



Neutral Citation Number: [2021] EWCA Civ 112

Case No: A3/2019/2964

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Fancourt
[2019] EWHC 3286 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2021

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

Between:

DERHALLI
- and -
DERHALLI

Appellant

Respondent

Michael Glaser QC and Emily Betts (instructed by **Farrer & Co. LLP**) for the **Appellant**
Nigel Dyer QC and Nathaniel Duckworth (instructed by **Charles Russell Speechlys LLP**)
for the **Respondent**

Hearing date: 16 December 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 2 February 2021

Lady Justice King:

1. This is a second appeal brought by the appellant (“the husband”) against an Order made by Fancourt J (“the judge”) in possession proceedings which depended upon the proper interpretation of a Consent Order (“the Order”) dated 28 September 2016 made in financial remedy proceedings following the breakdown of the marriage between the husband and the respondent (“the wife”).
2. The judge allowed an appeal against a declaration made by HHJ Gerald (“the first instance judge”) on 3 May 2019. That declaration was set aside and a fresh declaration was made by the judge who held that upon its true interpretation, the meaning and effect of the Order was to permit the wife to occupy the former matrimonial home until the sale of the property, with payment by her of the outgoings of the property, but with no obligation to pay occupational rent pending sale.
3. The issue on appeal is whether the judge erred in deciding that the reasonable reader, having all the background knowledge which was available to the parties, would have concluded that it was the intention of these parties that the wife would be permitted to remain living in the matrimonial home, rent free, until it was sold. If she was not, then the husband would succeed in his claim for damages.

Background

4. The parties married in 1989. In 2004 a property, 5 St Mary’s Place, London (“the matrimonial home”) was bought as a family home and registered in the husband’s sole name. The parties’ two children were then aged about 10 and 13 years of age. The family lived together in the house until after the breakdown of the marriage. In late 2014, the husband moved out and rented a property in London. The wife and children remained in the property until it was sold on 27 March 2019.
5. In addition to the matrimonial home, the parties owned two other properties: “St Raphael’s Lodge”, a property in Torquay which was acquired by the wife before the marriage as a home for her parents; and “Stonelands”, a substantial property bought in 2007 which was also registered in the husband’s sole name. This property was used by the family as their country home during the course of the marriage and has been retained by the husband.
6. Following divorce proceedings, a decree nisi was pronounced on 20 January 2015. On 6 June 2016, the parties reached a negotiated compromise in what had become highly acrimonious financial remedy proceedings. The Order which followed, and which is at the heart of this appeal, was approved by Holman J at a hearing on 29 September 2016 and was expressed in the usual way to be ‘subject to the grant of decree absolute’.
7. The Order approved by Holman J was complex and ran to some 47 paragraphs. It dealt with the parties’ homes, a family trust, the husband’s companies as well as complex tax provisions. The basic structure of the Order provided forthwith for the sale of the former matrimonial home and the payment to the wife of a series of three lump sums (paragraph 42 of the Order). The lump sums were to be made up in part from the proceeds of sale of the matrimonial home. Payment of the lump sums would be in full and final settlement of all the wife’s claims arising out of the marriage. Because of the complex tax considerations arising out of an HMRC tax investigation, a lump sum of

£5,829,300 (which was not referable to the sale proceeds) was, by para. 39 of the Order, to be paid to an offshore account and was not to be brought onshore before decree absolute, or April 2017 whichever was the later. Two additional lump sums referable to the sale of the former matrimonial home were to be paid onshore or offshore as the husband chose.

8. The desire of the parties to ensure that this hard-won agreement could not subsequently be undermined was reflected in a number of separate paragraphs in the Order:

“12. The parties agree that the terms set out in this order (including the recitals, agreements, undertaking and the orders of the court) are accepted in full and final satisfaction of-

- a. all claims for income;
- b. all claims for capital, that is payments of lump sums, transfers of property and variations of settlements;
- c. all claims in respect of each other’s pensions;
- d. all claims in respect of the contents of their properties and personal belongings including but not limited to furniture, artwork, jewellery and motor vehicles with the precise allocation of those chattels to be agreed or determined in accordance with paragraph 13 below;
- e. all claims in respect of legal costs including those of the divorce/dissolution proceedings;
- f. all claims against each other’s estate on death; and
- g. all other claims of any nature which one may have against the other as a result of their relationship, howsoever arising, either in England and Wales or in any other jurisdiction.

