Neutral Citation Number: [2024] EWHC 165 (Ch)

Case No: PT-2021-000114

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/02/2024

Before :

MASTER KAYE

- -

Between :

KIRSTY AMANDA MARY LOUISE CADOGAN	**Claimant**
- and -	
(1) KEVIN ANDREW CADOGAN	**Defendant**
(2) PERSONS UNKNOWN	
(3) MR DANIEL DACRES	
-and-	
(4) BANK OF SCOTLAND PLC	

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- -

Mr Francis Ng (instructed by **Irwin Mitchell**) for the **Claimant**
Mr Charles Sinclair (instructed by **Aberdine Considine**) for the **Bank of Scotland**
No other party attended or was represented

Hearing dates: 24 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER KAYE

Master Kaye:

1. This is my judgment on the Bank of Scotland PLC's ("**BOS**") application dated 20 September 2023 ("**the Application**") by which they seek a variation to an Order for Sale made on 6 July 2021 (the "**OFS**") in relation to Flat 101 Solent Court, 1258 London Road, London SW16 4EZ ("**the Property**").

2. The Claimant subsequently issued two applications:

    i) an application dated 17 October 2023 by which she sought declarations that some of the unagreed costs and expenses she has incurred in respect of the Property whilst it was in her possession were to be treated as costs and expenses of sale (the **"Sale Costs Application**"). The Sale Costs Application is dealt with as part of this judgment; and

    ii) an application dated 25 September 2023 by which she sought an order in relation to the costs she had incurred in seeking an earlier variation of the OFS (the **"Costs Application**"). The Costs Application will be dealt with as part of any consequential issues arising from this judgment.

3. The Application, Sale Costs Application and Costs Application (together referred to as "**the Applications**") were supported or opposed by witness evidence as follows:

    i) BOS relied on the First, Second and Third Witness Statements of Neil Patterson solicitor for BOS dated 26 July 2023, 20 September 2023, and 11 October 2023, respectively.

    ii) The Claimant relied on the Seventh, Eighth, Ninth and Tenth Witness Statements of Richard Smaller solicitor for the Claimant dated 11 July 2023, 29 September 2023, 9 October 2023, and 17 October 2023 respectively together with the Claimant's first witness statement dated 9 February 2023.

4. I have had the benefit of written and oral submissions from Mr Ng for the Claimant. Mr Ng has represented the Claimant throughout these proceedings and related proceedings involving the First Defendant some of which I refer to below. On the Applications I have also had the benefit of written and oral submissions from Mr Sinclair on behalf of BOS. I have taken all those submissions, both oral and written, into account when reaching this decision even if I have not set out every point or argument advanced by the parties.

5. In this judgment I shall refer to Claimant and First Defendant primarily by their given names ("**Kirsty**" and "**Kevin**") as I have in other judgments or as C and D1, no disrespect is intended.

Conclusion

6. For the reasons set out in this judgment I have concluded that the OFS should be varied to remove the words "including the costs of the claim" from paragraph 9. However, the costs of the claim should still be added to Kirsty's charges as against Kevin. The Application therefore succeeds. In relation to the Sale Costs Application the three disputed items should not be treated as costs or expenses of sale. The landlord/freeholder costs including service charges and ground rent are plainly a cost and expense of the sale. Indeed there does not appear to be a dispute about that. For the reasons set out below it does not appear to me that an order is needed in relation to them as between Kirsty and BOS.

Background

7. A brief background is helpful to understand how there came to be numerous costs orders and other orders made against Kevin which had been secured against the title of the Property and other properties. Although for BOS this is a short narrow point relating to mortgages and priorities, for Kirsty it is part of a long running family dispute principally with her brother, Kevin, following the death of their mother, Veronica Cadogan, who died on 3 September 2011 aged 76 ("the deceased" or "late mother").

8. On 17 November 2003 Kevin purchased the Property with the aid of a loan of monies provided by Birmingham Midshires (now BOS) secured by way of a first legal charge over the Property ("**the mortgage**"). Both Kevin's legal title and the mortgage were registered against the title to the Property on 12 December 2003.

9. As at the date of the OFS in addition to the mortgage there were a number of further equitable charges registered against the title to the Property all of which were subordinate to the mortgage. They included a number of charging orders in favour of Kirsty.

10. Kirsty and Kevin are siblings. They are two of the five children of Mr and Mrs Cadogan. Mr and Mrs Cadogan ran a business providing services to local authorities for looked after children under the name Ebonycare. The precise nature of that business at various times; the extent of Kevin's day to day involvement in it; and the extent to which the other siblings were involved have been canvassed in other disputes and judgments and are not relevant to this decision. However, Mr and Mrs Cadogan's business arrangements were opaque including Kevin's role and the ownership and use of various properties that had been acquired by or on behalf of Mr and Mrs Cadogan over time.

11. Mr Cadogan had pre-deceased Mrs Cadogan. She left a will dated 27 May 1994 under which she left the residue of her estate to her five children equally. Kirsty is one of her daughters and Kevin is one of her sons.

12. Following their late mother's death, Kirsty and Kevin obtained letters of administration with will annexed in April 2013. The Ebonycare business appears to have been continued in some form by Kevin. The administration did not run particularly smoothly, and on 12 July 2016, Kirsty issued proceedings against Kevin, as administrator, seeking an account on a wilful default footing and an account of profits. Kevin, as part of his defence cross-claimed for an account of Kirsty's dealings with the estate also on a wilful default basis, HC-2016-002060 ("**the 2016 claim**").

13. The 2016 claim had a long and tortuous history. On 6 April 2017, Chief Master Marsh substituted Mills & Reeve Trust Corporation as the administrators of the deceased's estate in place of Kirsty and Kevin ("the **Administrators**"). They were and are represented by Mills & Reeve.

14. Kirsty was and continues to be represented by Irwin Mitchell in both the 2016 claim and these proceedings ("**IM**"). Kevin was represented at the outset of the 2016 claim but not by the time of the final hearing in June 2019. He has instructed direct access counsel from time to time, including on his application to set aside the OFS in October 2021. He retained solicitors in respect of conveyancing and refinancing work concerning the properties over the same period.

15. By 2016 Kevin was the legal owner of a number of properties including the Property. On 21 June 2019, His Honour Judge Klein found that a number of those properties, though not the Property, where held by Kevin as trustee for his late mother's estate (see the judgment at [2019] *EWHC 1577 (Ch)*).

16. HHJ Klein determined that Kevin should account for his administration of what were described as the "Ebonycare properties" on a wilful default basis and must otherwise account in common form in relation to his administration of the estate. Kirsty was to account in common form. He directed that Kevin pay Kirsty's costs and directed an interim payment on account of £150,000. Kevin sought permission to appeal which was eventually refused in about November 2020 following numerous applications and extensions of time.

17. HHJ Klein gave directions for the taking of the account by September 2019. However, following numerous applications by Kevin and Kirsty, the account was not finally taken until November 2020. In relation to most of the applications made between June 2019 and November 2020, whoever made them, a costs order was made against Kevin. A number were made on the indemnity basis and the majority of the costs were summarily assessed. Many of the orders certified that Kevin's applications were totally without merit. Kevin sought permission to appeal the majority of the orders but then either withdrew those applications or was unsuccessful resulting in further costs orders being made against him. Save for one costs order paid on 1 May 2020, Kevin has not paid any part of those costs orders.

18. In November 2020 Deputy Master Linwood determined that Kevin was liable to account to the estate for a sum of approximately £1.7 million, that too remains wholly unpaid. Deputy Master Linwood made a limited civil restraint order in relation to Kevin in the 2016 claim.

19. Both Kirsty and the Administrators secured some of the costs orders they obtained against Kevin's properties including the Property by means of charging orders. The Administrators also secured the account judgment. Each of Kevin's properties: 56 Broughton Road, 96 Greyhound Road, 95 Park Avenue, the Property, and 20 Caithness Road had at least one senior or first charge holder ranking ahead of the numerous charging orders. The ranking of the charging orders between Kirsty, the Administrators and others varies between the properties. The totality of Kevin's indebtedness substantially exceeded the value of the properties.

20. BOS were served with Kirsty's charging orders between February 2020 and June 2020 but did not respond. There was no obvious reason for them to do so at the time.

21. By the time the OFS was made in July 2021, in addition to the mortgages of the senior or first charge holders, as against the properties, the secured element of Kevin's indebtedness to Kirsty was for in excess of £280,000 including interest. The secured element of Kevin's indebtedness to the Administrators exceeded £1.8m. As against the Property Kirsty's first charging order ranked in priority immediately behind the mortgage. Given the extent of the liabilities any beneficial interest Kevin may once have had in the properties was entirely expunged by the securities.

