Neutral Citation Number: [2024] EWHC 2120 (KB)

Case No: KB-2024-001774

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Monday, 8th July 2024

Before:

MR. JUSTICE FREEDMAN
Hybrid via CVP

- -

Between:

PERSEUS VENTURES LIMITED	**Applicant/ Claimant**
- and -	
(1) DAVID FOSKETT **(2) RICHARD ALFORD** **(3) EMMA LOUISE ATKINSON** **(4) JOHN DUFFY** **(5) BARCLAYS BANK UK PLC**	**Respondents/ Defendants**

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THE CLAIMANT appeared through its director Martin Walsh **(with the permission of the Court)**

MR. JAMES McWILLIAMS (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

- -

Approved Judgment

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MR. JUSTICE FREEDMAN:

I Introduction

1. This is an *ex tempore* in the sense that I have not committed it to a written document.

2. There are before the court two applications on behalf of Perseus Ventures Limited ("the claimant"). The first, dated 6th June 2024, is an application for an interim declaration under CPR Part 25.1(b) that LPA Receivers have breached their duty by failing to obtain a possession order over residential property and specifically that the LPA Receivership is void from the outset because there was no jurisdiction to appoint over the leasehold property owned by the claimant.

3. The second application is dated 12th June 2024 and that is pursuant to CPR Part 25.1(1)(a) for a "penal" injunction to prevent the defendants from interfering with the claimant's property for the reasons given in and on the terms of the draft order appended with the interim application.

4. It has been clarified that these applications are ancillary to a Part 8 claim form dated 4th June 2024. The applications came before the court on Monday 1st July 2024 and were then adjourned for judgment on Wednesday, 3rd July 2024. However, at the time of that hearing the court required further explanation and information and, as a result, there was further argument. That then led to directions about further submissions to be made by the defendants by 4th July 2024 and by the claimant by 5th July 2024. Those submissions have been made. In addition to that, there have been a number of emails by the defendants with attachments which have been read.

II The Parties

5. The claimant is a BVI company. It is said to be owned by Mr. Walsh. Mr. Walsh is a director of that company. The third defendant, the Bank, has assumed historically that the claimant belongs to Mr Walsh as is evidenced by a guarantee to which I shall refer. Since the last hearing Mr. Walsh has provided documents to the court showing his appointment as a director in 2003 and showing that he became a shareholder in 2016.

6. There has been a question as to whether the court should give a right to Mr. Walsh to have a right of audi the company. The most recent judicial hearing in which that was ventilated was before Collins Rice J on 3rd May 2024. Her concern was as to whether he was authorised to represent the company and she permitted him to represent the claimant subject to an undertaking about the provision of information. The claimant did provide some information by a witness statement provided shortly after the hearing. There was a question as to whether it contained sufficient evidence of his directorship and of his shareholding. When the matter was before the court on 1st July 2024 I required documentary evidence to make that good. That documentary evidence has now been provided and, accordingly, the undertaking before Collins Rice J has been satisfied. I, therefore, in the circumstances, grant Mr. Walsh a right of audience for the

purpose of this application only. Mr. Walsh has conducted hearings from where he lives in Hong Kong acting by CVP.

7. The first defendants are the LPA Receivers.. The second defendants are solicitors acting for the Receivers. The third defendants are the Bank who provided facilities for the claimant.

III Background

8. On 22nd December 2006 Mr. Walsh granted a legal charge over a property, namely 94 Rope Street, Rotherhithe, London SE16 7TF. The charge was in favour of Barclays Private Bank Limited ("BPBL"). It appears that a guarantee was provided in 2006 or 2007 but that has not been disclosed. The rights and obligations of BPBL (including under the charge and the facility) were transferred to the Bank, to the third defendant, pursuant to the Barclays Bank Reorganisation Act 2002 on 1st September 2006. As a result, the charge vested in the Bank and the title of the Property at HM Land Registry was updated on 27th July 2008 to record the Bank as the registered proprietor of the charge in place of BPBL.

9. On 14th February 2008 Mr. Walsh transferred legal title in the Property to the claimant for no consideration. The defendants submit – and I shall return to this – that the transfer to the claimant from Mr. Walsh did not affect the Bank's charge which remained registered as against the title to the Property. Mr. Walsh has submitted that the effect of the transfer of the Property is that the Bank do not have a charge which is valid against the owner of the Property namely the claimant. By a facility letter dated 27th July 2011 the Bank offered the claimant a further loan facility of £600,000 so as to refinance a 2006 facility which had by then expired.

10. By a personal guarantee dated 9th December 2011 Mr. Walsh personally guaranteed the repayment obligations of the claimant to the Bank under a term loan to the Bank. That guarantee was in consideration of the Bank giving or continuing to give time credit and/or banking facilities and accommodation to the client. It was also intended, as is stated in the guarantee, that it would take effect as a deed. It was signed as a deed by Mr. Walsh. It was a continuing guarantee as per paragraph 4.1 and extended to the ultimate balance of the guaranteed amounts and to performance in full of any obligations guaranteed. The guarantee was in respect of time credit and/or banking facilities and accommodation to the client. "The client" meant the claimant. The guarantee was repayable on demand. At clause 2.1 it was provided that under the guarantee the guarantor unconditionally and irrevocably guaranteed to the Bank the payment by the client on the due date of guaranteed amounts in accordance with the financing documents and undertook that if and each time that the client did not make payment of any amount of the guaranteed amounts in accordance with the financing documents, the guarantor should pay to the Bank the amounts not so paid in whatever currency denominated upon first written demand by the Bank.

