Neutral Citation Number: [2023] EWHC 1461 (Comm)

Case No: CL-2017-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN THE MATTER OF GERALD MARTIN SMITH
AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988

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

Date: 26/05/2023

Before:

MR. JUSTICE BUTCHER

- -

Between:

GERALD MARTIN SMITH

Applicant

- and -

DAVID STANDISH AND DAVID PIKE
(As Joint Receivers Appointed By Order of Foxton J
Dated 14 December 2022)

Respondents

- -
- -

DR. GERALD SMITH, the Applicant, appeared In Person

MR. KAVAN GUNARATNA (instructed by Stephenson Harwood LLP) appeared on behalf of the Respondents

- -

Approved Judgment

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MR JUSTICE BUTCHER

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MR. JUSTICE BUTCHER :

1. This is the application made by Dr. Smith to stay execution of a writ of possession in respect of flats 11 and 12 Hamilton House, 81 Southampton Row, London.

2. The application has been made this morning by Dr. Smith. It has been opposed by Mr. Gunaratna on behalf of the respondent receivers ('the Respondents').

3. For the purposes of this application, I have read the parties' skeleton arguments; I have read Dr. Smith's application notice for a stay; and I have read his two witness statements of 4th April 2023 and 15th May 2023. I have read two witness statements of David Standish. I have read five particular orders to which reference has been made: a consent order dated 18 December 2022 ('the Consent Order'), a receivership order dated 14 December 2022 ('the Receivership Order'), a consequentials order dated 11 June 2021 ('the Consequentials Order'), an LCL settlement order dated 4 February 2021 ('the LCL Settlement Order') and a guillotine order dated 20 May 2020 ('the Guillotine Order'). I have also read various pieces of correspondence relating to the consent order. I also read in advance, and was taken by Dr. Smith to, a tenancy agreement dated 1st June 2010.

4. This morning I have heard extensive submissions from Dr. Smith and from Mr. Gunaratna and I have been taken by Dr. Smith to part of the lengthy history of these matters.

5. With respect to his submissions, in my view, the relevant materials for the purposes of determining this application are limited and in particular the approach which the court needs to and indeed must take in relation to this application is largely determined by orders of the court which are final and have not been set aside and are not subject to appeal.

6. Specifically, the immediate procedural context of this application is that on 14th December 2022 Foxton J made the Receivership Order, whereby the Respondents were appointed as joint receivers to take possession of and realise by way of sale or otherwise certain properties, which included flats 11 and 12 of Hamilton House. That order followed on from the Consequentials Order made by Foxton J on 11th June 2021, to which I will return.

7. By paragraph 6 of the Receivership Order, Foxton J empowered the Respondents to take possession of the specified properties and exercise all rights that anyone in possession of them might have in connection with them and take such steps as they deemed appropriate to obtain possession of them to the extent that they were occupied.

8. Foxton J's order also obliged all persons in possession or control of the properties to take steps required of them by the Respondents to enable the Respondents to discharge their functions under the Receivership Order.

9. It is also pertinent to note that in the runup to the making of the Receivership Order Dr. Smith had been asked to confirm that he would vacate flats 11 and 12. Dr. Smith, acting through his solicitors, at the time Berkeley Square Solicitors, proposed that he should enter into a consent order providing for him to give vacant possession of flats

11 and 12 within 14 days of judgment in an application by Mr. Ticehurst, Mr. Taylor and Mr. Thomas against Harbour Fund II, case number PT-2022-000386.

10. In Berkeley Square Solicitors' letter of 10th June 2022, it was said, among other things:

> "Dr. Gerald Martin Smith accepts vacant possession should be granted but that this judgment will give clarity as to who the properties should be surrendered to in light of the current uncertainty. A consent order can be lodged to this effect. We hope you agree that this is a sensible way forward."