22. Kevin had been the subject of a debtor questioning under CPR 71 during 2020/2021. He had provided some information about the properties including what he said about the balance outstanding in relation to the first legal charges, the arrears, the tenants, if any, and his view on valuation together with some documents.

23. This information appeared to confirm that (i) across the properties that there was sufficient to clear the senior or first charge holders and leave some net proceeds to be paid to the next charge holders but (ii) that the position was deteriorating as Kevin did not appear to be maintaining any of the mortgages all of which appeared to be in arrears. The tenancy and rental position was opaque. It did not appear that if there was any rental income it was being used to pay any of the indebtedness or any of the mortgages. In relation to the Property Kevin explained a Mr Berhe was in occupation having been let in by Mr and Mrs Cadogan. Mr Berhe was said to have been living in the Property rent free for 15-years. By the time of the OFS Kevin's evidence was that Mr Berhe was in fact part of a refugee family with a five year old child. No evidence was provided which supported either contention and there did not appear to be any tenancy agreement nor any rent being paid. None of the tenants said to be occupying any of the properties took any part in the claim.

24. On 14 January and 3 February 2021 IM wrote to BOS informing them of Kirsty's intention to seek an order for sale and seeking details of the charge but did not receive a response.

25. Although it is common for senior or first charge holders not to engage with subordinate charge holders and/or to decline to provide information about the value of their charge this does present the subordinate charge holders with difficulties. A senior or first charge holder is able to take all the benefit of doing nothing whilst the subordinate charge holders' ability to recover the sums due to them from any equity left after payment of any prior charges will often be diminishing as here. They often have a greater interest in and need to pursue a resolution by way of an order for possession and sale than a senior or first charge holder who may consider that they have adequate protection.

26. This is an example of the difficulties that can emerge in such a case.

27. In February 2021 Kirsty issued this claim against Kevin and persons unknown in respect of the Property, 95 Park Avenue, 96 Greyhound Road and 56 Broughton Road. She did not pursue an order for sale in relation to 20 Caithness Road until later as in February 2021, the senior charge holder already had possession and was

marketing the property. At that stage, the valuation evidence in relation to the Property provided a figure of £340,000.

28. Kirsty did not send BOS a copy of the proceedings until 16 June 2021 when IM sent BOS a copy of the Claim Form and evidence in support and details of the date and time of the disposal hearing. The covering letter confirmed (i) that BOS were the priority charge holder, (ii) that there appeared to be sufficient equity to redeem BOS's charge in full and (iii) there was no requirement for BOS to attend. BOS did not respond and did not attend the hearing. There was no obvious reason why they should. The letter explicitly confirmed that their charge would be redeemed in full and did not put BOS on notice of any intention to modify the OFS in a way that might adversely affect them. BOS both rely on this letter but also say that they have no record of it being received.

29. Kevin did not respond to the claim but attended the disposal hearing on 29 June 2021 filing a late witness statement on the same day. He said that there was a cladding issue with the Property and its value was lower than Kirsty's valuation. However, he seemed to believe that the outstanding balance of the mortgage was substantially lower than the figures which Kirsty relied on. Had that been right it would have substantially increased the sums available after redemption of the mortgage. However, as it turned out the figures Kirsty had extracted from the documents provided by Kevin and relied on were broadly right.

30. The hearing was adjourned to 6 July 2021. Kevin made a late application to adjourn which was dismissed. He did not attend the hearing.

31. On 6 July 2021 I made an OFS in relation to both the Property and 56 Broughton Road. At Kirsty's request I adjourned the proceedings generally in relation to both 95 Park Avenue and 96 Greyhound Road because the senior or first charge holders were already taking action in relation to those properties.

32. The OFS was a modified version of the sample order annexed to PD73A. The only modification BOS complain about prioritised the costs of the claim incurred by Kirsty in obtaining the OFS such that they would be paid out with the costs and expenses of effecting the sale rather than being added to Kirsty's charge and only being paid out if there were sufficient net proceeds after the mortgage and costs and expenses of the sale had been paid.

33. Based on Kirsty's valuation the OFS provided a sale figure of not less than £320,000 for the Property. On the basis of Kirsty's evidence this would have been sufficient to clear the mortgage and the costs and expenses of sale leaving some equity to be released to Kirsty to part pay the sums secured by her charging order. If Kirsty were wrong about the valuation, the Property would not sell at the price set in the OFS and she would have to apply back to court. If she were wrong about the liabilities ahead of her subordinate charge, then there was a risk that there would be nothing available to her.

34. A point that arises from the composite nature of the claim is that it addressed the position in relation to all four properties and the costs of the claim are the costs of a claim in relation to four properties not just one. I do not know whether 56 Broughton Road has been sold and whether in fact any of the sums secured have been paid

including the costs of the claim and/or whether they are likely to be. I do not know if either 95 Park Avenue or 96 Greyhound Road have been sold and whether any sums have been accounted back to Kirsty from any net proceeds. She would not on any basis be entitled to make a double recovery.

35. Kevin applied to set aside the OFS. At the hearing on 1 October 2021 he was represented by direct access counsel. The application was dismissed.

36. Kirsty did not send a copy of the OFS to BOS either in July 2021 or October 2021. BOS were not therefore on notice of the modifications to the OFS or its other terms.

37. During 2022 Kevin made several further applications seeking to delay possession of 56 Broughton Road and the Property. This eventually resulted in a further limited civil restraint Order being made against Kevin in these proceedings on 21 February 2022.

38. Kirsty obtained possession of the Property in February 2022. By that stage not only had the mortgage arrears continued to accrue since July 2021 but the selling agents confirmed that the block of flats in which the Property was situated did have a cladding issue which had depressed its value. Offers of between £225,000 and £279,000 were received and rejected. Given Kirsty's understanding of the outstanding balance of the mortgage as at July 2021 she must have appreciated that the offers were likely to be insufficient to redeem the mortgage and pay the costs and expenses of sale whether or not they included the costs of the claim. This would therefore directly affect BOS whose agreement would be necessary for any sale. The OFS had still not been served on BOS.

39. There were other ongoing proceedings involving Kevin and/or Kirsty during this period in the High Court and the County Court. See for example [2021] *EWHC 2421 (Ch)*).

40. BOS finally engaged with Kirsty on 31 May 2022 providing a redemption figure of £301,524.56. Kirsty says that in fact this is the first time that she knew that the there was a real risk that the mortgage might exceed the value of the Property. This did seem surprising. It ought to have been obvious from the moment that Kirsty started to market the Property that the offers received were insufficient to redeem the mortgage. It is not clear whether Kirsty knew by then that there were also significant service charge arrears. BOS had still not been served with the OFS and still did not know that it had been modified to prioritise the costs of the claim over the mortgage.

41. In about April 2021 Kevin had re-occupied 20 Caithness Road and changed the locks. The first charge holder did not take any further steps to obtain possession. The mortgage arrears on 20 Caithness Road were increasing reducing any equity that might be available for any subordinate charge holders. Kirsty therefore issued a further claim seeking an order for sale in relation to 20 Caithness Road on 13 June 2022. An order for possession and sale was made on 20 October 2022. Following numerous applications by Kevin, Kirsty eventually secured possession of 20 Caithness Road. Kevin was made subject to a further limited civil restraint Order in those proceedings on 26 January 2023. Again I do not know what progress has been made in relation to the sale of 20 Caithness Road.

42. Meanwhile in August 2022 Kirsty received an offer of £300,000 for the Property which would be insufficient to redeem the mortgage and pay the costs and expenses of sale whether or not they included the costs of the claim.

43. On 19 August 2022 IM sought BOS's consent to a sale of the Property at £300,000 and finally provided the OFS to BOS. This is the first time that BOS could have identified the modification but unless it had been drawn to their attention, they would not necessarily have immediately identified it. BOS did not respond.

44. On or around 5 September 2022 BOS advised Kirsty that the current outstanding balance of the mortgage had increased to £308,788.80. The £300,000 offer was withdrawn on 20 September 2022.

45. On 7 October 2022 BOS commenced a claim for possession against Kevin in the County Court in Croydon, they did not make Kirsty a party to that claim. Given BOS knew that Kirsty had been in possession since February 2022, this seemed an unusual approach. The Croydon possession claim was listed for hearing on 9 November 2022.

46. By October 2022 Kevin's activities in relation to 56 Broughton Road caused Kirsty to apply for an injunction. It was that application that resulted in the addition of Mr Dacres as a further defendant.