11. Returning to the legal charge of 22nd December 2006, that is a legal charge made between Martin Walsh and Barclays Private Bank Limited. That legal charge was signed as a deed by Mr. Walsh. Under that legal charge it was provided as follows (and I read out only a part of it):

> "1. The Mortgagor hereby covenants with the Bank that the Mortgagor will on demand in writing made to the Mortgagor pay or discharge to the Bank all moneys and liabilities which shall for the time being (and whether on or at any time after such demand) be due, owing or incurred to the Bank by the Mortgagor whether actually or contingently and whether solely or jointly with any other person and whether as principal or surety including interest, discount, commission or other lawful charges and expenses ..."

12. Under clause 6(a) of the legal charge it was provided as follows:

> "At any time after the Bank shall have demanded payment of any moneys hereby secured or if requested by the Mortgagor, the Bank may appoint by writing any person or persons (whether an officer of the Bank or not) to be Receiver or Manager or Receivers and Managers ... of all or any part of the mortgaged property."

13. There were various powers of the Receiver. Under clause 6(d), it was provided that the Receiver should have the same powers as are conferred by the Law of Property Act 1925. It was stated also that the Receiver should be the agent of the Mortgagor who should alone be personally liable for his acts, defaults and remuneration. It was provided also under (i) that the Receiver had power, among other things: "... to take possession of, collect and get in all or any part of the mortgaged property and for that purpose to take any proceedings as he shall think fit."

IV Appointment of Receivers

14. Letters of demand were sent on 18th October 2017. A letter of demand was sent to the the claimant demanding repayment of a sum of £457,349.85. A letter of demand was also sent to Mr. Walsh as guarantor demanding the same sum. Neither the claimant nor Mr. Walsh paid money pursuant to the demand.

15. On 14th March 2018 the Bank appointed the Receivers over the Property with powers under their deed of appointment and the charge, amongst other things, to manage, take possession of and sell the Property. Following their appointment, the case of the Receivers is that they took steps to sell the Property. They say that their attempts to do so were hampered by the registration against the Property's title of the unilateral notice in favour of White Mid Sloan Limited ("WMSL"), a company claiming to have an interest in the Property and, further, by the occupation of the Property without consent of various residential occupiers who refused to leave the Property voluntarily. This is set out in the first witness statement of Mr. Cooper dated 25th June 20024 at paragraph 40. The Receivers did take possession of the Property on 29th September 2023. They say they did so by peaceable re-entry after having ascertained that the unlawful occupiers had left.

16. The case of the claimant is radically different. It is to challenge the appointment of the Receivers. and I shall later in this judgment set out the basis of challenge to the appointment of the Receivers. It is said that in the course of the next many years that they failed to take any or any reasonable steps to manage the Property or to take

possession or sell the Property due to what is described as "fraud or neglect" on their part. It is said that the Property was held pursuant to a forged lease and that the Receivers failed to act diligently and to protect the position of the claimant as the owners of the Property. In so doing they were in breach of their duty. They failed, in particular, to obtain large sums of rent during the relevant period and it is said that if they had acted with diligence they ought to have been able to collect many tens of thousands of pounds of rent which they failed to do. It is said also that although they claimed that they had collected no rent, in fact a conversation recorded with Mr. Foskett elicited an admission from him that there were at least two or three months of rent that he collected. It is said that in so far as a case has been put to the effect that no rent was collected, that was untrue. The claimant says that it was knowingly untrue.

17. As regards the obtaining of possession of the Property, the claimant's case in respect of that is that the Receivers had claimed that they could not obtain possession without a court order. In fact following the years of the Receivers failing to obtain possession, proceedings were brought by the claimant to obtain possession and they did in fact obtain possession in 2023. The claimant submits that in the event that the Receivers have any entitlement to claim possession, they were bound to make such a claim by a claim to the court and that such application could only be made in accordance with the provisions of CPR Part 55. They therefore submit that the obtaining of possession on 29th September 2023 was a forced entry that was a trespass. They submit that it was a criminal trespass and that they had no right to do any such thing.

18. As a result of that, there have been hearings before the court. Before the current proceedings under Part 18 had been issued, an application dated 30th November 2023 was made for specific disclosure and an interim declaration. That was struck out by Cotter J acting of his own motion on 15th December 2023. The judge struck out the application for specific disclosure. He also struck out the application in relation to an interim declaration unless an application was served by the claimant upon the respondents and unless a statement was served indicating why the court should give permission to Mr. Walsh to represent the claimant.

19. In brief reasons for his judgment he specifically referred to the fact that there was no underlying action for the claim. Cotter J held that an order for specific disclosure can be made in ongoing proceedings but there were no proceedings. There was no application for pre-action disclosure under CPR 31.16 and so the application was found to be misconceived.

20. There was an application dated 16th December 2023 to vary or set aside the order of Cotter J and for pre-action disclosure which came before Collins Rice J on 3rd May 2024. For reasons which she gave in a judgment, she dismissed the application and ordered that the costs of and occasioned by the application were summarily assessed in the sum of £30,808.42 and that they were to be paid by 17th May 2024. An oral application for permission to appeal was refused. In her judgment Collins Rice J referred to pre-action correspondence and to the application before Cotter J. She first considered an application to set aside the order of Cotter J. She said that in her judgment Cotter J was right to hold that the wrong sort of disclosure had been sought. Dealing with the matters that were before her she found that there was no basis for seeking pre-order disclosure under CPR 31.16. The fact, she said, that the claim that was in contemplation extended, for example, to fraud, negligence and breach of legal duties, she could see that details about the leases could be relevant to a claim of this sort but

not that they could avoid or dispose of such a claim. She said the following at the end of paragraph 21:

> "The usual course of events would be that this material and any other to which the claimant is entitled would be disclosed on a mutual basis at the right time after the pleadings had been set out so as to define the dispute."

