* judgment to have said that she had invited his attention only to one offer, she would have raised this with him after he finished giving that judgment.

48. Mr Snell had a different recollection. He said that he expressly recalled Ms Windsor making the point (probably in her reply to his submissions and in response to a specific query from the Deputy Master) that the Pluto Finance Offer was the only one that needed to be taken into account (although I note that he did not specifically take issue with paragraph 52 of Ms Windsor's skeleton argument in his own skeleton argument).

49. Unfortunately, presumably because the Deputy Master's alleged error in stating that he had been invited only to consider the Pluto Finance Offer was not raised as a central plank of the appeal in the Grounds of Appeal, no transcript of the hearing before the Deputy Master is available to the court on this appeal. Given the Deputy Master's careful judgment and the fact that in paragraphs [37]-[41] he does appear specifically to have focussed on the Pluto Finance Offer, I am bound to say that it certainly appears to me that he was under the impression that he was only required to focus on that offer. However, absent a transcript and in circumstances where the parties disagree as to what took place, I cannot determine the matter one way or the other (beyond accepting what the Deputy Master has said).

50. In the end, however, I have decided that this is perhaps an unnecessary debate in circumstances where the Deputy Master has recorded that he had in fact considered all of the offers and they "[took] the matter no further". In my judgment there is no basis for me to find, as Ms Windsor invites me to do, that notwithstanding this express recognition of the existence of other offers together with a clear statement that he had taken them into account, the Deputy Master in fact gave no consideration whatever to

the MSP Capital Offer. I note also in this regard the wording of paragraph [40] of the Decision:

> "…the question which I must ask myself is, in the words of section 36, whether it appears to the court that in the event of exercising the section 36 powers, Mr Hull would be likely to be able, within a reasonable period, to pay any sums due under the mortgage or to remedy his default. **Having thought carefully on this question, and considering the evidence, and taking full account of everything Mr Hull says**, it does not appear to me that he has demonstrated that he would be likely, within a reasonable period, to pay any sums due under the mortgage" (**emphasis added**)

51. In this context, it appears to me to be relevant that Ms Windsor accepts that she expressly took the Deputy Master to relevant passages in her skeleton argument and in the evidence dealing with the offers. I note also the detailed analysis of the various offers in Mr Snell's skeleton argument for the hearing below at paragraph 32 in which he pointed out the limitations with the MSP Capital Offer, including (amongst other things) that it only provided for a net loan of £3,890m, that it was conditional on a first legal charge, in circumstances where Lloyds Bank was already a first legal charge holder, and that it required a valuation.

52. It is true that paragraphs [37]-[39] of the Decision deal in detail with the Pluto Finance Offer, without making reference to the MSP Capital Offer or its terms. However, in my judgment it is important to see why the Deputy Master considered the Pluto Finance Offer to fall "far short of amounting to any sort of lending commitment of any description".

53. In paragraph [38] of the Decision, the Deputy Master said this about the Pluto Finance Offer (which provided for a facility of £3.85 million):

> "On its face, it falls short of enabling finance of £4 million which, as Ms Windsor accepted, was the minimum sum which Mr Hull needed to demonstrate to the court that he could raise. She points to words in his witness statement to the effect that if there was what he referred to as a small shortfall, he was sure he could raise it. However, no information is given as to how he could in fact raise what could be a significant sum of £150,000 of thereabouts".

54. Ms Windsor did not contend at this hearing that the Deputy Master was wrong to say that she had accepted the proposition that Mr Hull needed to show the availability of finance of £4 million and it is plain that the Pluto Finance Offer did not do so. The MSP Capital Offer also did not satisfy that requirement, proposing a net loan of £3,890,000 and so also giving rise to a shortfall. In the circumstances, the Deputy Master was entitled to conclude in the exercise of his discretion that the MSP Capital Offer "took matters no further". In common with the Pluto Finance Offer it failed to satisfy the requirement to show potential funding at the minimum level of £4 million and it therefore gave rise to a shortfall. Although Ms Windsor contended during the appeal that this shortfall was in reality something in the region of only £80,000,

nevertheless she was unable to point me to any evidence as to how it could be met by Mr Hull. In paragraph 14 of his second statement, Mr Hull said only this: "…there would be a small shortfall of which I am confident I would either be able to secure when more formal offers were acted upon or which could be made up by personal funds available to me". He provided no evidence as to the availability of these "personal funds".