47. On 8 November 2022 Kirsty proposed that the parties agree to vary the OFS providing BOS with conduct of the sale of the Property subject to payment of Kirsty's costs of the claim. BOS saw this as an attempt to maintain the priority created by the modification in circumstances where the value of the Property would no longer be sufficient to clear the mortgage, the costs of sale, expenses, and the costs of the claim. It seems clear that Kirsty was aware of the benefit of the modification as against BOS albeit that the parties' positions did not crystallise for another month.

48. BOS agreed to adjourn the 9 November hearing. I understand that the Croydon possession claim had not yet been relisted as at October 2023.

49. On 15 November 2022 BOS told Kirsty that she should make her own insurance arrangements for the Property. She was in possession, so it was not covered by BOS's block policy.

50. On 6 December 2022 BOS rejected Kirsty's 8 November 2022 proposal and instead proposed to apply to add Kirsty as a Defendant to the Croydon possession claim. Kirsty said she would cross apply for a declaration that her costs of the claim be paid in priority to the mortgage from the proceeds of sale. BOS objected to payment of the costs of the claim. Kirsty noted that BOS had not made any application to vary the OFS despite their objections. By 12 December 2022, the parties' positions had crystallised.

51. This brought into stark relief the real dispute between BOS and Kirsty. The OFS did not permit a sale below £320,000. BOS did not accept that the costs of the claim should be prioritised and paid as part of the costs and expenses of the sale thus reducing the sums available to redeem the mortgage. Kirsty argued that if BOS objected to the modified OFS they should have engaged earlier and/or applied to vary

it. Kirsty threatened to apply to reduce the sale price and to stay the Croydon possession claim.

52. However, the offers on the Property had fallen away so there was no longer the imminent prospect of a sale and no urgency save, of course, that the arrears and interest would continue to accrue, and the position could only get worse for everyone. Between December 2022 and July 2023, neither Kirsty nor BOS made any of the threatened applications, but both were on notice of the position the other adopted. It cannot be said that Kirsty could have been in any doubt from at least 12 December 2022 that there was a live dispute about whether she should be permitted to deduct the costs of the claim in priority to her charge when the Property was sold.

53. Without a significant upwards change in the value of the Property there was no realistic prospect of Kirsty recovering any part of the sums secured by her first charging order. Her only interest was therefore to recoup the costs and expenses she had incurred in relation to sale of the Property including the costs of the claim. The costs and expenses of the sale excluding the costs of the claim appear to be in the region of £30,000 including outstanding service charges and ground rent currently around £24,000. I do not know what they were in 2021 or 2022.

54. The Sale Costs Application arises from a further dispute about what amounts to the costs and expenses of sale as separate to the costs of the claim. This only really arises because the combination of the value of the Property and the extent of the mortgage arrears and the service charge arrears mean that the Property has tipped so far over the line into negative equity that BOS want to minimise the costs and expenses of sale to reduce their shortfall. The service charges are in issue because of a debate about how to fix the quantum to allow completion. Kirsty may be in possession but neither she nor BOS are in the better position to know if the figures sought by the landlord/freeholder for service charges are correct without incurring more cost and delay. Neither are going to be able to complete a sale without paying the service charges on completion. Given that the determination of the final figure for freehold/landlords costs including ground rent and service charges is an everyday conveyancing issue it was unclear to me why it was necessary to include it in the application or why any order is necessary. Those costs will continue to accrue until completion. However, it will not be possible to complete the sale without the figures having been agreed with the freeholder/landlord and being paid on completion.

55. The usual course would be for the seller (Kirsty) to seek to agree those figures with the freeholder/landlord and address them in requisitions with the buyer. They will need to be included in any completion statement. BOS accept that any service charges or ground rents properly due and payable must be paid. It appears that BOS have raised concerns about inconsistent information received from the freeholder/landlord. It is for Kirsty as seller and mortgagee in possession to satisfy herself as to the sums properly due and resolve those issues with the freeholder/landlord. Whilst ultimately it is a matter for Kirsty to satisfy herself about the sums due it would be preferable if there were a degree of cooperation between BOS and Kirsty in relation to this issue. It would be unfortunate given the position reached if the parties had to incur more costs and expense and/or BOS were to resist providing a release of the mortgage or the freeholder/landlord were to refuse consent to the transfer because of an issue over the service charges and ground rent.

56. An offer of £290,000 was received in February 2023. At the same time works were being undertaken in respect of the defective cladding which were due to be completed in about March 2023. One might have hoped that this would improve the value of the Property. However, Kirsty received advice from the selling agents that even if the cladding issue were resolved £290,000 was a good price. Kirsty therefore sought BOS's agreement to sell at that price. BOS, perhaps understandably, wanted to obtain an up to date valuation which they did in May 2023. They have not disclosed it.

57. In June 2023 BOS again sought Kirsty's consent to her being joined to the Croydon possession claim. On 27 June 2023 Kirsty received a conditional offer of £300,000. The February 2023 unconditional offer of £290,000 was still available. Kirsty sought BOS's consent to both the sale and to a variation of the sale price. On 10 July 2023, BOS declined and again invited Kirsty to consent to being joined to the Croydon possession claim.

58. As at July 2023, BOS were still not a party to the OFS nor bound by it. Neither Kirsty nor BOS had applied to vary the OFS. Stalemate.

59. Kirsty applied, using the broad permission to apply in the OFS, to join BOS and for permission to sell at £290,000. The hearing was listed on 28 July 2023. In response BOS said they now intended to cross apply to vary the OFS to remove the modification. Shortly before the hearing an increased offer of £320,000 was received. Kirsty and BOS agreed a consent order which enabled the sale to proceed at £320,000 leaving the parties with a period of time to seek to resolve their differences and if not to seek a resolution from the court. The order provided a time period of 56 days in which to make such an application. The Application was made in accordance with the terms of the order.

60. Disappointingly, the parties were unable to resolve their differences. The Applications were made in September and October 2023. By the time of this hearing the areas of dispute in relation to the Sale Costs Application were as follows:

    i) Insurance premiums (no figures provided)

    ii) Bailiffs & Locksmiths costs (£990 plus VAT a total of £1,188)

    iii) Clearance costs (£1,325 plus VAT a total of £1,590)

    iv) Landlord/Freeholder costs such as service charges, ground rent and administration fees. As set out above the issue in relation to these costs was primarily about determining the quantum before completion. The current estimate for outstanding service charges and ground rents was in the region of £24,000.

The Application

61. The Application seeks to vary the OFS to remove the modification to the costs and expenses of sale provision in paragraph 9. BOS submit there is no proper basis for the costs of the claim to be treated as part of the costs and expenses of sale and paid in priority to the mortgage from the proceeds of sale. They say they should be added to

Kirsty's charge and are recoverable by Kirsty from Kevin in the same priority to her charge.

62. As the Property is now in negative equity even as against the senior or first charge holder, although BOS would be able to pursue Kevin for any shortfall the reality is that that Kevin's liabilities far exceed the extent of any of his assets that have been identified to date by some margin.

63. Whilst Kevin maintains that he has pending claims and/or potential appeals that would substantially change his current position, to date he has not been successful in his endeavours and so that is no comfort for either Kirsty or BOS. Kevin continued and continues to be active in other court proceedings in the County Court and the Companies Court. His conduct over the last 7 years since the inception of the 2016 claim explains the significant costs incurred by both Kirsty and the Administrators.

64. The consequence is that both Kirsty and BOS are keen to maximise their return from the sale of the Property. However, they have been unable to reach agreement and instead have both incurred substantial costs in bringing the Applications.

65. At the date of this hearing the outstanding balance of the mortgage is in the region of £344,695.36 which exceeds even the current sale price by some margin. The costs and expenses of the sale including the estimated service charges but excluding the disputed items are about £30,000. The shortfall even without the costs of the claim and the disputed items will therefore be in excess of £54,000 and increasing daily.

66. Whether the costs of the claim or the disputed costs of sale are included the position is that Kirsty will not now recover anything at all towards even her first charging order in light of the events that have occurred. On the basis of the figures available that seems to have been the position at least since she obtained possession of the Property in February 2022 if not before.