21. She therefore found that this was not an application that came within the pre-action disclosure provisions of CPR 31.16. She also referred to a broader discretion to order pre-trial declaratory relief. However, she took the view that that could not be exercised unless the matter was urgent or in the interests of justice to do so. She noted that the declaration was about Receivers' fiduciary duties and in her judgment that was not necessary to enable Mr. Walsh to bring the claim that he said he intended to bring: see para 23 of the judgment. She could not see any helpful purpose to either party to attempt to adjudicate upon it before the claim was brought. She also took the view that the appropriate level of urgency was not demonstrated. She therefore refused the applications made by Mr. Walsh and certified them as being "totally without merit".

22. Since those applications a Part 8 claim has now been brought. It was issued on 4th June 2024. There has also been a particulars of claim that have been served. The particulars of claim identify the factual background relied upon by the claimant. The claimant refers to an illegal occupation based upon a forged lease referring to a former business acquaintance of Mr. Walsh who he said forged a lease purporting to be between WMSL and the claimant. WMSL purported to sub-lease to various purported tenants off the back of the forged lease and from then until 28th May 2024 (the date of the particulars of claim) fraudulently obtained rental proceeds.

23. The particulars of claim go on to say that there was a negligent breach of duty by the defendants. Knowing that neither the former business associate nor WMSL had any right to occupy the claimant's property, they failed in their duty to manage the Property including to have obtained vacant possession and they failed to seek possession under CPR Part 55. They then refer to a statement of Mr. Walsh in support of the claimant's application relating to this claim and to Mr. Foskett's alleged state of knowledge that a court case would be taken by the Bank. However, the Bank did not take possession proceedings. This was said to be in breach of duty to the court. Further, it was against this background that the claimant submits that the taking of possession that occurred on 29th September 2023 was without legal process under CPR Part 55, was not just unlawful but was knowingly unlawful. This is alleged because the Receivers and the Bank knew that it was necessary to obtain a possession order in respect of a residential property.

24. It was submitted that owing to the neglect over the many years there was a failure on the part of Receivers to collect and receive over £300,000 in rent. It was a part of the case that: "It is not in any way disputed that the defendants have fraudulently and/or negligently breached their duty": see para 19 of the particulars of claim. Reference was made to a recorded call in relation to the collection of rent further and that Mr. Foskett had confirmed that he did receive rent.

25. As a result of all of this the claimant says that there was (a) a failure to manage the Property, (b) a failure to market the Property; (c) a failure to obtain and account for

rent. The claimant contends that the taking possession of the Property on 29th September 2023 was an unlawful conspiracy in relation to occupied residential property belong to the claimant and which was said by them to be in the occupation of the Walsh family: see especially para 28 of the particulars of claim. There is, therefore, a claim for aggravated breach of fiduciary duty and for criminal damages referred to in paras 29 to 33.

26. In trying to bring together the nature of the claim, the defendants have summarised the contents of the Part 8 claim form at paras 29.1 to 29.6 of their skeleton argument dated 28th June 2024. I shall set this out as a summary:

> "29.1 the Receivers, acting as agents for the Bank, and in conspiracy with the Second Defendant – individual solicitors at Addleshaw Goddard who happened to work on this matter for the Receivers (the 'AG Defendants') – *'fraudulently and/or negligently'* breached '*their fiduciary duty owed to the Claimant by failing to receive over £300,000 (at minimum) in rental income derived from the Property';*
>
> 29.2 the Defendants' *'fraudulent, and or negligent failure to manage the Property and specifically to have sought ramifications against White Mid Sloan Limited and the unlawful occupiers, the purported tenants', who have caused 'criminal damages to the Property' exceeding '£100,000'*;
>
> 29.3. The Defendants broke into the Perseus' Property after '*fraudulently and/or negligently failing to have obtained a possession order under CPR Part 55*';
>
> 29.4. '*acting in conspiracy to defraud, the Defendants sought to leverage [the Bank's] legitimate security over the Property by procurement of a valuable security by deception*' in that the Receivers and the AG Defendants '*seek to make gain and to cause a loss consequential of their dishonest abuse of fiduciary duty, of over £250,000 by levying their fee for fraudulently failing to receive over £300,000 in rent and causing damages of at least £250,000 to the Claimant*; and
>
> "29.5. It is entitled to a declaration that the 'illegality doctrine' 'precludes the Defendants from the right to gain civil restitution in connection with their own legality', and that this applies '*in respect of the Defendants procuring a valuable security founded by their failure to receive, and their illegality by breaking into the Property without having a legal right to have done so*'; and
>
> "29.6. it is entitled to a declaration that '*the Defendants have fraudulently, and or negligently breached their duty causing substantial loss, for which the Claimant must be compensated'*."

27. Returning to the particulars of claim at paras 29 to 33, this refers again to the Walsh family being unlawfully prevented from enjoying their right to occupy the residential

property through illegal acts of breaking and entering the Property and from the changing of the locks. It also refers to sums of money. There is a claim for loss of rental income for the six months and two weeks since the defendants broke in of £42,250. There is a claim for aggravated damages totalling three times that amount plus a quantified claim for loss of rent that the defendants have failed to receive in breach of their duty from 18th March 2018. The finalised quantum claim is said to be between £940,750 and £3 million including interest and accrued costs.

