

Neutral Citation: [2024] EWHC 2653 (KB)

Claim No. LM-2022-000232

**IN THE HIGH COURT OF JUSTICE
LONDON CIRCUIT COMMERCIAL COURT**

**Royal Courts of Justice
Strand
London, WC2A 2LL**

Heard on: 1st October 2024

Judgment given on: 28th October 2024

**Before:
MASTER YOXALL
(Sitting in Retirement)**

BETWEEN:

**(1) LOWRY TRADING LIMITED
(2) SAS FINANCING LIMITED**

Claimants

-and-

**(1) MUSICALIZE LTD
(2) BENJAMIN DELANO ANDERSON
(3) SOPHIE KATE ANDERSON
(4) MUSICALIZE TOURING LTD
(5) MUSICALIZE TOURING EVENTS LIMITED (in liquidation)**

Defendants

-and-

MS SUZANNE FISHER

Third Party

Representation

For the Claimants: Mr. Lee Jia Wei of counsel, instructed by ARMA Litigation

For the Third Party: Mr. Daniel Gatty of counsel, instructed by Wykeham-Hurford Sheppard & Son

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10.30am on 28th October 2024

1. This is the Claimants' application for an order that an interim charging order on land be made final.
2. Mr. Lee Jia Wei, of counsel, appeared for the Claimants and Mr. Daniel Gatty, of counsel, appeared on behalf of Ms Suzanne Fisher who has been treated as a Third Party for the purposes of this application. She is the freehold owner of the land and opposes the making of the charging order. She has no other involvement in the dispute between the Claimants and the Defendants.
3. I must state at the outset that I am truly grateful for the written and oral submissions of counsel. The skeleton arguments of counsel should be read with this judgment. I hope that I shall be forgiven for not rehearsing their arguments in full.
4. The Claimants contend that the Second and Third Defendants, Mr. and Mrs Anderson, have a beneficial interest in the land which is the subject of the interim charging order which has been made. I shall refer to these Defendants as the Andersons. They provided a joint witness statement for the purposes of the hearing before me but made no oral submissions and only attended (by MS Teams) to observe the proceedings. The Andersons do not support or oppose the making of the charging order and do *not* allege that they have a beneficial interest in the land. They state that they are now simply tenants. In addition to their witness statement, by letter to the court dated 19th June 2024, the Andersons confirm that the property is not their asset and that "ownership of the house belongs entirely" to Ms Fisher. They state that following legal advice, they will now be applying for the unilateral notice on the property to be removed. "This should have been removed following our failed completion," they state.

The Background

5. By an order of HHJ Pearce, sitting as a Judge of the High Court, made on the 20th March 2024 the Claimants obtained summary judgment against the Defendants.¹ On the 23rd May 2024, Master Thornett made an interim charging order for over £6.3m against the Anderson’s beneficial interest in land known as Openshaw in Orpington, Kent [“the property”]. Openshaw is a substantial residential property.
6. The Claimants contend that the Andersons have a beneficial interest in Openshaw as purchasers under a contract of sale of land – which sale has never completed. The Claimants contend that the contract for sale remains in force.
7. By a contract dated 9th January 2019, Ms Fisher agreed to sell the property to the Andersons for £2.65m. Ms. Fischer herself held the property subject to a first charge with the Bank of Scotland.² The Standard Conditions of Sale, 5th edition, applied. The contract provided for completion on the 30th September 2019. As agreed, the Andersons paid a deposit of £100,000.
8. It is to be noted that Standard Condition 1.5.1 states that the buyer is not entitled to transfer the benefit of the contract. Standard Condition 1.5.2 states that the seller cannot be required to transfer the property in parts or to any person other than the buyer.
9. Ms Fisher agreed to let the Andersons into possession of the property pending completion. She granted an assured shorthold tenancy to the Andersons at £8,000 a month starting on 14th January 2019 and ending on 13th September 2019.³ The evidence is that the Andersons paid the rent from January 2019 to April 2024.
10. The Andersons failed to complete on the 30th September 2019. Accordingly, Ms Fisher served a notice to complete on that day. Condition 6.8.3 of the Standard Conditions provides that “the parties are to complete the contract within *ten working days* of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.”

¹ The learned judge made various findings of fraud against the Andersons. These allegations are not relevant for the purposes of the application before me.