67. It is common ground that the charging orders are all subordinate to the mortgage. Consequently, at its simplest BOS's position is that because of its position as senior or first charge holder, Kevin's interest in the Property was only that which remained after the senior or first charge had been satisfied. If as a consequence of the events that have occurred Kevin's interest in the Property was expunged as against the senior or first charge holder there was nothing left for the charging orders to attach to. I accept that the charging order obtained by Kirsty can only attach to any beneficial interest that Kevin still had in the Property. It appears given the value of the mortgage and the value of the Property that the point at which Kevin ceased to have any interest in the Property as against BOS has long since passed. BOS submit that this applies equally to the costs of the claim which have been prioritised by the modification.

The OFS

68. The OFS follows the sample order in PD73A with some limited amendments to reflect that it related to more than one property and to include details of the occupiers identified by Kevin during the debtor questioning in June 2021. There are only two modifications of any note, the one in relation to which the Application is made and the other which arguably makes BOS's ability to make the Application easier. I note that neither party reflected on the fact that the OFS was in fact in relation to more than

one Property as were the costs of the claim which seemed to me to represent an additional complexity.

69. Paragraph 1 of the sample order annexed to PD73A and paragraph 4 of the OFS (though completed to include the sums due to Kirsty overall based on her charging orders and her costs of the claim) provide:

> "The remainder of this order will not take effect if the defendant by 4.00 p.m. on the ———————— 20 —— pays to the claimant the judgment debt of £———————— secured by the charge and his costs to date of this application assessed at £————————, making together £———————— [together ———————— with interest at the rate of £———————— per day from the date of this order until payment is received by the claimant]."

70. Thus the OFS was conditional. If Kevin had paid the full sum set out in paragraph 4 of the OFS including Kirsty's costs and interest the OFS would not take effect.

71. The OFS then follows the sample order until paragraph 6 of the sample order and paragraph 9 of the OFS where the modification the subject of the Application is made. Paragraph 6 of the sample order with the relevant modification in paragraph 9 of the OFS shown in bold provides as follows:

> "The claimant shall first apply the proceeds of sale of the property –
>
> (i) to pay the costs and expenses of effecting the sale **(including the costs of the claim)**; and
>
> (ii) to discharge any charges or other securities over the property which have priority over the charging order."

72. Mr Sinclair submits that not only is this wrong in principle since it prioritises payment of the costs of the claim ahead of the subordinate charging order and adversely affects the senior or first charge holder, but it is also inconsistent with paragraph 7 of the sample order/ paragraph 10 of the OFS which reads as follows:

> "Out of the remaining proceeds of sale the claimant shall –
>
> (i) retain the amount due to him as stated in paragraph 1[paragraph 4 of the OFS][1]; and
>
> (ii) pay the balance (if any) [to the Defendant] [to ———————— ————————————] [into court] [the Administrators in the OFS]."

[1] Although not raised by the parties it strikes me that this paragraph might have been usefully modified given the differing priorities between Kirsty and the other subordinate charge holders across the different properties. Paying Kirsty the full amount in paragraph 4 might in some cases prioritise some of her entitlement over other subordinate charge holders. Mr Ng may need to reflect on whether the OFS needs to be further modified to clarify the priorities as between the subordinate charge holders across the different properties.

73. Paragraph 10 therefore provides for the full sum due to Kirsty under paragraph 4 (including the costs of the claim) to be paid from the remaining proceeds of sale. It would have been necessary to make further modifications to both paragraph 4 and 10 to follow through the modification at paragraph 9. At present the OFS provides for Kirsty to recover her costs of the claim as both part of the costs and expenses of sale in priority to the redemption of the mortgage at paragraph 9 but also to be paid the costs of the claim out of the remaining proceeds of sale in paragraph 10. Mr Ng did not address this inconsistency in his submissions.

74. Paragraph 11 of the OFS was amended in relation to the permission to apply to provide a far broader permission than the sample order. It provides as follows:

> "Any person interested in 56 Broughton Road or [the Property] may apply to the court to vary any of the terms of this order, or for further directions about the sale or the application of the proceeds of sale, or otherwise."

75. BOS do not complain about that modification, nor do they seek to vary it.

76. The draft order including the modification now complained of formed part of Mr Ng's skeleton argument for the initial order for sale hearings in 2021. Mr Ng could not recall whether he specifically raised the modification in issue or its effect at the hearing.

The arguments and discussion

77. Mr Ng's argument in relation to the Application is twofold. First that the Application should be dismissed because it is an application to vary a final order which is too late and would prejudice Kirsty. Second, that the variation to the sample order in PD73A does not substantially change the intention of the order and that allowing the senior or first charge holder to take the benefit of Kirsty's work to obtain the order for sale would be unjust and would unjustly enrich the senior or first charge holder.

78. Mr Ng relies on CPR 3.1(7) even though the OFS included a broad permission to apply to vary or for further directions and BOS were not a party to it. He referred to the commentary in the White Book 2023 at 3.1.17.2 which relates to the variation of final orders and relied on *Tibbles v SIG plc* [2012] 1 WLR 259 ("***Tibbles***").

79. In *Tibbles* at [39] Rix LJ set out his conclusions in relation to CPR 3.1(7). Mr Ng relies particularly on the need for finality, the undesirability of having two bites of the cherry and the need to avoid undermining the appeal process.

80. However, a final order is one that determines, as between the parties to the claim, here Kevin and Kirsty, not BOS, the issues the subject matter of that claim. It creates as between those parties an issue estoppel.

81. Here the order itself envisaged the need for it to be varied and by persons other than the parties. It specifically provided permission to apply to vary any of the terms of the order and in addition provided permission to apply for further directions about the application of the proceeds of sale. Both of which permissions are broad enough to

cover the Application being made by a non-party, BOS, directly affected by the terms of the OFS.

82. There were numerous persons who might have had an interest in applying back under the terms of the OFS in relation to the various properties the subject matter of the claim. Indeed the order for sale claim had been adjourned in relation to two of the properties. Consequently a broad permission to apply extending to any person interested in the Property and the other properties including not just the order for sale but the application of the proceeds or otherwise was appropriate given the number of charging orders, the number of alleged occupiers and the number of persons affected by Kevin's activities. Given the number of moving parts and the composite nature of the OFS, it seemed to me that it would have raised a question as to the extent to which it was truly a final order and in relation to which parts it was to be treated as a final order even as between the parties. As the authorities make clear whether an order is final or not depends on the nature of the order and not the nature of the hearing.

83. Mr Ng however, argued that even where there is permission to apply to vary that permission is circumscribed and referred me the commentary at 3.1.17.3 of the White Book 2023:

"Varying or revoking orders subject to liberty to apply

> 3.1.17.3
>
> In the context of interim orders, judges often include "liberty to apply" in the order. As was recognised in [*Tibbles*], this is an express recognition of the possible need to revisit an order in an ongoing situation. In such cases the court making the order does not lose seisin of the matter: the inclusion of a liberty to apply indicates that it is foreseen that further applications are likely in the course of implementing the decision. However, the liberty does not constitute a "broad licence to avoid appeals". In order to secure the variation or revocation of an order the requirements of [*Tibbles*] must still be satisfied. It is difficult to see how "a liberty to apply" provision in an order would justify a subsequent variation in the absence of a change of circumstances or the misstatement of facts. The absence of "liberty to apply" certainly does not preclude an application."

84. The difficulty with this analysis and the beginning and end of its application in this case, was that BOS were not a party to the OFS and were not bound by it. Further and importantly they were not on notice of the modification which directly affected them until August 2022 a year after the OFS was made. This it seems to me would have brought them within the scope of an argument that there were exceptional grounds to seek to vary the order relying on a change of circumstances or a misstatement of facts had it been necessary to do so given the chronology of facts set out in this judgment. But CPR 3.1(7) is simply not the relevant test to apply in respect of BOS's application to vary.

85. BOS are plainly adversely affected by the modification in the OFS and as such have a direct interest in it which provides them with the relevant standing to apply or intervene under CPR40.9 which provides:

> "Any person who is not a party but who is directly affected by a judgment or order may apply to have the judgment set aside or varied."

86. The commentary in the White Book at 40.9.1 explains the breadth of the provision as it applies to non-parties whilst making it clear that any application to vary would be considered in context. But it seems to me that in any event the permission to apply in the OFS itself was sufficiently broad that BOS did not have to rely on any inherent right to apply and/or CPR 40 because although they are directly and adversely affected by the OFS they have a direct entitlement to apply back under the terms of the OFS itself.

87. This seemed to me to clearly differentiate it from a final order or even interim order between parties where one party seeks to apply back to vary at a later date. Clearly as between the parties themselves the permission to apply provisions cannot and should not be used to circumvent the appeal process and there needs to be finality. This is not such a case. In those circumstances *Tibbles* did not seem to me to the right focus. The focus should instead be on CPR 40.9 and/or the permission to apply itself and whether in all the circumstances the Application should be allowed.