28. It was said that pre-trial disclosure of leases was required and that the court should order the defendants to provide a statement of case containing a schedule of all of the leases in connection with the Property and an accountant's statement showing each and all of the rent sums received by the first defendant from which leases and from which the tenant, for the duration of their tenure, as LPA Receivers. That reference to pre-trial disclosure was in a document dated 28th May 2024 despite the decision of Collins Rice J refusing pre-action disclosure.

29. It will be noted as regards timing, that the application for interim declarations and interim relief has been made shortly after the issue of the Part 8 proceedings and ancillary to the Part 8 proceedings. It has therefore been made at a time when the defendants have not yet been compelled to provide evidence or pleadings in response to the claims. However, there has been in response to the applications a witness statement of Mr. Cooper dated 25th June 2024. That refers at paragraphs 40 to 44 to the allegations in respect of possession. Mr. Cooper says at paragraph 40 that he is advised by Mr. Foskett that following his appointment possession and sale of the Property he could not make progress as there were unauthorised occupiers residing in the Property and the purported tenancy agreement. At that time, Mr. Foskett understood that possession proceedings would be required as a matter of law as the unauthorised occupiers were residential occupiers. However, once the unauthorised occupiers vacated the Property, possession proceedings were no longer required as the Property was empty. The Receivers were said to be within their rights to take possession pursuant to clause 6(d)(i) of the Charge to which reference has been made above. The evidence of Mr. Cooper in the last sentence of paragraph 40 was that he understood from the Receivers that they did so peaceably on 29th September 2023 having attended at the Property and having found no evidence that it was occupied.

30. At paragraph 41 Mr. Cooper says the following:

> "In any event, other than vague references to the 'Walsh family', the claimant has failed to produce any – still less credible – evidence identifying who was purportedly living at the Property or on what basis they were allegedly occupying the Property at the time the Receivers took possession."

31. At paragraph 42 Mr. Cooper said that he noted that following the locks being changed and possession being taken by the Receivers no contact had been made by any individual other than the claimant to claim occupation of the Property or to query why the locks had been changed. Mr. Cooper said that he believed it was reasonable to assume that any person who had in fact been in actual occupation would have challenged the Receivers having taken possession. In any case, at paragraph 43, Mr. Cooper said that if there were concerns regarding trespass at that time, that would be an issue for the occupants to raise themselves.

32. Mr. Cooper also referred to the requests for further information to which reference will be made below. However, at this stage reference is made to paragraph 47 and onwards of Mr. Cooper's statement in respect of a telephone call between an unknown or unidentified representative of the claimant and Ms. Peel of Eddisons. In respect of that call it was stated that Ms. Peel was an employee at Eddisons with a role as director of a department which deals with property security services and insurance compliance. According to the transcript it appears that Ms. Peel was called directly by the representative of the claimant and that the call was recorded. There was reliance upon statements by Ms. Peel as regards the need to obtain a possession order in favour of the Receivers. In Mr Cooper's statement, there was reference to the fact that the communications were aggressive and that it was an honest mistake on her part to refer to the need for a possession order in favour of the claimant.

V The Application for the Interim Declaration

33. The interim declaration can be seen in the form of the order. The claimant seeks an order in the following terms, that there should be an interim declaration on specific terms as follows:

> "(a) The Defendants had no right to take possession of the Property which is owned by Perseus Ventures Limited and even were it owned by Mr. Walsh personally, the Defendants had no right to have taken possession of it to exercise any of their powers granted by the legal mortgage deed without first obtaining a possession order for residential property under Part 55 of the Civil Procedure Rules;
>
> (b) The Defendants had no right to enforce any part of the purported legal mortgage deed over Perseus Ventures Limited or Mr. Walsh because any such action is long past the Statute of Limitations;
>
> (c) And so therefore, the LPA Receivers had no right to seek to apply any costs for the Property, and the Bank's security is declared void and unenforceable."

34. It is stated in the body of the order that the Statute of Limitations applies such as to make any claim for possession statute barred particularly because: (1) the Leasehold Property was transferred by Mr. Walsh to the claimant on 14th February 2008 and it is more than 12 years since then; (2) in so far as the appointment was pursuant to the personal guarantee by Mr. Walsh the personal guarantee was well beyond the Statute of Limitations and was unenforceable. I shall also refer in due course to the further information that is sought in the course of this application.

35. In making an application for an interim declaration I have been referred to relevant law which is as follows: from the case of *Lenovo Group Limited v InterDigital Technology Corporation* [2024] EWHC 596 (Ch) at 35 as summarised by Richards J as follows:

> "(i) An interim declaration is, of course, still a declaration. Accordingly, the court should have regard to the principles applicable to the grant of declarations generally as set out in the

> well-known seven principles set out by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ.
>
> (ii) An interim declaration is a discretionary remedy. It is for the court to consider the proper exercise of its discretion in the case before it.
>
> (iii) Where an interim declaration fulfils a function similar to an interim injunction, it can be instructive for the court to apply principles in *American Cyanamid v Ethicon* [1975] AC 396 by analogy in deciding how to exercise its discretion.
>
> (iv) However, applying American Cyanamid principles will not provide a complete answer in all cases since a court should be wary of granting an interim declaration on matters of substantive law that only permit of a final rather than a temporary answer. That risk is particularly acute where an interim declaration might be conclusive as to whether a particular act amounts to criminal conduct or not. It also arises where a court is being asked to make an interim declaration in relation to the contractual rights of parties to a private law contract.
>
> (v) If a court overcomes its reluctance to grant an interim declaration which is determinative of a particular matter, it is likely to be appropriate to require a 'high degree of assurance' that the applicant is entitled to the declaration sought.
>
> (vi) When considering the exercise of discretion, it is legitimate for a court to have regard to the consequences that would flow if the interim declaration is or is not made."

