



Neutral Citation Number: [2019] EWHC 977 (Fam)

Case No: 2018/0173

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

**ON APPEAL FROM THE FAMILY**  
**COURT SITTING AT BROMLEY**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/04/2019

**Before :**

**MR JUSTICE COHEN**

**Between :**

**ROBERT MICHAEL ALFRED GRANDISON**

**Appellant**

**- and -**

**MERLE CECILIA JOSEPH**

**Respondent**

**Mr F Feehan QC** (instructed by **Stowe Family Law**) for the **Appellant**  
**Mr A Bojarski** (instructed by **Winckworth Sherwood**) for the **Respondent**

Hearing date: 1<sup>st</sup> April 2019

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
MR JUSTICE COHEN

**The Honourable Mr Justice Cohen :**

1. On 23<sup>rd</sup> October 2018 Her Honour Judge Redgrave sitting at the family court at Bromley ordered that unless Mr Grandison, now the appellant husband, by 23<sup>rd</sup> April 2019 transferred the legal title to 42 properties from either the joint names of the parties or the wife's name into his sole name and obtained the release of his former wife from her obligations under the mortgages on the properties the properties shall be placed on the market for sale.
2. The husband seeks to appeal on three grounds as follows:
  - i) That there was no requirement in the underlying order requiring him to transfer the legal, as opposed to beneficial, ownership of the properties from either the wife's name or joint names into his own name;
  - ii) That the judge was wrong to place a time limit on the requirement that he use his best endeavours to obtain the wife's release of her obligations under the mortgage and/or that he had failed to use his best endeavours;
  - iii) That the judge should not have ordered a sale under Section 24A of the Matrimonial Causes Act 1973 as it amounted to a major variation of the final order in the case.
3. Background

The parties commenced their cohabitation in 1990. They did not marry until 2006 and the marriage broke down in 2009. During the course of the relationship the parties built up a portfolio of 127 properties, most if not all of them heavily mortgaged.
4. Upon the breakdown of the marriage and in the course of financial proceedings in 2013 they agreed that the portfolio would, in broad terms, be divided equally between them in terms of value and income. They reached heads of agreement but fell out as to how the agreement was to be implemented and in particular how the properties were to be divided between them. This eventually led to a hearing before District Judge Wilkinson in October 2014.
5. An additional issue was as to whether there was to be a fixed date by which each party must have secured the release of the other from joint mortgages. The District Judge found that might have the effect of forcing upon the parties the obligation either to sell their respective properties or re-mortgage them at unfavourable rates and so he declined to order that there should be a fixed date (paragraph 14(v)) of his judgment) but at paragraph 15 of his judgment he suggested that the transfers of the properties into the sole name of the parties should be achieved by 1<sup>st</sup> March 2015, namely some 4 months after the date of his judgment. The District Judge then left it to the parties to agree the order and to draw up the overarching deed which was necessary.
6. Over the course of most of the next 12 months the parties were engaged in deep negotiation. Matters were not concluded until an order made on 10<sup>th</sup> September 2015 which incorporated a deed ostensibly dated 16<sup>th</sup> October 2015 but which plainly was

in existence prior to the making of the order. The construction of the order and deed is at the core of what I have to decide.

7. On the same date that the order was made, the decree nisi which had been pronounced as long ago as 2011 was made absolute. Notwithstanding, I shall continue to refer to the parties as husband and wife.

8. The Order

i) Each party undertook to use best endeavours to procure the release of the other from any liability under the mortgage secured on the properties that were to be transferred to him/her (paragraph 6(iii) for the husband's undertaking).

ii) Paragraph 9 of the order recites "*by way of property transfers, the property portfolio shall be divided between the parties forthwith in accordance with the property schedules annexed to this order and the deed*"

The schedules provided that the wife was to end up with 60 properties and the husband with 67.