88. BOS seek to apply back because the OFS adversely affects them. Importantly not only did Kirsty not provide them with a draft of the proposed modified order in advance but she also represented to them that their security was adequately covered, and they did not need to attend the hearing in 2021. Whether BOS in fact received the 16 June 2021 letter does not matter for these purposes. If BOS had received the 16 June 2021 letter there would have been no reason for them to take any action – indeed, had they received it they would have been reassured about their position and the position as to their right to apply back would have been even clearer.

89. Had the proposed modification been drawn to BOS's attention in advance and had they done nothing the position might be different. As it is even without the 16 June 2021 letter, I cannot imagine a clearer example of when the permission to apply might be used by a non-party.

90. Mr Ng submits that even if there is some proper basis for the Application it should nonetheless be dismissed because it is a very late application to vary. He argues that Kirsty's reliance on the finality of the OFS is of particular importance. Consequently, the delay in making the Application is a material consideration because that delay has adversely affected Kirsty.

91. He submits that the delay has caused her to continue to incur costs in maintaining the OFS as against Kevin at a time when she was entitled to rely on its finality. He reminds me of the provisions of PD23A paragraph 2.7 *"Every Application should be made as soon as it becomes apparent that it is necessary or desirable to make it."*

92. It seems to me that whether the Application is considered by reference to *Tibbles*, CPR 40.9 or under the OFS' broad permission to apply the court does need to

consider all the circumstances and that must include the question of delay if any in making the Application and any prejudice said to be suffered by Kirsty and/or BOS.

93. The conduct relied on by Kirsty and said to be inconsistent with the overriding objective included (i) BOS's failure to engage earlier; (ii) its failure to provide up to date details of the mortgage when the claim for an order for sale was made (iii) BOS's delay in putting Kirsty on notice that they intended to apply to vary despite (a) being served with the OFS in August 2022 and (b) IM telling them that variation was the proper course in December 2022 (iv) the delay in then making the application to vary until September 2023 thus allowing or causing Kirsty to incur further costs in maintaining the Property in reliance on the OFS.

94. Mr Ng argued that the delay in making the Application was material and sufficient of itself to justify dismissing the Application. Relying on *Tolmie and anor v Taylor and anor* [2019] EWHC 3424 (Ch) ("***Tolmie***") and *Ageas Insurance Limited v Stoodley* [2019] Lloyds Rep IR1 ("**Ageas")** he submitted that the quality of the explanation for any delay as well as the prejudice to Kirsty are factors to take into account when considering whether to allow the Application.

95. In *Tolmie,* the claimant had obtained default judgment against the first defendant in November 2017. Subsequently in 2019 the claimant applied to join the second defendant. The claimant sought freezing and disclosure orders against the second defendant as an aid to enforcement against the first defendant. The second defendant subsequently applied to set aside the default judgment obtained against the first defendant.

96. Mr Ng sought to rely on the judges' consideration of promptness at [62] and [63]. In that case the judge considered that the delay in making the application to set aside, 5 ½ months after the freezing injunction was too long when combined with the age of the default judgment. He was satisfied that the second defendant had sufficient information and knowledge to have made the application earlier. Mr Ng notes that the delay and the failure to act promptly was a freestanding basis for refusing the application in *Tolmie*.

97. However, CPR 13.3 provides a specific regime for applications to set aside default judgments which includes a mandatory requirement for an application to be made promptly, although even under CPR 13 what is prompt depends on the circumstances of the case. It seems to me that this differentiates CPR 13 from the court's general case management powers. Where the court is considering the power of variation as part of its case management powers it brings into account the overriding objective and the need to deal with cases justly and fairly which would include a more general consideration of all the circumstances including delay but it is not of the same nature as the mandatory requirement in CPR 13.3. I do not consider that delay is a freestanding basis for refusing the Application in this case. It has to be considered as part of all the circumstances and the weight to be attributed to any delay will be more material in some cases that in others as for example in *Ageas*.

98. In *Ageas,* many years after a fatal accident Ageas obtained a declaration in June 2016 entitling them to avoid insurance policies entered into after the accident. Another insurer Advantage, a non-party, applied to set aside the judgment under CPR 40.9 in August 2017. The application was dismissed, the judge found that although

Advantage was directly and adversely affected by the declarations obtained in 2016 on the facts, they had no reasonable prospect of overturning the judgment. Whilst the judge had recognised that the question of delay was as a material consideration to be taken into account, neither party had argued that the application made over a year after the judgment had not been made promptly.

99. Mr Sinclair argues there was no material delay in making the Application. There was no reason to apply earlier as there was no prospect of a sale or at least not without Kirsty making an application for permission to sell at less than £320,000. BOS had made their position clear by at latest December 2022. Kirsty knew they objected to the modification even though no application had yet been made.

100. It was only when Kirsty made an application both to join BOS and reduce the sale price to a figure below the then combined total of the costs and expenses of sale and the mortgage that BOS was directly and adversely affected. The parties nonetheless reached a pragmatic agreement that a sale at £320,000 would be a reasonable price in July 2023 at which point BOS had an interest in seeking to resolve what it saw as an inappropriate modification to the OFS that directly affected its rights.

101. Having regard to PD23A he argues that it was neither necessary nor desirable to make an application earlier as there was no impending sale. It would have incurred unnecessary costs for both Kirsty and BOS and would not have been reasonable. BOS could not know that the Property would not receive a higher offer that would make any application unnecessary and a waste of time and costs. It seems to me that there is considerable force in that argument. Had the position been that there was sufficient equity in the Property and the modification did not therefore directly affect BOS's priority and ability to redeem the mortgage no application would have been necessary even though the OFS did not reflect the sample order.

102. Kirsty was not misled. She knew better than BOS the extent of her costs and the sums she wanted to deduct from the proceeds of sale. She knew better than BOS the extent of the problem.

103. By May 2022 Kirsty knew that the mortgage had increased to over £300,000. The offers received were substantially less than the amount needed to redeem the mortgage and the costs and expenses of sale even without the costs of claim. There was going to be a substantial shortfall. Kirsty must have appreciated both that she was going to need BOS's consent to any sale and that the increasing arrears were only going to make the position worse.

104. And yet Kirsty still did not serve the OFS on BOS until August 2022. BOS could not have known about the modification until then. At least up to August 2022 they had no reason to know or appreciate that the OFS had been modified. They could reasonably have proceeded on the basis that Kirsty would have to account to them for the mortgage with only the costs and expense of sale to be deducted.

105. Indeed if, as Kirsty believed, BOS had received the letter of 16 June 2021, then Kirsty knew that BOS believed that the mortgage would be redeemed in full from the proceeds of sale which by then Kirsty must have known was no longer possible given the offers that had been made and the additional costs which as a result of the modification she intended to deduct.

106. There was no obligation on BOS to reduce its charge. They were not a party to the OFS, and they were not bound by the Order. If the Property were to be sold for less than the amount needed to redeem the mortgage it did not bind BOS and they would have to agree to the sale. Kirsty's charging order only attached to any beneficial interest Kevin had in the Property having taken account of the mortgage. This highlights the significance of the modification which sought to prioritise the costs of the claim and the significance of the absence of any notice of it having been given to BOS.

107. It seems to me to be obvious that the question of delay on the part of BOS can only arise when BOS were told about the modification. When should BOS as a non-party without notice of the OFS but affected by the modification have taken active steps to vary it? Was there a material delay in doing such that the Application to vary should be refused?

108. BOS's position changed on 19 August 2022 when the OFS was finally provided to them coupled with a request that they consent to a sale at £300,000. IM's letter noted that a sale at £300,000 would produce a net figure for BOS of £251,582.36, a £50,000 shortfall against the mortgage. The majority of the deductions were the costs of the claim which would be deducted as a result of the modification. It appears that the figures did not properly account for outstanding service charges and ground rent which would only have further reduced the net figure available.

109. This then raises squarely the question of when and who should have issued an application to vary. That seems to me to be focussed on the period between August 2022 and September 2023.

110. It seems to me that it was reasonable for BOS to take time to reflect on the position after provision of the OFS in August 2022. This was the first time they knew about the modification. Until then they had been entitled to assume that the net proceeds of sale other than the costs and expenses of sale would be used to redeem the mortgage. Not only was the value of the Property such that with or without the costs of the claim there would be a shortfall but in addition they had to determine what to do about the modification.