36. In addition to the above, an interim declaration in relation to the contractual rights of parties to a private law contract is a very exceptional remedy: see *British Airline Pilots' Association v British Airways Cityflyer Limited* [2018] EWHC 1889 (QB) at [26] per Butcher J.

37. As regards the principles applicable to declarations generally, they were summarised by Neuberger J (as he then was) in *Financial Services Authority v Rourke* [2002] CP Rep 14 at p. 11 as follows:

> "It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

38. The court is satisfied on the basis of the information before the court at this stage that the interim declarations are inappropriate. The reasons for this are as follows: (1) the merits of the application; (2) the inappropriateness of such an application at the interim stage; and (3) the factors going to the discretion generally.

1. The Merits of the Application

39. I consider the merits of the application for an interim declaration on the basis of the enhanced approach to merits required by the authorities. The authorities regard the granting of an interim declaration to decide matters that might be conclusive particularly when matters amount to criminal conduct as being matters which, by themselves, might be determinative against an interim declaration. If the court overcomes its reluctance to grant an interim declaration it would be likely to be appropriate to require a high degree of assurance that the applicant is entitled to the declaration sought. In my judgment, if it is the case that it could be appropriate to make an order of an interim declaration, there is no high degree of assurance that the declaration is well based. The reasons for that follow in the ensuring paragraphs.

40. First, it is submitted on behalf of the claimant that the effect of the transfer by Mr. Walsh to the claimant in February 2008 was that there was no longer an entitlement to exercise any rights against the Property. He submits that the crux of the matter is that the transfer took place without any restriction against such transfer and without objection by the Bank. He submits that because the transfer was without consideration that the charge in no longer valid against the Property or that if was valid against the Property that there was only 12 years from the time of that transfer to make any such claim. No such claim has been made and therefore the claim is statute barred.

41. I do not, at this stage, have to determine the matter one way or the other. However, in my judgment there is at the very least no high degree of assurance that the claimant can give to the effect that those submissions are well made in law. The important point is that a transferee takes title subject to pre-existing equities and registered charges. In this case the Charge of 2006 (to which reference has been made above) was an all moneys charge covering existing and future indebtedness of Mr. Walsh to the Bank. It was in respect of: "All moneys shall for the time being be owed and whether or not at any time after demand."

42. What happened here was that before the relevant demand against Mr. Walsh, he had executed a guarantee in 2011 in respect of borrowings then being made by the Bank to the claimant. The guarantee was in respect of the indebtedness of the claimant to the Bank. In those circumstances, the Property owned by the claimant was subject to the pre-existing charge in favour of the Bank against Mr. Walsh. Further, it is no answer that there may have been an earlier guarantee made in 2006 or 2007 in favour of the Bank. That was either superseded by the guarantee of 2011 or there would have been two guarantees in existence. What matters is that the guarantee of 2011 took effect. It does not matter that the guarantee was created after the Charge because of the broad wording of the Charge. The guarantee was for the benefit of the Bank and the Bank had the continuing legal Charge. It therefore followed that in 2017 the Bank made demands against both the claimant and against Mr. Walsh under the guarantee.

43. In my judgment, in those circumstances, the claimant has not shown an argument with a high degree of assurance that the Bank was not entitled to enforce that Charge.. It did so by making the appointment of a Receiver in 2018. I have been assisted in this regard by a further submission made by the Bank dated 4th July 2024. The relevant legal principles are that upon registration a Charge will take effect as a Charge by Deed by way of legal mortgage: see section 51 of the Land Registration Act 2002. Where title is registered the principles that determine the priority of competing interests are

statutory. The basic rule is that the priority and interest affecting a registered estate or charge is not affected by disposition of the estate or charge: see section 28(1) of the Land Registration Act 2002. It makes no difference for the purposes of this rule whether the interest of disposition is registered: see section 28(2) of the Land Registration Act 2002. The effect of the rule is that the date of the creation of an interest determines its priority: the first of the competing interests to be created as priorities, see Megarry & Wade 10th edition at para 6-060.

44. There is an exception to this. If the registrable disposition of the registered estate is made for valuable consideration and then completed by registration and the onus of proving a disposition for valuable consideration rests upon the party asserting it, a prior interest affecting the estate whose priority was not protected at the time of registration, it is postponed to the interests under disposition: see section 29(1) of the Land Registration Act 2002. In other words, the interest created or transferred by the registered disposition takes priority over the prior unprotected interest: see Megarry & Wade, 10th edition at para 6-061.

45. In the case of a transfer which is not for valuable consideration then the person registered as proprietor will accordingly take the registered estate subject to interest protected on the register. Any overriding interests and any other subsisting property interests affecting the estate or charge at the date of registration may not be protected by way of entry on the register irrespective of whether the new proprietor had notice of them and regardless of whether such interest could have been discovered by an inspection of the land: see *Halifax v Curry Popeck* [2008] EWHC 1692 (Ch).