55. The key paragraph on which Ms Windsor focuses is paragraph [41] of the Decision:

> "41. He has not been able to demonstrate anything other than an email, which is just the sort of opening email that one might expect in this type of case, which would then lead to negotiations and a considerable amount of work done on documents, and significant fees being payable, and legal clearance being given. None of that has happened in this case. All that Mr Hull has is a very broad, potential and highly conditional, suggestion from a finance company that it could or might be willing to offer finance, and of a sum which in fact falls short of the sum which would be required."

56. Ms Windsor submits, rightly, that this paragraph gives the impression that the Deputy Master has looked only at the Pluto Finance Offer (the email referred to in the first sentence is plainly a reference back to the email from Pluto Finance set out in paragraph [37] of the Decision). Further, she submits that had the Deputy Master considered all of the offers (as he said he had), then he would not have said in paragraph [41] that Mr Hull "has not been able to demonstrate **anything other than** [the Pluto Finance] email" (**emphasis added**).

57. I acknowledge that paragraph [41] is rather unfortunately phrased in that it appears inconsistent with the Deputy Master having seen or read the MSP Capital Offer. However, given (i) that this was an *ex tempore* judgment; (ii) the substance of paragraphs [36] and [40], both of which refer to the fact that the Deputy Master has taken all of the evidence (including the offers) into account, and (iii) that there was good reason to take the view that the MSP Capital Offer took matters no further having regard to the points made by the Deputy Master in paragraph [38] of the Decision, I reject the submission that paragraph [41] evidences that the Deputy Master had not in fact considered the MSP Capital Offer. Indeed, I note that although the MSP Capital Offer contained rather more detail than the Pluto Finance Offer, including a formal "Offer of Finance", it too was conditional and would plainly have led to "negotiations and a considerable amount of work done on documents, and significant fees being payable and legal clearance being given". None of that had happened in relation to the MSP Capital Offer, just as it had not happened on the Pluto Finance Offer, another reason for taking the view that the MSP Capital Offer "took matters no further".

58. Having made clear in the paragraphs to which I have referred that he had had regard to all of the evidence, the Deputy Master determined that he was "bound to reach the conclusion that [Mr Hull] has failed, and failed by rather a long way, to demonstrate any likelihood of being able, within a reasonable period, to pay the sums due under the mortgage" (paragraph [42]). Indeed this was, as the Deputy Master said "even without bearing in mind the significant history of default in this matter".

59. He went on in paragraph [43] to repeat that his decision had been arrived at "…**having given Mr Hull's case the most careful consideration I can, and taking full account of all the submissions made by Ms Windsor** in her usual full and capable way on his behalf – and I think everything that could be said for Mr Hull she has said…" (**emphasis added**) and he went on to say that in the circumstances "it seems to me that it would be wrong in principle for me to accede to his case that I can be satisfied that he would be able to pay the sums due under the mortgage".

60. In my judgment this decision was not obviously wrong, it was not a decision that no reasonable judge could have arrived at and nor did it fail to take account of the MSP Capital Offer. I do not agree with Ms Windsor's submission that a proper reading of the evidence (in particular the MSP Capital Offer) should have led to the Deputy Master concluding that it was likely that Mr Hull would repay the debt at the end of the trial. On the contrary, there was plainly a shortfall in respect of the debt with which Mr Hull's evidence singularly failed to deal. It was open to the Deputy Master to conclude on the evidence that Mr Hull had failed to satisfy the burden of proof under section 36 of the Act and there is no proper basis for this court to disturb that decision.

61. In light of the fact that I have rejected Grounds 2-5 of the Appeal, there is no need for me to return to consider Ground 1 and I shall not do so.

Conclusion

62. The appeal is dismissed.