111. Issuing possession proceedings against Kevin in Croydon in October 2022 and not making Kirsty (who was in possession) a party seems to have confused matters and delayed the crystallisation of the real issue. It was, however, clear from the issue of the Croydon possession claim that BOS did not accept the modification and indeed Kirsty's proposal that she retain the benefit of the modification if she were to agree to be joined to the Croydon possession claim made it clear that both she and BOS already knew the real issue between them was the modification by October/November 2022.

112. However, even if there was some doubt earlier by no later than 12 December 2022 BOS's position was clear, and Kirsty was on notice. The absence of an actual application until September 2023 in the circumstances does not appear to me to be critical. BOS could have made their position clearer earlier, but I do not consider that the delay between 19 August 2022 when they received the OFS and December 2022 when they made their intentions clear was either unreasonable or material in particular given the extent of both parties understanding of the position by that stage.

113. An application in December 2022 would seem to me to have been an unnecessary waste of costs and time. It was still possible that a higher price could be achieved for the Property that might alleviate the problems and there was no current interest in the Property so no imminent sale.

114. Between December 2022 and July 2023 with no imminent sale neither Kirsty nor BOS seem to have had much appetite to progress matters. Kirsty did not apply back to sell at a lower price and join BOS. Discussions between the parties appear to have continued sporadically but there was no real impetus to do anything. One can well see that both Kirsty and BOS may have hoped that the resolution of the cladding issues in March 2023 may have resulted in an improvement in the valuation of the Property. In the meantime the mortgage arrears continued to accrue and as it turns out – but perhaps unsurprisingly- so did the service charge arrears.

115. Kirsty of course remained able to seek legal advice in relation to the issues raised by BOS and if she considered it appropriate to hand back the Property to Kevin and/or BOS and/or to make her own application to vary either the price or any of the other terms of the OFS. She did none of this.

116. It seems to me that the failure of action or delay in early 2023 is equally applicable to both parties given the issues that had arisen. Neither party was under any illusion as to the real issue between them by this stage or the consequences to each of them. But neither party had any reason to incur the costs of an application in that period given the position in relation to the Property. I do not consider that the failure of BOS to issue the Application between December 2022 and July 2023, in all the circumstances was on its own a basis for refusing the Application.

117. As set out above Kirsty issued her application to join BOS and reduce the sale price in July 2023. Mr Ng complains that even after the application in July 2023 it took BOS another 56 days to make the Application. However, that does not seem to me to be a fair criticism. The purpose of the July 2023 order was to enable the parties to seek to reach agreement. The terms of the order provided time for the parties to seek to reach agreement and provided that BOS had to make their application within 56 days which they did. Whatever criticisms can be made about the period between August 2022 and July 2023 they do not apply to the period after July 2023.

118. I do not consider that there was a material delay in making the Application and/or any culpable delay on the part of BOS that would have been sufficient of itself to justify refusing the Application on that basis alone.

119. Mr Ng further submitted that that OFS should not be varied in any event even if the court did not consider that there had been a material delay in all the circumstances.

120. Mr Ng sought to persuade me that as the form of order in PD73A is a sample and not a prescribed form it can be adapted or varied by the court to suit the particular circumstances. I agree with that submission in principle, there may be numerous reasons why some adaption is necessary to suit particular circumstances that is why the sample is not a prescribed form. But Mr Sinclair's objection to the modification is that it seeks to prioritise and improve Kirsty's position in preference to the senior or first charge holder.

121. It does appear to me that as a general rule parties should explain any variations from the sample order and the effect of them and the reasons for them. If a variation to the sample order were one that may adversely affect a senior or first charge holder who is not a party to the claim it seems to me that is a matter of particular significance, and it may be appropriate or necessary to give specific notice to any affected party of the intention to seek that variation. Whether such notice should be given in advance or whether CPR 19 is used would be an issue to be determined on the facts of a specific case. However, it seems to me that there is a risk that the court might consider it necessary to adjourn a disposal hearing if proper notice of a variation that may directly affect the interests of a senior charge holder has not been given. Here, of course, the notice given to BOS did not identify the intention to seek any modification and Mr Ng cannot recall whether he raised it in terms at the hearing in July 2021.

122. Mr Ng further submitted that the additional text does not substantively change the sample order because the costs and expenses of effecting the sale as a matter of textual or purposive analysis must include the costs of obtaining the order for sale itself; and/or alternatively the modification still follows the spirit and purpose of the sample order. And in any event the reason why the costs and expenses of sale rank in priority to the any senior charge holder is to avoid a senior charge holder being unjustly enriched by the costs incurred by a junior charge holder since but for the work of the junior charge holder to obtain the order for sale the senior charge holder would themselves have had to do so. Whilst I accept that it may seem "unfair" to have undertaken all the work to obtain the OFS but not gain any benefit from it, this submission did not seem to me to sit well with the established principles relating to the rights of mortgagees and priorities. It did not recognise the element of choice involved in the decision to pursue the OFS.

123. The principles relating to the rights of mortgagees can be usefully extracted from *Fisher and Lightwoods Law of Mortgages* ("*Fisher"*) at paragraph 55.33 to 55.38. Although this overlaps with the Sale Costs Application it is also the answer to Mr Ng's submissions on this issue.

124. At 55.37 they explain that:

> "The right of a mortgagee to costs extends to the case where the mortgaged property is sold under the order of the court. **The order for sale does not itself alter the rights of the parties**, but the purchase money, being considered to be substituted for the property, is treated in the same manner as the property and **each encumbrancer will be paid his costs**, **including the costs of obtaining the direction for payment to him of the proceeds of sale, together with his principal and interest, according to priority, the later incumbrancer taking nothing until he who is prior has been paid in full.**" (my emphasis)

125. Mr Sinclair reminded me of the provisions of section 105 Law of Property Act 1925 which addresses the application of the proceeds of sale by a mortgagee in possession. Notably section 105 differentiates between the costs and expenses properly incurred

as an incident of sale and other costs and is consistent with the framework of the sample order.

126. Kirsty can therefore seek to add her costs of the claim to her own charge but not prioritise them over BOS. With the principal and interest they form a single debt and are payable in the same priority as her secured debt. That single debt will not be paid until the mortgage has been redeemed in full. Only the costs and expenses of sale itself can be prioritised over Kirsty's subordinate charge. And it is clear that the costs of obtaining the OFS are to be paid in accordance with the priority and are not part of the costs and expenses of sale.

127. This is further addressed in *Fisher* at 55.33 which again overlaps with the Sale Costs Application. They explain:

> "the mortgagee [Kirsty] is generally entitled to expenditure properly incurred in preserving the security, for example: the payment of rent to avoid the forfeiture of leasehold property; carrying out necessary and proper repairs and improvements; taking necessary steps to protect the property against vandals pending sale…."

128. However, this is tempered by the following passage from 55.33:

> "Where sums are expended by a subsequent mortgagee in possession [Kirsty], that mortgagee [Kirsty] will not be entitled to the same as against a prior mortgagee [BOS]."

129. At 55.36 when considering the expenses of sale *Fisher* notes that a mortgagee can add to the security the expenses of sale. But that is to add those expenses to their own security and not to prioritise them above those of a senior or first charge holder.

130. The perceived unfairness of this outcome results from the choices and risks Kirsty took. She made a choice to apply for the OFS as a means to seek to enforce the costs orders she had obtained against Kevin in 2016 claim. In doing so she no doubt considered and took into account that if there was little or no equity in the Property there would be no benefit to her. In fact at the time the OFS was made it appeared on the figures then available that Kirsty would be likely to recover at least some of her first charging order if the Property were sold at the then current valuation and the mortgage was at the level Kirsty understood it to be. It was therefore a choice to pursue the OFS in relation to the Property as part of an overall package of measures of enforcement which, it should not be forgotten, included 56 Broughton Road and two other properties within the same claim. Importantly this was a choice that Kirsty made to seek to recover sums due from Kevin to her and was not action she took for the benefit of all of Kevin's creditors who had managed to register charges against the Property or for the benefit of BOS.

131. It was the subsequent reduction in the valuation of the Property coupled with the subsequent time it took to obtain possession that caused the problem. In July 2021, the figures Kirsty was relying on in relation to the mortgage were not dissimilar to and consistent with (assuming continuing accruing arrears) the figures subsequently provided by BOS. It was not clear why BOS confirming the mortgage figure in 2021

would have made any difference to Kirsty's decision to pursue the OFS. And indeed if Kirsty had had concerns about the evidence she was relying on she could have sought an order to require BOS to provide an up to date redemption figure before seeking a final order. She did not.