11. Thereafter, the Respondents' and Dr. Smith's solicitors negotiated, over a considerable period of time, the terms of a proposed consent order. Towards the end of the period in which it was being negotiated, namely on 1st December 2022, a request was made by Dr. Smith for an extension to a 14day period previously proposed in which Dr Smith would grant vacant possession, on account of the proximity of the Christmas holidays, because of the time necessary to arrange removal of his belongings from the premises, and because of his mother's ill health.

12. On 6th December 2022, Dr. Smith, by his solicitors, confirmed the parties' agreement for him to deliver up vacant possession of flats 11 and 12 by 2pm on 13th January 2023, with the agreed draft consent order being signed and returned to the respondent's solicitors, Stephenson Harwood, in the terms which had been negotiated. Stephenson Harwood confirmed they would seek the Court's approval of that order and it was submitted for the Court's consideration and approval on 15th December 2022. It was approved by Cockerill J on 18th December 2022. It is pertinent to record the relevant terms of that order in full. They are at page 944 of the bundle and the operative terms read as follows:

> "1. This order is made:
>
> 1.1 without prejudice to any obligation in the LCL Deed, or any dispute as to the LCL Deed's validity, enforceability or effect between any of the parties of the LCL Deed (in respect of which all rights are reserved and no admissions are made);
>
> 1.2. without prejudice to any alleged breach of the undertakings (in respect of which all rights are reserved and no admissions are made); and
>
> 1.3. notwithstanding any terms of any (purported) tenancy, licence or agreement (whether express or implied) under which the 20th Respondent [viz Dr Smith] occupies (or purports to occupy) the Properties.
>
> 2. By 2pm on 13th January 2023, the 20th Respondent shall give vacant possession {or procure vacant possession including the termination of any tenancies and removal of third party occupants) of the Properties to Messrs. Standish and Pike or such other persons as they may direct.

> 3. If the 20th Respondent does not deliver up vacant possession in accordance with paragraph 2 of this Consent Order, then Messrs. Standish and Pike shall have permission to issue a Writ of Possession in the High Court for the giving of vacant possession of the Properties to Messrs. Standish and Pike or such other persons as they may direct.
>
> 4. In this Consent Order, giving vacant possession of the Properties shall include, without limitation:
>
> 4.1. the hand delivery to Messrs. Standish and Pike (or their agents) of all keys or other means of obtaining access (including any copies) to the Properties, the building and premises at Hamilton House, 81 Southampton Row, in the possession or control of the 20th Respondent;
>
> 4.2. the removal of all possessions, belongings or chattels located in the Properties; and
>
> 4.3. the removal of all possessions, belongings or chattels of the 20th Respondent located in the building or premises at Hamilton House, 81 Southampton Row (including in any car parking spaces).
>
> 5. No order as to costs."

13. On 12th January 2023, that is to say the day before the day on which, under that Consent Order, Dr. Smith was obliged to deliver up possession of flats 11 and 12, Dr. Smith wrote to the Respondents saying that he would not give possession of the properties and stated instead that he had rights in respect of those properties in the form of tenancies which gave him the right of occupation of flats 11 and 12 "until I no longer require it". That assertion was made notwithstanding certain previous orders of the court, not only the Consent Order, which I have quoted, the Receivership Order, to which I have also referred, and the Consequentials Order of Foxton J of 11th June 2021. The Consequentials order, had declared, and I quote:

> "25. Save insofar as set out above or below, the claims pursued by the parties at the Directed Trial are dismissed and none of the said parties hold any equitable or proprietary interests in any of the Relevant Property - or- the IUAs [viz Identified Underlying Assets].
>
> 26. Except in so far as referred to in this order, no other person, whether a party to this claim or otherwise, is entitled to any proprietary interest or interest under the 1988 Act in the Relevant Property or the IUAs. In addition to the interests recognised above in this order, the following bona fide interests remain unaffected by this paragraph:
>
> (a) Assured shorthold tenancies in favour of the occupants of Flats 2, 3, 10, 14, 17, 18, 22, 23 and 24 Hamilton House;

(b) The life interest in Antoinette Gardens;

(c) 50% of 32 Moor Lane owned by Mrs. Catherine Irving;

(d) The mortgage of Montagu Square in favour of Santander UK Plc in the sum of £330,000."