46. In this case the Charge was granted by Mr. Walsh on 22nd December 2006 over the Property as security for his obligations to the Bank. The Charge was duly registered against the title to the Property on 20th July 2007. Accordingly, when Mr. Walsh transferred the Property to the claimant pursuant to the TR1 dated 14th February 2008 the claimant took the Property subject to the prior registered interest of the Bank as registered proprietor of the Charge. The priority of the Bank's interest over that of the claimant occurred in circumstances where: (1) the Bank's interest was created first in time; (2) the Bank's interest was registered; and (3) the claimant received the Property as a volunteer and for no consideration. It is to be noted that in Box 8 of the TR1 Mr. Walsh confirmed that: "The transfer is not for money and anything which has a monetary value".

47. It therefore is the case that the Bank remained entitled to exercise its rights and powers under the Charge over the Property including but not limited to the power to appoint the Receivers pursuant to clause 6(a).

48. Likewise, the claimant is unable to give a high degree of assurance that it will succeed in its case about limitation. The reasons for this are as follows. The question concerns the right of the Bank against Mr. Walsh. The obligation in question is the obligation under the personal guarantee of 2011. For the reasons that I have given, it is irrelevant whether there was an earlier personal guarantee in 2006 or 2007. The claim was made under the personal guarantee of 2011. That guaranteed the liabilities of the claimant to the Bank. The moneys were called in by the Bank against the claimant on 18th October 2017. The demand under the guarantee was made on 18th October 2017. The relevant limitation period from then is a period of 12 years under the deed. It is not a period that

goes back to the time of the guarantee, nor is it a period that is the usual contractual period of six years, but it is a period for an agreement under deed which is 12 years.

49. It therefore follows that as of the time when possession was taken and as of now and for years to come there is no high degree of assurance that the claim is statute barred. This is not affected by the provisions of section 15 of the Limitation Act 1980 on which Mr. Walsh relies because this is a claim on the indebtedness under the guarantee. In the course of the submissions made on behalf of the defendants it is submitted that the court should rule that none of the matters raised by Mr. Walsh have any real prospect of success. There is not any application to strike out at this stage and it is not necessary to do that for the purpose of this application, the purpose of this application being an application in respect of interim declarations. There should be at least a high degree of assurance that it will succeed. In my judgment, that is not made out.

2. Inappropriateness of Declarations in Respect of Private Law Claims

50. Applying the law set out above, it is inappropriate, given the reluctance of the court to grant a declaration in respect of a private law claim. That, in my judgment, applies in this case. It would have to be an exceptional remedy and there are no reasons that make this case in any way exceptional. The matters that are raised in this case, the assertions that are made on behalf of the claimant, there are clearly disputes of fact and these matters, in so far as they raise triable issues, they would have to be gone into in the usual way. There is no reason why the matter should be dealt with at this stage. There is no useful purpose to grant an interim order at this stage.

3. Broader Matters of Discretion

51. Looking at the matter more broadly, even if it had been the case that there was a case for an interim declaration, in my judgment, damages would be an adequate remedy. If I am wrong about that, there is no evidence that the claimant would be good on a cross-undertaking as to damages. In my judgment there should be no interim declaration in relations to these matters.

VI The Interim Declaration Relating to the Taking of Possession of the Property in September 2024

52. It is submitted on behalf of the claimant that the possession was demonstrably wrongful. I have referred to matters in relation to that in the analysis of the history of this matter. I have taken into account all of the matters on which the claimant relies but I have regard without prejudice to the generality of that to the following matters:

(1) It is submitted that generally CPR Part 55 ought to apply;

(2) The Receivers are said to have acknowledged this in the course of these recorded conversations;

(3) The Walsh family are said to have been occupiers and are said to have been in residence in the Property;

(4) It is said to be an important principle in those circumstances that the defendants have no right to take possession of the Property without obtaining a possession order and that

the court ought to make such a ruling having regard to the importance that is attached to the residential rights of occupiers of premises.

53. Here too, there is no high degree of assurance that any of the above is correct. The reasons for this are as follows. The general rule is that subject to contractual or statutory limitations a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed by virtue of the estate vested in him: see Megarry & Wade 10th edition at para 24-025 and Fisher and Lightwood's Law of Mortgage 15th edition at para 29.2. The mortgagee is entitled to possession without notice or demand subject to statutory or contractual restrictions without a court order: see *Ropaigelach v Barclays Bank Plc* [2000] QB 263 at 282 per Chadwick LJ. Receivers appointed by a mortgage under an appointment and charge that confers the requisite powers are similarly entitled: see *Pask v Menon* [2020] Ch 66 at [14] to [15].

54. There is a statutory restriction on a mortgagee from taking possession without a court order in respect of regulated agreements, regulated mortgage contracts and consumer credit agreements. This is under section 126 of the Consumer Credit Act 1974: see Megarry & Wade 10th edition at para 25-025. However, the relevant lending in this case is lending from the Bank to a limited company that does not come within those provision. A guarantee if given by an individual is not in itself a credit agreement because credit is not provided pursuant to that agreement.

55. In the circumstances that occurred there is no high degree of assurance in this case that the Bank was not entitled to exercise its possession peaceably on 29th December 2023. That is not affected by the fact that as between the claimant and the unlawful occupiers, the claimant obtained a possession order against them. As regards the evidence in respect of the Walsh family, the assertion that the Walsh family was in occupation, at this stage I do not find that there is a high degree of assurance in respect of that assertion. It is not backed up by evidence by relevant members of the Walsh family. Mr. Walsh is in Hong Kong and the relevant people at the relevant time when it is said that they were in occupation have not been identified. Further, the information provided by Mr. Foskett was that at the relevant time there was nobody who was occupying the premises.