132. The sale prices relied on including for the Property were based on valuations obtained by Kirsty. It is not clear how much of an impact the cladding issue had on value. But again, since Kevin raised it at the hearing in July 2021, it would have been open to Kirsty to seek further directions or an adjournment to enable her to investigate rather had she considered it appropriate to do so. She did not.

133. Further Kirsty knew that Kevin was not paying the mortgage and the arrears were increasing. She had years of experience of litigating with Kevin and no doubt took into account the likelihood of him making further applications and that it might take time to obtain possession.

134. All of which would seem likely to be factors to be considered by Kirsty in determining whether to seek an OFS in relation to any of the properties but none of them in the circumstances of this case seem to be impacted directly by any action or inaction on the part of BOS.

135. By February 2022 when Kirsty obtained possession the value and offers on the Property were substantially below the figure in the OFS and below the mortgage figure she had used when obtaining the OFS. She was no longer in a position to fully redeem the mortgage as she had told BOS in 2021.

136. From at least May 2022 Kirsty knew that the offers on the Property were less than the mortgage and that BOS's consent would have been necessary for any sale. If not before at least by then objectively she should have appreciated that the modification was going to be an issue since the effect was to substantially reduce any recovery by BOS. Thereafter Kirsty made choices to continue down the route of seeking to maintain the OFS with its modification and made choices to retain possession of the Property and to manage the sale despite the deteriorating position. Prior to putting BOS on notice in August 2022 Kirsty had already incurred all the costs of obtaining possession as against Kevin.

137. Although I am not persuaded that the delay if any in issuing the Application would justify refusing the Application on its own, I do need to consider the question of delay if any when considering the circumstances overall and the question of prejudice. Can any prejudice said to be suffered by Kirsty be said to be caused by BOS rather than as a consequence of Kevin's activities or Kirsty's own decisions about what steps to take to seek to enforce her charging orders?

138. Mr Ng submits that the failure of action by BOS should weigh heavily against them. He submits that Kirsty was entitled to rely on the OFS and its finality throughout the period from July 2021 when she continued to incur costs and expenses.

139. But BOS was not a party to the OFS and did not know its terms until August 2022. They are not to blame for the terms of the OFS or the value of the Property. BOS did not cause Kirsty to issue the claim nor were they responsible for the choices she made in relation to the terms of the OFS. They were not the cause of Kevin's resistance to

giving up possession. The additional costs incurred by Kirsty at least up to August 2022 cannot be said to be caused or contributed to by BOS. Silence from BOS cannot be said to be the cause of her pursuing her claim for an OFS. It does not appear to me that any prejudice that Kirsty may argue she suffered can be said to have arisen as a consequence of any action or inaction on the part of BOS at least up to August 2022 on the facts of this case.

140. I am not persuaded that any prejudice said to have been suffered by Kirsty was caused by BOS– whether it be the timing of the Application or otherwise. It appears to me that the prejudice suffered by Kirsty if any is a consequence of seeking to improve her position by use of the modification without giving notice to BOS, coupled with the vagaries of the property market and the actions of Kevin. None of those can be said to be caused by BOS. Conversely, the modification by its very nature has a significant adverse impact on BOS and prejudices them. I am not persuaded that in all the circumstances the court should maintain the OFS as modified to the detriment of BOS.

141. In seeking to obtain an advantage by modifying the OFS without putting BOS on notice Kirsty set in motion a train of events that have led to this outcome. Had she sent BOS the draft order and made it clear they were seeking to modify the OFS in the manner which would adversely affect BOS the Application would have had far less prospect of success.

142. For the reasons set out in this judgment it seems to me that the Application must succeed. I am satisfied that the Application to vary either by reason of BOS's direct interest and the adverse affect on BOS under CPR 40.9 or the wide permission to apply was an application BOS could make. Further that in all the circumstances it is appropriate to vary the OFS to remove the modification in paragraph 4. Whilst the costs of the OFS claim itself can be added to Kirsty's subordinate charge they cannot be prioritised over the mortgage. That seems to me to be the outcome most consistent with the exercise of the court's broad discretion and the overriding objective.

143. This may be seen as a harsh case and a harsh outcome for Kirsty particularly given all the work she has put in to reaching this point as against Kevin. But that of course is precisely the point. BOS are not Kevin and are not responsible for the situation that Kirsty finds herself in.

144. In most cases one would not expect the series of events/circumstances that converged in this case to occur together but there will be other cases in which similar issues arise in particular when the property market is falling. Parties seeking an order for sale in which they seek to modify the sample order in a way which might affect the ability of the senior or first charge holder to recover the sums due to them should (i) give notice to that senior or first charge holder of the proposed modification, and (ii) draw it to the attention of the judge. They should consider carefully whether the benefit they seek to achieve is realistic.

145. Mr Ng's fall-back position was that in the event that the court were persuaded that there was some proper basis to vary the OFS the same factors he relied on in relation to BOS's conduct would support a conclusion that any variation should be on terms that BOS pay Kirsty's costs of the claim. This appeared to me to be seeking to come back around to achieve the same outcome by a different route.

146. Whilst there will no doubt be arguments about the costs of the Application itself, I am not persuaded that the costs of the claim should be paid by BOS by another route for the same reasons that the Application should be allowed.

Sale Costs Application

147. By the Sale Costs Application Kirsty seeks declarations that some of the costs and expenses she has incurred in obtaining and maintaining possession of the Property should be treated as costs and expenses of the sale and consequently prioritised and recovered ahead of Kirsty's charge.

148. Might it be argued that had BOS acted earlier or been clearer about their intentions when served with the OFS in August 2022 this dispute may have been resolved before Kirsty incurred some of the costs the subject of the Sale Costs Application? Might she have been in a better position to decide whether to give up on the OFS and to hand the Property back to Kevin or BOS?

149. I have already addressed many of the reasons why it does not appear to me that it would have made any difference to the action Kirsty took or the position that has now been reached. However, additionally it appears that the majority if not all of the costs that remain in dispute were or should have been incurred prior to BOS having been provided with the OFS.

150. In any event the Sale Costs Application simply requires a consideration of whether the costs incurred by Kirsty fall within the costs and expenses of sale. That is a question of analysis of the types of costs and expenses incurred and whether they fall within the scope of recoverable costs and expenses. If they do not, they would have been open to challenge by any priority charge holder and depending on the nature of them perhaps also by anyone else with an interest in the net proceeds of sale.

151. BOS argue that the disputed sale costs relate to costs incurred in respect of preserving and managing the property which Kirsty can properly seek to add to her charge and recover with that same priority against Kevin but cannot be prioritised over the mortgage for the same reasons as the Application is successful. Save for the costs associated with "salving" the security the costs and expenses of effecting the sale of the Property do not include for example the costs of maintenance or obtaining possession.

152. The principle that the costs and expenses incurred by Kirsty other than those that fall within the definition of costs and expenses of sale should be added to her charge and paid in the same priority as her charge follows from the reasoning set out above.

153. *Cousins: The Law of Mortgages*, 4th Edition considers the position at 32.24 and concludes:

> "Finally, it must be observed that repairs and improvements are not salvage advances and do not entitle the mesne encumbrancer who executes them to priority for his expenditure over earlier mortgagees."

154. *Cousins* considers the position in relation to the maintenance of the mortgaged property more broadly at 32-22. This passage addresses the majority of the costs and expenses relevant to the Sale Costs Application as follows:

> "A mortgagee is generally entitled to preserve his security and to add to the debt expenses incurred in so doing. A mortgagee of leaseholds may bring into the account payments for rent, ground-rents … A mortgagee whose security includes an insurance policy may pay the premiums to prevent default. Where the payments are not merely to protect but to salve the security, a puisne encumbrancer who makes the payments is entitled to a charge for such payments in priority even to the first mortgagee…. **If the terms of the contract do not allow for the mortgagee insuring and the mortgagor paying for such insurance, it appears that any insurance policy he takes out is effected for his own benefit and that he cannot charge the premiums in the account**."

155. The position in relation to the costs and expenses of sale is also considered in *Fisher* at 55.34 in respect of insurance, 55.35 in respect of management, 55.36 in respect of the expenses of sale and 55.37 as set out above in relation to the costs of sale.

156. The issue is then whether the categories of costs and expenses which Kirsty seeks to recover by her Sale Costs Application are costs and expenses that can be recovered in priority to her charge or not.