14. In light of this development, namely Dr. Smith's refusal to give possession of the properties, the Respondents requested the issue of a Writ of Possession in accordance with the terms of paragraph 3 of the Consent Order which I have quoted above. The Court issued such a Writ on 20th March 2023 and notices of eviction were delivered to the relevant properties on 23rd March 2023 in relation to a proposed execution of that Writ to take place on 11th April 2023.

15. On 5th April 2023, the present application was issued by Dr. Smith and the Respondents agreed on that date that they would defer execution of the Writ of Possession from 11th April 2023 to a new date to follow the determination of this application by the Court once it had been listed.

16. The application has, I think the Respondents are correct to say, as its central premise that the Court should at this stage, namely before the Respondents may take possession of flats 11 and 12, test and determine the nature and terms of Dr Smith's rights in respect of flats 11 and 12, to include an adjudication of the terms of the tenancies which he now alleges entitle him to remain in possession of those properties until he no longer requires them.

17. I think it is also right that Dr. Smith's arguments in relation to this application can be grouped under a number of headings, namely (1) that Dr. Smith says that there has been no due process or consideration by the Court of the lawfulness of a possession order, (2) that the possession order is contrary to paragraph 11 of an earlier order of Popplewell J of December 2017; (3) that the Consent Order was entered into by him by mistake or under a mistake; (4) that he entered into the Consent Order under duress; and (5), although I suspect that this has now fallen away, that the Receivership Order is subject to an application for permission to appeal and a stay.

The Central Premise

18. Turning to address the central premise, in my judgment, the application made by Dr. Smith must fail and its central premise must be said to be unfounded by reason of previous orders of the Court. Specifically, by the Consequentials Order of 11th June 2021 the Court has determined and declared the relevant interests in flats 11 and 12 and in other relevant flats within Hamilton House which exist. By that order, the Court recognised various assured shorthold tenancies and life interests in other flats in Hamilton House and in properties elsewhere, as well as equitable interests in favour of the beneficiaries of the trusts on which those properties were held. But in that order the Court did not recognise any leasehold interest of Dr. Smith such as he now seeks to assert in flats 11 and 12 and which he claims would bind a purchaser of those flats. It does appear to me that the type of interest which Dr. Smith now asserts he has of a right of occupation under a tenancy agreement would have been necessary to be recognised in that Order if it were to be found to exist.

19. Furthermore, the order made by Foxton J in those paragraphs of the Consequentials Order of 11th June 2021 have to be seen against a background in which, in advance of the Directed Trial which led to that Consequentials Order, the court had made the Guillotine Order on 20th May 2020 with a view to encouraging all concerned, both parties and non-parties, to come forward to assert any proprietary claims in relation to flats 11 and 12 or any other of the IUAs and to be bound or otherwise debarred, save to the extent that such claims were made and established.

20. Furthermore, on 4th February 2021 at the start of the Directed Trial, Dr. Smith, along with other LCL parties of which he was one, discontinued all claims which he and they had previously made in respect of the IUAs and relevant property assets. In my judgment, Dr. Smith is bound by those orders and is precluded from raising claims to the contrary, including a claim of a right to occupy flats 11 and 12 under a tenancy agreement.

21. In those circumstances, there is no proper basis for requiring the Court now to test whether Dr. Smith in fact holds tenancy interests in flats 11 and 12.

22. Moreover, the present application is seeking to go behind the Consent Order, which remains extant and in force. It has not been set aside on appeal or otherwise, and there has been no application in proper form to seek to set it aside.

The complaints about absence of due process

23. On that basis, Dr. Smith's submissions about the absence of due process, in my judgment, must fail because of the terms of the previous orders.