² I was not given a figure for the outstanding mortgage but was told that her mortgage payments were about £2,750 per month. This indicates a substantial mortgage – over £825,000 (?).

³ The tenancy agreement signed in January 2019 has been lost – leading Ms Fisher and the Andersons to sign a replacement tenancy in June 2024 dated 11th January 2019. There are differing accounts of how the agreement came to be signed but there is no dispute that an AST was granted.

11. On receipt of a notice to complete the Andersons were obliged forthwith to pay a further deposit to bring the total deposit up to 10% of the purchase price.⁴ The Andersons paid the further £165,000 on 1st November 2019. Accordingly, £2,385,000 of the sale price remained outstanding.
12. The Andersons did not proceed to completion. It appears that solicitors then acting for Ms Fisher advised her to rescind the contract.⁵ Ms Fisher did not serve a notice rescinding the contract. After the interim charging order had been made, by letter dated 9th July 2024 solicitors acting for Ms Fisher wrote to the Andersons rescinding the contract. The Claimants contend that this purported rescission was of no effect as Ms Fisher had affirmed the contract and could not rely on the failure to complete on the 10th October 2019.
13. The solicitor then acting for Ms Fisher made a file note on 14th October 2019 in the following terms:

“... (Ms Fisher) called. I advised that the deposit can be surrendered. She asked that I get the balance of deposit paid over now. *But she wishes to continue with Buyer.* Explained risks, she does not wish to rescind nor sue for completion.” (My emphasis).
14. The Andersons and Ms Fisher evidently discussed extending the completion date.⁶ In 2021 a deed of variation was prepared dealing with this. It was signed by the Andersons but was not signed by Ms Fisher. In the absence of Ms Fisher’s signature, the variation was of no effect given the terms of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.
15. On the 20th March 2021, Ms Fisher used the £265,000 deposit towards the purchase of another property: The Chantell.
16. Between the 14th November 2019 and 12th October 2022, the Andersons spent about £190,000 on works and fittings on the property. It is clear that the Andersons treated the property as their own – no doubt assuming that they would proceed to completion at some point.

⁴ See Special Condition 5 of the contract.

⁵ See also Bundle 1, p102 Ms Anderson’s then solicitors notes on 17th and 30th October 2019 respectively.

⁶ It appears that the reason for the delay in completion was a family tragedy which the Andersons suffered and the effects of the Covid pandemic on their business.

17. On the 7th June 2024, Ms Fisher served notice to terminate the assured shorthold tenancy on 9th August 2024. Ms Fisher has issued proceedings for possession and the Andersons have filed a form of defence.

Conclusions

The vendor/purchaser trust

18. The contract for the sale of Openshaw immediately gave rise to a trust with Ms Fisher as trustee and the Andersons as beneficiaries.⁷ This trust arose through the doctrine of conversion. However, this is an unusual and curious form of trust. It is a trust “to give effect to the contract” and, as such, it is governed by the terms of the contract.⁸ Although as against third parties it creates an equitable interest, the proprietary consequences between the parties themselves are limited, because the vendor retains a lien over the property for the price until it is paid. Under the vendor’s common law lien the vendor is entitled to possession of the “trust” property until payment of the purchase price. The interest acquired by the purchaser against the vendor cannot be passed onto a sub-purchaser; *Southern Pacific Mortgages Ltd v Scott* at [66]; *Berkley v Poulett* [1977] 1 E.G.L.R.86; *Ezair v Conn* [2020] EWCA Civ 687 at [50]–[51].
19. It is not disputed, and I hold, that on termination of contract for sale of land the vendor/purchaser trust collapses. Clearly, if the contract for sale in this case has been terminated, the Andersons would have no beneficial interest in the property and there would be no question of a final charging order being made.

Affirmation

20. Has the contract for sale in this case been terminated? Has Ms Fisher affirmed the contract? Ms Fisher relies on the letter of 9th July 2024 as rescinding the contract. In my judgment, this letter came too late to be effective. In the circumstances following the notice to complete on the 30th September 2019, I consider that Ms Fisher affirmed the contract. It is apparent that Ms Fisher’s then solicitors advised her to rescind. Ms Fisher was aware of the Anderson’s failure to complete and was aware of her right to rescind. She told her solicitors that she wished to proceed with the Andersons.