157. I was referred to *Parker-Tweedale v Dunbar Bank plc & ors* (No2) 1991 Ch and *Holder v Supperstone & Others* [1999] EWHC Ch 189 by Mr Ng. Those are authority for the proposition that the costs of enforcing a charging order are costs which Kirsty is entitled to recover even though a charging order is an equitable charge but they are also authority for the proposition that they are costs to be added to the relevant security and not costs to be prioritised over the entitlement of any senior or first charge holder.

158. Mr Ng drew my attention to both Evans-Lombe's comments in *Holder* at [24] where he concluded that he did not have to determine the question of whether the costs of the proceedings would have been liable to be allowed for within the relevant insolvency under the principles in *Berkeley Applegate (Investment Consultants) Ltd (in liquidation)* 1989 CH 32. Mr Ng further relied on *Prime Noble Properties (In administration) and The residential leaseholders* [2022] EWHC 2271 Ch. In this later case Administrators as assignees relied on section 105 LPA or sought to rely on the Berkeley Applegate principle to receive payment of their professional fees, costs, and disbursements in relation to properties. Importantly the Administrators were in a position to rely on section 105 LPA. Further I note that not only did this claim relate to an in principle consideration in relation to professional administrators, who had taken an assignment, but that no decision was made as to what costs and expenses were to be included or allowed.

159. Mr Ng sought to argue that an approach similar to that applied in these types of insolvency situations relating to office holders should be applied to Kirsty's costs on the basis that her costs were costs that would have to be incurred regardless of who

was in possession and were incurred for the benefit of both BOS and Kirsty and I assume all the other charge holders. He sought to persuade me that such expenses should all be prioritised as communal expenses as part of the court's equitable jurisdiction over equitable mortgages. It was on this basis that he sought to argue that whether it was the cost of the claim, or the costs sought pursuant to the Sale Costs Application that BOS would be unjustly enriched if Kirsty were not able to recover the costs and expenses she had incurred.

160. I was not persuaded by this argument. As set out above Kirsty made a choice to go down this route. She was not taking action to obtain possession and sell for the benefit of BOS or any of the other subordinate charge holders but for her own benefit. She was not standing in the position of an office holder seeking to take action for the benefit of the creditors as a class. Indeed as I set out above BOS did not need to do anything at all. It could rely on its rights under the mortgage. In any event *Prime Noble* is of limited assistance since it was a claim which in which the Administrators were entitled to rely on their statutory entitlement under section 105 LPA. However, even if there was some basis for considering that Kirsty would be able to pray in aid the Berkeley Applegate principle, which I am not persuaded she can, the court would still have to engage in the process of determining which costs and expenses were recoverable in priority to the mortgage. I can see no reason why the usual principles applicable in mortgage cases as enunciated in *Fisher* and *Cousins* would be ignored in such a case.

161. Mr Ng approaches Sale Costs Applications on the basis that the unagreed costs and expenses are all costs and expenses of sale. He submits that they are the costs of being in possession. He argues that without possession it would have been difficult if not impossible to sell the Property. Consequently the costs that are disputed that relate to obtaining possession, the bailiffs and locksmith costs, and the costs of clearance to facilitate the sale, the costs of repairs to unblock a toilet and the costs of insurance premiums to protect the Property are all properly to be treated as costs and expenses of sale. Had BOS taken possession they would have had to incur the same costs.

162. Mr Sinclair submits that these are not costs and expenses of sale. They are not necessary costs to enable the Property to be sold. It could have been sold without vacant possession. Consequently the costs of obtaining vacant possession are not necessary costs and expenses for a sale. The absence of vacant possession would just affect the price at which the Property could be sold. In relation to insurance he argues that having obtained possession the decision to obtain insurance was about risk and protection for Kirsty. It was a cost of being in possession. These are therefore costs and expenses that are ones which Kirsty may be able to add to her charge and recover as against Kevin but are not costs which she can recover in priority to her own charge or that of BOS.

163. This did seem to me to be a purist approach in the sense that for example it would be difficult to sell a property without keys to access it. But more generally I accept that a property can be, and many are sold without vacant possession. There would be a balance to be struck between the costs of obtaining vacant possession and the reduction in value in selling without vacant possession. Any mortgagee in possession would have to satisfy themselves that what they were doing was going to achieve the best price or best outcome possible having regard to their duties and obligations as the mortgagee in possession. However, it was ultimately a question for Kirsty to balance

the risks/costs and choices about what to do. *Fisher* and *Cousins* make it clear that the costs and expenses that Kirsty is seeking to recover do not generally fall within the costs and expenses of sale.

Locksmith and Bailiff costs

164. These were all incurred between 31 January 2022 and 22 February 2022. As Mr Sinclair submits strictly the bailiff and locksmith costs are not necessary costs to enable the Property to be sold – he submits they are just about the value at which the Property is sold. As I set out above this is a purist approach, but I accept vacant possession is not necessary and the OFS itself includes an order for possession.

165. As to whether it is "fair", the issue is only about whether these costs are prioritised not whether in principle Kirsty is able to recover them against Kevin.

166. I consider they are recoverable against Kevin but do not form part of the costs and expenses of sale.

Clearance Costs

167. It appears that the clearance costs were incurred in about May 2022 which suggests that the Property had been offered for sale prior to that without the clearance having taken place. The blocked toilet was identified in July 2022 and appears to have been in part as a consequence of the system having been drained down.

168. Kirsty was under no obligation to either BOS or Kevin to pay to have the toilet unblocked or to clear or clean the Property prior to sale it was a choice. Not doing so may have affected the sale price but that was a balance for Kirsty to assess on the basis of the costs as against the potential reduction in value and her obligations and duties as mortgagee in possession.

169. Likewise the fact that Kirsty chose to instruct agents to manage the Property at a cost rather than to manage or clear it herself was also a choice.

170. I agree with Mr Sinclair that the clearance and repair costs are not strictly a cost or expense of sale that can be prioritised. She may well be entitled to add them to her own charge as against Kevin see *Cousins* at 32.22 and *Fisher* at 55.36.

Insurance Premiums:

171. Kirsty seeks a declaration that she be entitled to recover/deduct the insurance premiums she has paid as a cost and expense of sale. Kirsty does not say how much she has incurred on insurance premiums.

172. The position in relation to insurance is complicated by the fact that different rules apply where the relevant charge is made by deed or the provision of insurance is a term of the mortgage contract neither of which are applicable to an equitable mortgage such as a charging order. Although even under section 101 Law Property Act 1925 any charge for insurance has the same priority as the charge held by the charge holder who obtains it. Where, as here, the charge arises out of a charging order (an equitable charge) it does not have the same characteristics. In such a case the payment of insurance premiums is not prioritised but recoverable in the same priority

the charge holder who obtained the insurance. In this case that would mean that Kirsty's payment of insurance premiums does not have priority over BOS.

173. Kirsty says that she has been insuring the Property since she obtained possession in February 2022. It is right that BOS made it clear that they were not insuring the Property under their block policy in November 2022, they were not in possession. It was not clear to me why a reminder of the need to insure and when Kirsty was already in possession and insuring provides any basis for saying that BOS are responsible for the cost of insurance. If Kirsty had not insured the Property she was personally at risk in the event that anything happened to the Property. That does not mean it was a cost recoverable in priority to the mortgage or Kirsty's charge. It was not unreasonable for BOS to remind her of the need to insure or that it was not covered by any block policy they had. However, ultimately it was choice that she made to manage the risk. Insurance was a cost of being in possession. It is not therefore, strictly interpreted, a cost or expense of sale that can be recovered in priority to the mortgage or her own charge. She may well be entitled to recover it as against Kevin.

Service Charges and Ground Rents

174. I have already addressed the question of service charges and ground rent. Those are charges which have to be paid to enable the sale to complete and that of itself was not in dispute. It is not for the court to declare anything in relation to those sums at this stage if at all. It is for Kirsty to resolve the position with the freeholder/landlord and the buyer and ideally with the cooperation of BOS for the reasons set out above.

175. For these reasons the Sale Costs Application is refused. The costs in relation to the Bailiffs, Locksmiths, clearance costs, blocked toilet and insurance cannot be prioritised and treated as the costs and expenses of sale in priority to the mortgage or Kirsty's charge. They may well be recoverable against Kevin as costs incurred by Kirsty and recoverable in the same priority as her own charge.

Order and Consequential matters

176. I would encourage the parties to seek to minimise any further costs by seeking to agree all consequential matters. The parties are referred to paragraphs 12.88 to 12.91 of the Chancery Guide. If nonetheless the parties consider that a consequentials hearing is necessary they should provide dates to avoid when they provide any corrections so that a short 1-hour hearing can be fixed no later than 28 days after the hand down of this judgment.