24. I should add that even if there were an examination of the issue of whether there were relevant protections to Dr. Smith's tenure, there must be considerable doubts as to whether he does have, even on the basis of the tenancy agreement which he alleges, any protected rights under the Housing Acts. The points in that regard are set out in paragraph 92 of Mr. Gunaratna's skeleton argument. I do not need to go into them in detail, suffice to say that there appear to be very significant obstacles in the way of any claim that there is a protected tenure in relation to rights under the tenancy agreements which Dr. Smith asserts.

Popplewell J's order of December 2017

25. As to the reliance on the order of Popplewell J, namely his order of 7th December 2017, this in my judgment is clearly unsustainable. The LCL Settlement Order at paragraph 4 states that: "The order of Popplewell J dated 7th December 2017 is varied as follows..." Then in (a) it specifies that paragraph 1 of that order is amended so as to include flat 1 of Hamilton House within the scope of the receivership order, and in (b) refers to paragraph 11 of the order of Popplewell J being discharged, provided that vacant possession is only to be obtained on the terms set out in the LCL Settlement Deed.

26. Further, by paragraph 2 of the Receivership Order, it is provided:

> "For the avoidance of doubt, and subject to paragraph 3 below, to the extent that any of the Receivership Property was, prior to

> the date hereof, the subject of the Order of Popplewell J dated 7th December 2017 (the "2017 Receivership Order") (whether originally or as varied by the order of Foxton J, dated 4th February 2021), such property is hereafter subject to the receivership created by paragraph 1 of this Order and henceforth the provisions of the 2017 Receivership Order shall not apply to such property."

27. It does not seem to me that in light of those provisions that there can be reliance on the terms of the order of Popplewell J.

Entry of Consent Order under a mistake

28. In relation to Dr. Smith's argument that he entered into the Consent Order under a relevant mistake, I consider that that is not a credible position as a matter of fact. Dr. Smith was advised throughout in relation to the process of entering into the Consent Order. In so far as the suggested mistake is that Dr. Smith thought he was obliged to give possession under an earlier conditional settlement agreement in the LCL Deed, whereas he now realises that the condition had not been met and his obligations had not been triggered, the Consent Order expressly recites Dr. Smith's position that the LCL Deed is of no force or effect and that his obligation to give vacant possession has not been triggered, and that he was offering to give vacant possession of the properties to the appropriate parties 14 days following handdown of judgment determining the applications. The Consent Order was also stated to be without prejudice to the parties' rival contentions as to whether Dr. Smith was obliged to give vacant possession under the LCL Deed. The correspondence had explained that Dr. Smith's motivation in entering into a consent order was to avoid further litigation costs.

Entry of Consent Order under duress

29. Equally, in relation to Dr. Smith's assertion that the Consent Order was entered into by him under duress, I regard that as being incredible factually and insufficiently evidenced. It has to be remembered: that Dr. Smith was being advised; that it was he, through his solicitors, who proposed a consent order; that the process of negotiating and agreeing a consent order ran for some six months; and the evidence is that the Respondents did not threaten to commence proceedings for contempt of court against him on this issue.

30. It was, as I have said, Dr. Smith's solicitors who confirmed that his motivation for proposing or entering into a consent order was to avoid further litigation or costs. There was, by contrast, no suggestion of a protest or complaint that he was entering into a consent order under duress.

Permission to Appeal

31. The last of the heads of argument that Dr. Smith put forward, which, as I say, I think has probably now fallen away, was that permission to appeal was being sought. The reason why it must have fallen away is that the Court of Appeal dismissed the application for permission to appeal the receivership order and any stay on 19th May 2023 in an order of Males LJ.

Disposal

32. Accordingly, I will dismiss Dr. Smith's application and I will permit the evictions to proceed. Dr. Smith says, by way of a fallback, that he is seeking a reasonable time in which to, as it were, move his possessions. That is, I think, resisted by the Respondents. I am going to say that the eviction can take place after a period of 14 days from today.

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