56. I accept the arguments that are raised at paras 42 to 43 at this stage, namely that absent complaint from any individual to claim occupation of the premises or any complaint by any individual about the locks being changed, there does not appear to be substantial evidence to show that the Property was being occupied at the relevant time. I do not exclude the possibility of these matters being revisited at a later stage. I am simply considering the matters for the purpose of an interim declaration at this stage. In my judgment there is not a high degree of assurance of a claim the Receivers were acting unlawfully such that an interim declaration would be appropriate. In any event I come to the conclusion here too that there is no reason to have an interim declaration in relation to contractual rights of parties given the very exceptional nature of the remedy. Here too I also take into account the fact that damages appears to be an adequate remedy. To the extent that it is not an adequate remedy, there is no cross-undertaking as to damages that appears to have any value in this case.

57. For all these reasons I reject the application for the interim declaration. I shall refer, after looking at the question of the injunction sought, to the applications for further information and disclosure.

VII The Injunction Application

58. The injunction which is sought at this stage is an order that:

> "This Order injuncts and restrains the Respondents or anyone acting on their behalf prohibiting them or their agents from being within 50 metres of the Applicant's Property and from interfering with the Property without a further order of this court and an order for possession of the Property pursuant to Part 55 of the Civil Procedure Rules 2020. The Respondents or anyone acting on their behalf must comply with this paragraph."

59. This order is, in effect, an order to reverse the existing status quo. Possession has been taken of the Property. It is not simply an application to restrain the respondents from being within the Property but it is tantamount to an injunction to desist from selling the Property and an order that possession be given up of the Property.

60. In my judgment that has characteristics that are analogous to a mandatory injunction and, in the circumstances, the court would be entitled to require a high prospect of success in relation to such an injunction: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 and *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468. If I am wrong about that, in the alternative, the Court considers this on the basis of the balance of convenience. I shall assume for this purpose that there is a serious issue to be tried, albeit that I make no finding that one exists.

VIII Damages as an adequate remedy and related questions

61. If one gets beyond the question of the prospect of success the questions which then arise are the following questions:

(1) If the claimant were to succeed at trial in establishing a right to a permanent injunction, would the claimant be adequately compensated by an award of damages;

(2) If damages would not provide an adequate remedy for the claimant the court should consider whether if the defendants succeeded at trial they would be adequately compensated under the claimant's undertaking as to damages if they would and the claimant was in a financial position;

(3) Where at the start as to the adequacy of the respective remedies and damages available to either party or to both the question of balance of convenience arises.

62. Where other factors appear to be evenly balanced, the court should take steps to preserve the status quo. Further, in such circumstances, the court may as a last resort turn to the merits of the case.

63. In my judgment as regards the interests of the claimant, damages would adequately compensate the claimant. The evidence in relation to any individuals affected, whether members of the Walsh family or others, is not sufficiently substantial for that to weigh

significantly with the court. In those circumstances there is no basis for an injunction because the matters can be dealt with by an award of damages.

64. If that is wrong and damages would not provide an adequate remedy for the claimant, I am satisfied that the claimant has not shown that the defendants could be adequately compensated under any undertaking as to damages of the claimant. There is no evidence that has been provided as regards the claimant's resources. The claimant is a BVI company. The claimant appears, on the face of it, to have been in debt to the claimant of a sum of about £457,000 at the time of the demand in 2018 and there is no evidence of any further sums having been paid.

65. The claimant would say about this that they have counter-claims that are equivalent to or greatly exceed the amounts that are claimed by the defendants. Those are matters which are highly contentious and would depend upon a trial in respect of those matters to substantiate them. There is no reason to rely on such contentious matters to support an assertion that the claimant is good for an undertaking as to damages. I am not satisfied on the information currently before the Court that the claimant is able to substantiate a cross undertaking as to damages.

IX Balance of Convenience

66. If in fact one then has to turn to the general balance of convenience, in my judgment that is heavily in favour of the defendants and against the claimant. In that regard I turn back to the decision of Hoffmann J (as he then was) in the case *Film Rover* who said the following at page 680E:

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make wrong decision in the sense of granting an injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong in the sense I have described. The guidelines for interlocutory injunctions are derived from this principle."

67. In my judgment if an injunction is granted then there is a high risk of injustice to the defendants. That injustice would come from being unable to take steps to continue to seek to sell the Property. It would arise from the fact that in the period that then follows it would be unable to take steps with a view to reducing the amount of the indebtedness which it says is owed by the claimant to the defendants. Further, at a trial, if it is the case that the defendants will succeed, there is no prospect on the basis of the information before me that the claimant will be able to compensate the defendants pursuant to the cross-undertaking as to damages. The totality of that injustice is to be balanced against the course for which the claimant seeks the injunction. The only effect of that injunction would be that some occupation would be available of the Property in favour of the claimant.

68. For the reasons that I have given, I have discounted on the basis of the very limited evidence any rights in respect of the Walsh family which have not been adequately evidenced in the papers before the court. In any event, the defendants are able to compensate the claimant in damages in respect of and to the extent that there would be losses on the part of the claimant in not being able to occupy the Property.

69. In my judgment, when one looks at the balance of injustice in this case and applies the dictum of Hoffmann J, there is a far lower risk of injustice in the event that the court refuses the injunction than in the event that it granted the injunction.