14. The parties agree that they will each retain the assets in their respective sole names and that neither of them has any legal or equitable interest in the property or assets currently in the sole name or possession of the other, and neither of them has any liability for the debts of the other, except as provided for in this order. In particular, it is agreed that the respondent shall retain Stonelands.”

9. Paragraphs 26 and 34 of the Order provided that the lump sums would not be adjusted for any reason, whether by relation to asset values, exchange fluctuations or investment by the husband in his companies and that any change in relation to those companies would not be capable of being a *Barder* event entitling either party to set aside the Order.

10. The agreement in relation to the matrimonial home was contained in several paragraphs in the Order. There is no specific provision in relation to the occupation of the property pending sale. In the ‘Agreements’ section, provision was made for future payments of the running costs of the former matrimonial home and for the regulation of the husband’s attendance at the property. Neither clause had an ‘end date’.

“21. The parties agree that with effect from 7 June 2016 the applicant will discharge the outgoings on St Mary's Place and St Raphael's Lodge. To the extent that the respondent makes any such payments on the applicant's behalf after 7 June and before the transfer of the standing orders and direct debits in relation to St Mary's Place and St Raphael's Lodge (which the respondent will arrange to be transferred to the applicant's sole bank account as soon as practicable) then such payments will be netted off against the lump sum payable in accordance with paragraph 36(b) below.

23. The parties agree that (save as provided in paragraph 13g(2) above) the respondent shall provide the applicant with at least 24 hours' advance notice of an intention to attend St Mary's Place and will endeavour to accommodate the applicant by going there at a convenient time for her.”

11. In the ‘Undertakings’ section of the Order, the wife undertook to remove the protective notices which had been registered in her favour on the former matrimonial home and on Stonelands as follows:

“38. The applicant undertakes to the court and agrees with the respondent to remove the notices registered in her favour against:

- a. St Mary's Place forthwith upon the respondent's reasonable request so as to effect a sale or within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below; and
- b. Stonelands within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below.”

12. Finally, the Consent Order itself provided for the sale of the former matrimonial home upon the joint instruction of the parties and for the payment to the wife of the series of lump sums to which I have already referred:

“41. St Mary's Place shall be sold forthwith on the open market at the best price reasonably obtainable and the following directions shall apply:

- a. The parties shall have joint conduct of the sale.
- b. The selling agent shall be jointly agreed between the parties.
- c. On sale, the gross sale proceeds shall be applied to meet the following:
 - I. The selling agent's commission;

II. The legal fees; and

III. Any capital gains tax.

With the remaining balance being the net proceeds of sale which shall be paid to the respondent, to be held in accordance with the provisions detailed at paragraph 40 above.

42. The respondent shall pay to the applicant a series of lump sums (that, by agreement, are not variable under section 31 of the Matrimonial Causes Act 1973) as follows:

a. £5,829,300 on the date 14 days after the date of decree absolute or six weeks after the date of this order, whichever is the later, such payment to be made offshore to the applicant's nominated bank account.

b. £2,257,732 on the date 14 days after the completion of the sale of St Mary's Place in accordance with paragraph 41 above. Such payment to be made onshore or offshore as the respondent elects (subject to paragraph 29).

c. A sum equal to one half of the net sale proceeds of St Mary's Place (as defined at paragraph 41(c) above) on the date 14 days after the completion of the sale of St Mary's Place in accordance with paragraph 41 above. Such payment to be made onshore or offshore as the respondent elects (subject to paragraph 29).”

13. Decree absolute was granted on 11 October 2016, shortly after the making of the Order. This was necessary, as without decree absolute the Order could not take effect (Matrimonial Causes Act 1973 s.23(5)). Although the application for decree absolute was made by the wife as Petitioner in the divorce proceedings, given the length of time since decree nisi, the husband could himself have made the application.
14. In the event, by the date of the Order the matrimonial home had been on the market since June 2016 in line with the compromise agreement, that is to say three months before the making of the Order. The wife had also, as agreed, taken over responsibility for all the outgoings.
15. It was, and is common ground, that when the Order was made, the parties were confident that this highly desirable property would sell quickly. In practical terms, a rapid sale at, or near to, the asking price of in excess of £7m would have left the wife with ample funds with which to buy herself a suitable property without needing to have recourse to the separate lump sum of £5.8m which was to be held offshore until the beginning of the next financial year.
16. The high-end property market was, however, significantly stalled following the outcome of the United Kingdom European Membership referendum (“the Brexit referendum”) which took place on 23 June 2016. The property remained on the market

until 27 March 2019 when it sold for £5.9m, a sum which was approaching £2m less than the original asking price and the figure upon which the parties had based their negotiations. The wife and (now) adult children remained living in the property until sale when they moved out, giving vacant possession.