9. The Deed

i) Paragraph 2 reads as follows, "*Exchange of properties: Ms Joseph and Mr Grandison as beneficial owners hereby transfer by way of exchange the properties set out in schedule 2 ...*"

ii) Paragraph 7 of the deed provided for the transfer of freehold properties and paragraph 8 for the transfer of leasehold properties.

iii) Paragraph 9 reads as follows: "*Completion: Completion of each property being transferred will take place on the first working day of the month falling at least 28 days after the date of the final order in the matrimonial proceedings in Bromley County Court*". The effect of this provision was that completion should take place on 1<sup>st</sup> November 2015. "Completion" was not defined.

iv) Paragraph 18 recites: "*Obligations by Mr Grandison: Mr Grandison shall... (c) use his best endeavours to procure the release of Ms Joseph from any obligations to the mortgagee in respect of each mortgage that is registered against Mr Grandison's properties*".

10. Transfer of Title

It is the husband's case that the order and deed provided only for the transfer of the beneficial interest in the properties and not the legal interest. Mr Bojarski on behalf of the wife describes this submission as surprising. He rightly points out that it was no part of the husband's case when the wife sought to enforce the order in 2016 and Mr Feehan QC, on behalf of the husband, did not demur when I suggested that this argument had not even been considered by his client until his ingenuity alighted upon it. That does not of course absolve me from having to properly consider the argument.

11. Paragraph 9 of the order, set out above, is curiously drafted in the sense that it does not use the conventional words of a transfer of property order. But it is clear, in my judgment, that its intention was to be a property transfer order. It is to be noted that there was no limitation on the extent of the transfer or suggestion that it was a transfer only of a beneficial interest. If it was intended to provide only for the transfer of beneficial interest then I would expect it to say so.
12. Paragraph 2 of the deed is important. The parties on the signing of the deed “hereby” as beneficial owners transferred by way of exchange the properties set out in the schedule. Mr Bojarski is right in saying that the beneficial ownership transferred at the latest on the signing of the deed but indeed very probably on the making of the order. Mountney v Treharne [2002] FLR 930 is clear authority that beneficial interests are transferred at the moment when the order takes effect, namely on its making subject only to the decree absolute. In this case that would have been 10<sup>th</sup> September 2015, the confusion only being caused by the date of the deed which appears to have been post-dated.
13. Mr Feehan seeks to argue that the references in the deed to completion refer to completion of the transfer of the beneficial interest only but I regard that as unsustainable. Not only was it a point not taken until 2018, which is indicative of the parties’ state of understanding, but it runs plainly in the face of the wording of paragraph 2.1 of the deed where completion is provided to take place significantly after the beneficial interest had already been transferred. Completion can only refer in that context to completion of the transfer of the legal interest.
14. I do not consider that the references elsewhere in the deed to completion make any difference to this fundamental point and nor am I impressed with the argument that the timescale for completion of the transfer of so many properties would have been too brief to have made compliance possible. The difficulty with this argument is that, first, the deed had been in existence for a substantial period of time before the order was made and so that the parties were well able to have put the process under way before the order was made and further that the fact that completion of the transfer of the legal interest might have been delayed does not negate the requirement for it to take place. It is to be noted, and I will return to it, that the wife did transfer all her legal interest in the properties that were going to the husband, albeit not by 1<sup>st</sup> November 2015.
15. This is brought into further focus by the application made by the wife for enforcement of the order which came before Her Honour Judge Redgrave on 20<sup>th</sup> September 2016. Paragraph 15 of her judgment recites that the wife had re-mortgaged the properties in which the husband was joint mortgagor and which was agreed should be part of her portfolio, thus securing his release from his obligations under the mortgages, and had affected the transfer into her name of the jointly owned properties. There was no suggestion from the husband that he was not under a similar liability.
16. In September 2017 the wife again asked the husband to arrange for the transfer of the legal title of the properties allocated to him into his sole name. She pointed out that not only was she having to deal with freeholders of properties in which she had no beneficial interest but that she was also losing out on her ability to take advantage of the leasehold enfranchisement legislation because of her name appearing as a legal

owner of an excessive number of properties in the relevant block when in fact she had no beneficial interest. Her approach to the husband brought no success.