70. That then leaves two other matters relating to the balance of convenience that simply confirm that point. The first is that whatever was the status quo in September 2023, the status quo now is that the Receivers have taken possession of the Property. The claimant says that he has been making attempts at an earlier stage in these seven or eight months to get possession back. However, he has been taking steps that have been found to be wrong steps by both Cotter J and Collins Rice J and therefore the only effective step has been this application for an injunction which has been made more than seven months after the possession was obtained. The maintenance of the status quo is therefore a consideration which goes in favour of the defendants in this case. If all the matters in relation to the balance of convenience were said to be equal, and in my judgment, that is far from the case for the reasons that I have given, then the merits of the case come into being.

71. In my judgment, from everything that I have read, the merits of the case are very strongly in favour of the defendants' position albeit that I will not make any final determination in relation to that at this stage. It is simply a consideration on the basis of all the information that is before the court. It therefore follows that the application for an injunction is dismissed.

X The Applications for Information and for Documents

72. In the declaration application that which is sought is further information in relation to who it was that instructed the possession to be taken of the Property on 29th September 2023 and clarification in relation to the information that Mr. Foskett spoke about and the conversation of the 18th August 2023 in respect of not obtaining possession. There is also sought information in relation to matters relating to Mr. McWilliams, counsel for the defendants.

73. In the injunction application what is sought is information relating to what was said by Ms. Peel about the right to take possession. It was also said that Ms. Peel had seen a possession order in the name of Mr. Foskett and Mr. Alford and that the disclosure of the material in relation to that was sought.

74. In my judgment the court should refuse all of this material. As was said by Cotter J and Collins Rice J, pre-action disclosure is inappropriate but, further, the time for disclosure, as was said by Collins Rice J, is after the pleadings or first rounds of evidence have taken place when disclosure usually takes place. There is no basis for an early disclosure in this case. In any event, in circumstances where there are disputes between the parties, it is necessary to have formulated what the disputes are in order to understand what is the disclosure and the further information that is required.

75. Further, and in any event, the request is not necessary in this case for the claimant to be able to formulate its case. It is clear that it takes issue with the fact that possession was taken of the Property. There has to be a legal basis for that. The matters that are sought do not go as to whether or not there is a legal basis. Whatever the state of mind of Mr. Foskett or Ms. Peel or the advice that they were given does not, in the end, determine whether the claimant can formulate its case. In any event, it says that the possession was unlawful and it therefore does not depend upon any early disclosure or early provision of information.

76. Further, the request is not reasonably necessary for the claimant to understand a case it has to make nor could it be. As regards the attempts to seek information from counsel, there is no jurisdiction under CPR Part 18 to order the provision of further information from anyone other than a party to the proceedings. Defence counsel is not a party. The information sought was not reasonably necessary for the claimant to formulate its own case or to understand the case it has to make. It is an attempt at cross-examination of Mr. McWilliams and it impermissibly trespasses on matters of privilege.

77. Further, I refer to the submissions made on Friday, 5th July by Mr. Walsh in this regard when he says that there can be no fair trial in the absence of disclosure. That might be the case in respect of a trial of the action as a whole, but it does not, by itself, allow for disclosure prior to the action or to early disclosure. There is an assumption that underlies the claimant's application (and I quote from paragraph 9 of his document of Friday, 5th July): "There is no dispute of fact that the Defendants have fraudulently and/or negligently breached their duty causing loss to the Claimant."

78. There is every dispute in relation to that and the flaw of the application is the assumption that that is the case. There is in fact no reason to believe in this case that disclosure will prove fraud or that the effect of disclosure would be such as to remove the need for a trial in this regard. Likewise, in similar vein, the claimant's case is that the Receivers have undoubtedly breached their duties. However, that is to be established. In order for the Receivers to have breached their duties, it will be necessary to know more about: first, what were the precise duties alleged; secondly, precisely how they had been in breach of it; thirdly, if they had been in breach of it, what would have occurred; and fourthly, what were the losses?

79. It is necessary, having regard to cases like *Medforth v Blake* [2000] Ch 86 to have a discipline about showing the nature of the duty, the breach and the loss in order to advance such a case. The premise that there are undoubted wrongs that have occurred is one that is unsustainable in the sense that the duty, the breach and the losses have to be established.

80. Finally, there are allegations made that not only is the claimant dissatisfied with Collins Rice J's judgment, but he makes very serious allegations about her judgment. It is not for this court to deal with those matters. First of all, any such matter would be by way of an appeal to a higher court. There is no application under CPR 3.17 for variation of that order. It is also impossible for the court to see what the evidential foundation there is for the type of characterisation that has been made of her judgment.

XI Conclusion

81. I return, finally, to the conviction of the claimant that there has been widespread fraud in this case by Receivers, by solicitors, by counsel and by judges. He is right to say that fraud may unravel the law but also fraud has to be precisely formulated and proven. It is rare for fraud to be proven summarily and without a trial. It is not the case that fraud is proven simply by repeating the allegation many times.

82. It is important to analyse what is the precise fraud at each stage and whether the fraud then translates into a particular cause of action and what is the appropriate relief. If there was a false statement that had been made about rent, it is important to know what is the consequence. If possession had been taken without a court order, the question would then be where that took the matters in dispute between the parties. If it is believed that there were lies told in a court application, it is then necessary to analyse what is the consequence of all of that.

83. The current applications are interim applications. The claimant appears to assume that any misinformation has automatic consequences including interim declarations or interim injunctions. The matters that are before the court are in fact unestablished allegations with unestablished consequences. The court is not at this stage striking out the claim. That is not before the court. What is before the court is applications for interim declarations and interim injunctions.

84. For the reasons which I have given the applications are not well based and therefore they are dismissed.

(For continuation of proceedings: please see separate transcript)

(This Judgment has been approved by the Judge.)

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