⁷ See: *Lysaght v Edwards* (1876) 2 Ch.D 499, 506; and *Shaw v Foster* (1872) LR 5 HL 321, 338.

⁸ *Ezair v Conn* [2020] EWCA Civ 687 at [54] per Patten LJ.

21. I bear in mind that the purpose of the assured shorthold tenancy was to allow the Andersons into possession *pending completion*. It seems to me that Ms Fisher allowed the tenancy to continue on the basis that that completion would take place at some point. Ms Fisher was relatively relaxed about the completion date so long as she was in receipt of £8,000 a month in rent.
22. Although the 2021 deed of variation never took effect, it is clear that Ms Fisher and the Andersons discussed formalising a later completion date.
23. The Claimants make the point that the Andersons spent about £190,000 on various works and fittings to the property. Ms Fisher states that she was not aware of the works. I can come to no concluded view on this issue without oral evidence. If Ms Fisher did know of the works, that would be further evidence of affirmation.
24. I bear in mind that an innocent party faced with a breach of contract by the other party is entitled to some “thinking time” in order to decide whether or not to rescind the contract. We are well beyond that time on any view.
25. In conclusion on this point, I find that Ms Fisher affirmed the contract and that she cannot resile from that affirmation.

The point of the charging order – the Claimants’ scheme

26. It is not disputed that Ms Fisher could serve a fresh notice to complete followed by a notice rescinding the contract 10 days after the notice to complete - so putting an end to the trust. In argument, I asked Mr. Lee what the point of the Claimants’ application was in these circumstances. His response, as I understand it, was that in that 10 day period the Andersons could proceed to completion with the Claimants providing the Andersons with the balance of the purchase price and interest. Mr. Lee submitted that the Andersons, as equitable chargors (under the charging order) would be under an obligation to protect their interest and to complete the purchase. It was thought that the property was now worth about £3.4m to £3.5m⁹ As far as Ms Fisher’s position in these circumstances is concerned, Mr. Lee submitted that there was no unfairness to her as she would be getting the contractually agreed sum.

Is the beneficial interest under a vendor/purchaser trust capable of being the subject of a charging order

⁹ The Andersons gave this estimate of value in 2022 in the Claimants’ proceedings for a freezing order.

27. I have to decide whether or not the particular beneficial interest which the Andersons have - until expiry of the further notice to complete and notice of rescission – is capable of being the subject of a charging order. I have heard competing submissions on this point. With some hesitation, I have come to the view that a charging order is not possible against this particular kind of beneficial interest given the terms of the trust. I bear in mind that the contract/trust itself prohibits the assignment or sub-sale of the Andersons' interest. The Andersons could not create an equitable charge over their interest.
28. Mr. Lee submits that the purchaser's beneficial interest under a vendor/purchaser trust is capable of being devised, alienated, or charged and relies on *Shaw v Foster* (1872) LR 5 HL 321; *Nelson v Greening & Sykes* [2007] EWCA Civ 1358; and Lewin on Trusts, 20th Edn [4-009]). Mr. Lee submits that the court should not concern itself with the size of the Andersons' beneficial interest. I am not concerned with the size of the beneficial interest but with its quality given the terms of the contract for sale and the trust arising under it.
29. Lewin on Trusts [409], citing *Shaw v Foster*, does state that the buyer under a vendor/purchaser trust may devise, alienate or charge his interest. However, this is subject to the terms of the terms of the contract for sale of the land – and, therefore, the terms of the trust.
30. In the Encyclopaedia of Forms and Precedents the note to Standard Condition 1.5.1 is as follows:

In the absence of any specific provision in the contract, both the seller and the buyer are free to assign the benefit of the whole contract or a part of it (for example a charge of the benefit of the contract or a sub-sale of the property) and the buyer generally entitled to a transfer personally or as the buyer directs. Condition 1.5.1 prohibits the buyer from transferring the benefit of the contract and condition 1.5.2 provides that the seller cannot be required to transfer the property in parts or to any person other than the buyer. This latter condition prevents the seller from having to transfer the property to a sub-buyer, as would otherwise be the case, although it does not stop the buyer contracting to sell the property on provided that the buyer first obtains a transfer from the seller and then executes a second transfer to the sub-buyer. (My emphasis).
31. As far as *Nelson v Greening & Sykes* is concerned, I note that was a case under s.2(1)(b) of the 1979 Act rather than s.2(1)(a) as here. The charging order was made against the beneficial interest of a trustee (a Mr. Nelson) who acted as nominee for his daughter in the purchase of land. The purchase monies had been fully paid by the daughter. Accordingly, the vendor held the legal estate on trust for Mr. Nelson beneficially, and Mr. Nelson by reason of the provision of the