17. The husband says that it causes the wife no detriment if the properties remain in her name as he has given a full indemnity. Whilst it may be that the financial burden that she suffers is limited, it is plainly a cause of some loss in the way that she sets out, but it also leaves her being presented on what she describes as “a day to day basis” with correspondence in relation to the properties and mortgages that she should no longer have anything to do with. Bearing in mind how long ago the parties separated and reached agreement, including a clean break, this is not in my judgment the de minimis point that the husband suggests.
18. The meaning of best endeavours  

When this matter came before Judge Redgrave in September 2016 she urged the husband to do what the wife had done, namely to re-mortgage or otherwise arrange for the wife to come off the mortgages of the properties that were the husband’s, and warned him that if he did not do so, he might face a further application for sale. The husband had by then re-mortgaged, principally to buy himself a new home, and had transferred into his sole name 19 of the properties that he did not previously own outright and which were “his”. 2 had been sold. He accepted at the hearing that he was liable to deal with the other 42 properties which remained either in the wife’s name or in joint names.
19. The husband’s case is that authority shows that when looking at best endeavours in the context of commercial contracts a party is not obliged to enter into an arrangement or take a step which would cause significant financial loss. Exactly the same principle, he says, applies to this case in which the deed was a carefully constructed commercial arrangement.
20. Mr Feehan relies in particular on IBM v Rockware Glass [1980] FSR 335. This is a Court of Appeal case from 1976. Mr Feehan invites me to adopt the test used in that case namely “*what would an owner of the property who was anxious to obtain planning permission, do to achieve that end? The formula ... is that he is bound to take all steps in his power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result would take*”. I was referred further to Butcher v Hill [2015] EWHC 1703 (TCC) and Astor Management AG [2017] B USLR 1634 a decision of Leggatt J, as he then was. At paragraph 71 the judge said “*I do agree that a court will be very slow to second guess a commercial party on matters of commercial judgment for that reason, it may in many circumstances be extremely difficult or impossible to show that a party ought reasonably to have pursued a negotiation with a particular lender or accepted a given offer or proposed lower rate of interest – to take the examples given by the defendant’s counsel but it is important to remember that the burden of proof is on the party alleging failure to comply with the obligation*”.
21. The efforts that the husband had taken to secure the wife’s release from the mortgages or obtain the transfer of the legal title of the properties into his sole name were the subject of discussion before the judge at the hearing on 7<sup>th</sup> September 2018. At the end of the hearing the judge asked the parties what if any repercussions there would

be for the husband if she simply ordered the court to sign the documents to affect the transfer of the relevant properties into the husband's sole name whilst leaving the mortgages as they were. The judge referred to the power of the parties to affect a transfer using an AP1 upon sending a copy of the court order to the Land Registry. The parties were each given the opportunity to file further evidence on this issue and the husband's response was that, by reference to the mortgage deeds, effecting a transfer of the legal title would trigger a breach of the mortgage contract.

22. At paragraph 8 of her judgment, Judge Redgrave pointed out that the court has an unfettered statutory power to order the transfer of property pursuant to section 24 of The Matrimonial Causes Act 1973 and that power is not subject to the consent of mortgagees who have a right to be notified of any application for transfer and a right to be heard on an application but not a right to veto. She went on to say that a transfer of property order made by the court is an independent act and does not amount to a breach on the part of the husband to the terms of any particular mortgage contract.
23. Of course, there was nothing to prevent the husband from approaching the mortgagees and asking for their consent, either independent of or pursuant to the court order, to the release of the wife from her liability under the mortgages in exchange for the transfer of the properties to his sole name, or indeed simply effecting a transfer by means of an AP1. There was no evidence and it was not suggested that he has ever taken these obvious steps. This was an egregious omission on his part.
24. Bearing in mind that the wife had secured the release of the husband from the mortgages on her properties and transferred the legal title, and the husband had done or sought to do neither, it was hardly surprising that the judge formed the view that the husband was in breach of his liability to transfer the properties.
25. So far as the mortgage releases are concerned, the husband's principle argument on appeal has been based around a letter from his mortgage advisors which is undated but is agreed to have been produced in July 2018 after the wife had made her application for implementation of the order but before the hearing. The letter says this:

*"We are proposing to re-finance a further 42 properties [i.e. the ones that remained outstanding in terms of the mortgage release and transfer] to a different mortgage provider. Due to the number of properties involved, I expect to receive the mortgage offers in approximately 8-12 weeks from application (which is yet to be made). I expect that the re-mortgage process will take a further 8-12 weeks to complete"*.
26. The letter went on to say that the new rate for the mortgages would be significantly higher than the current interest rates to the extent of costing the husband a further £7,000 per month. This was exclusive of legal fees and mortgage fees of just under £114,000.
27. The judge rightly observed that the husband's objection was not that he could not secure the release of the wife from the mortgages but that it would be a very expensive process for him. She also correctly pointed out that the best endeavours provision contained no qualification - for instance, that it should be at minimal cost to him.

28. The wife produced evidence which suggested there were more competitive rates available which the husband's advisors said he would not be able to obtain. She also pointed out that several of the mortgages were set to expire in 9-12 years and as they were interest-only mortgages she was concerned that there might be a shortfall for which she might be held responsible. The judge accepted that her continuing to be liable for borrowings over which she had no control in respect of property in which she had no beneficial interest was potentially threatening to the ongoing success of her business and her future financial security.
29. The amount of information provided by the husband to the court was inadequate in a number of respects. There were no business accounts indicating how easily the increased borrowing could be sustained; there was no evidence as to the amount by which the rental income of the property had increased; there was no indication of capital value of the portfolio.
30. In my judgment, the judge was plainly right to find that the husband had not used his best endeavours – indeed he had used no or next to no endeavours at all to obtain the wife's release from the mortgages. She was right to reject his argument that he was entitled simply to rely on his mortgage brokers' assertion that a re-mortgage would be at a much greater rate. He had not taken the elementary first step of seeking their agreement for the wife's release from the mortgage with a corresponding transfer of property into his name. And, as the judge rightly pointed out, re-mortgage was not the only way of removing her liability from her. Sales of property were plainly an option as well.
31. Before leaving the subject, I accept Mr Feehan's argument that best endeavours does not fall to be construed differently in commercial and family cases. However, each agreement must be seen in the context in which it arises, which in this case is that of a final order in financial proceedings agreed many years ago and which had been implemented by one of the parties but still not implemented by the other.
32. Power to order a sale  

Mr Feehan had to accept that the court had the power to order a sale of the properties, but said that it should not be utilised except in "extreme circumstances" by which he meant in the plainest possible case of deliberate breach by the husband in circumstances when it would have cost him nothing to comply. And, in considering sale he says the judge should have considered the relative impact on the parties, the wife being left with a liability which he described as being in effect notional and the husband severely impacted upon.
33. I reject Mr Feehan's argument that what the judge achieved by making an order for sale was a variation of the original order. This was an implementation of a long outstanding order in circumstances which the judge had found were created by his failure to use best endeavours. To say that the court was in effect toothless in these circumstances cannot be right.
34. The judge gave the husband six months to do what was required before facing a sale. It is open to the husband to apply for an extension of time from the judge if that is the course that he wishes to take. But, bearing in mind that he was put on notice in 2016

that he needed to address the problem, it seems to me that the order made by the judge was plainly one within her discretion.

35. Having heard the appeal in full with the agreement of the parties, I consider it appropriate to grant permission to appeal, but I dismiss the appeal.