purchase price by his daughter was trustee of the beneficial interest for her. The point to note here is that in that case there was a full-bodied trust which did not involve a vendor's lien or any restriction on disposal of the beneficial interest held by Mr. Nelson. The vendor/purchaser trust which we are concerned with in this case is a trust in a different category. I am not assisted by the *Nelson* case.

32. By s.3(4) of the Charging Orders Act 1979, a charge imposed by a charging order has the same effect, and is enforceable in the same way "as an equitable charge created by the debtor under his hand." The Andersons could not create an equitable charge over their interest. Accordingly, a charging order is not possible.
33. Lewin on Trusts at [405] dealing with the vendor/purchaser trust, states that the trusteeship ceases if a right to specific performance is lost by the subsequent conduct of the party originally entitled to it; citing *Central Trust and Safe Deposit Co. v Snider* [1916] 1 A.C. 266 at 272, PC; *Marchesi v Apostolou* [2007] F.C.A. 986 at [109]–[110]. *Ezair v Conn* [2020] EWCA Civ 687; [2020] B.C.C. 865 at [47] ("dependent on the contract remaining specifically enforceable").
34. In the circumstances now prevailing, the contract for sale of the land is no longer capable of specific performance by application by the Andersons. Accordingly, the trust has ceased and the Andersons no longer have a beneficial interest.
35. In summary, I conclude that the interest of the Andersons in the property (if they have an interest) is *not* capable of being the subject of a charging order.

The court's discretion to make a charging order

36. If I am wrong in my view that the Anderson's beneficial interest is not capable being the subject of a charging order, I must still consider the court's discretion as to whether or not a charging order should be granted. S.1(5) of the 1979 Act provides that the court must consider in deciding whether or not to make a charging order: the personal circumstances of the debtor; and whether or not any other creditor would be likely to be unduly prejudiced by the making of the order. I must consider all the circumstances of the case.
37. I consider that Ms Fisher is a creditor and that I am entitled and obliged to take her position into account.

38. I have stated that the vendor/purchaser trust is unusual. In the circumstances of this case, it is a trust which stands on a precipice. Ms Fisher will serve a fresh notice to complete and will rescind the contract. As already stated, on rescission the trust will fall with the contract. Ms Fisher is entitled to expect to put the property on the market and sell for £3.4m to £3.5m or whatever is its current market value. She may well have been relaxed about the completion date as long as she received £8,000 a month in rent but she has not received any rent since April 2024.
39. An order for specific performance against Ms Fisher is no longer possible. It is clear that the Andersons do not have the funds to purchase the property and accept that they have no interest in it.
40. A judgment creditor would normally enforce a charging order over land by making an application for sale of the land. In the present case, I have difficulty in seeing how the land could ever be sold in particular as Ms Fisher retains the right to possession of the property. I also struggle to see what the value of the Anderson's beneficial interest is in the context of a sale of the property. Mr. Gatty makes the point, which I accept, that as soon as a court ordered the sale of the property to a third party, the Fisher/Andersons contract would cease to be specifically enforceable so that any subsisting trust would cease.
41. As far as the Claimants' "scheme" is concerned, there is no evidence that the Claimants are willing and able to provide £2,385,000 and interest to the Andersons so that they can complete the purchase within the said 10 day period. There is no evidence that the Andersons would be willing to proceed with the purchase in that timescale or at all. The scheme does not seem viable.
42. In the circumstances, I consider that Ms Fisher would be unduly prejudiced if a charging order were granted. She ought to be free to sell the property at its current market value. The Andersons could not oblige the Ms Fisher to complete a sale at £2.65m and the Claimants cannot be allowed to do so either.
43. In conclusion, I refuse to make the charging order final and will dismiss the application. The interim charging order will be discharged.

44. A draft of this judgment was sent to counsel on 9th October 2024.