Possession Proceedings

17. The husband could have sought possession of the matrimonial home by virtue of a combination of the powers under s24A MCA 1973, which permits a court at any time after the making of an order for sale of a property to make such “consequential or supplementary provisions as the court thinks fit” which, by FPR r.9.2(2), include an order for possession to “any other person”. Similarly, there is the power to vary a s24A MCA 1974 order for sale under s.31(2)(f) MCA1973.

18. Although disapproved in relation to its findings as to public policy by the Supreme Court in *Granatino v Radmacher* [2011] AC 334, Lady Hale’s confirmation in *MacLeod v MacLeod* [2010] AC298 that a financial remedy order is not a contract, remains good law:

“26. In the *Edgar case* [1980] 1 WLR 1410, of course, there had been a valid and enforceable separation deed. The same principles are, however, also applied to agreements to compromise a claim for ancillary relief, although it has been held that such agreements do not give rise to a contract enforceable in law and are not specifically enforceable: see *Xydhias v Xydhias* [1999] 2 All ER 386, 394. Unlike other court orders made by consent, a consent order in ancillary relief proceedings derives its authority from the court order and not from the preceding agreement: see *de Lasala v de Lasala* [1980] AC 546”

19. See also Lady Hale in *Sharland v Sharland* [2015] UKSC60 [2016] AC871 at [19] and at [27]:

“27. Family proceedings are different from ordinary civil proceedings in two respects. First, in family proceedings it has been clear, at least since the Privy Council’s decision in *de Lasala v de Lasala* [1980] AC 546, that a consent order derives its authority from the court and not from the consent of the parties, whereas in ordinary civil proceedings, a consent order derives its authority from the contract made between the parties: see, eg, *Purcell v FC Trigell Ltd* [1971] 1 QB 358 ”

20. I am, however, conscious of the words of Lord Sumption in *Prest v Petrodel* [2013] UKSC 34

“37....Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.”

21. That principle was reflected in *G v B* [2016] EWCA Civ 161 by Sir Stephen Richards:

“11. It is common ground that the principles applicable to the construction of a consent order are the same as those applying to a commercial contract: see *Sirius International Insurance Company v FAI General Insurance Limited* [2004] UKHL 54, [2004] 1 WLR 3251, at [18]. As Lord Steyn said in that paragraph, the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language; the answer to that question is to be gathered from the text under consideration and its relevant contextual scene.”

22. It follows that the principles of construction to be applied in determining the wife’s rights of occupation, if any, are the same regardless of whether the court is dealing with a contract or an order and it is undoubtedly the case that the county court has the jurisdiction to determine applications such as the present one notwithstanding that the Order with which the court is concerned is not a contract.

23. In my judgment however, any dispute as to the interpretation of a financial remedy order made following the breakdown of a marriage should be put before the specialist Financial Remedy Court or a High Court Judge of the Family Division. The Family Court not only has the power under the Matrimonial Causes Act 1973 to resolve any conflicts which may arise in relation to orders that it has made, but also the expertise that comes from exercising their specialist jurisdiction. In my view, the route taken by the husband by way of possession proceedings was inappropriate. The proper course for the husband to have taken in the present case was for him to have made an application for enforcement or variation of the Order not to the County Court but to the Family Court.

Proprietary Interests

24. Notwithstanding that this was an Order consequent upon the resolution of financial remedy proceedings, the husband took possession proceedings and relied (as did HHJ Gerald) heavily in his proposed interpretation of the Order, upon the fact that he was the sole legal and beneficial owner of the matrimonial home. That fact, it is said by Mr Glaser, together with the wife’s recognition that that was the case found in para.14 of the Order, is a magnetic factor when interpreting the Order.

25. In those circumstances, before moving to the judgments and submissions of the parties, it is useful to pull together various features, both general and specific, in relation to the matrimonial home which provided the backdrop which would have been known to the parties and their advisors and against which the Order was made:

- i) The matrimonial home was held by the husband as the sole legal and beneficial owner;
- ii) At no time did the wife seek to assert that she had a beneficial interest in the property;

- iii) The authorities make it clear that it is inappropriate to take TOLATA or s.17 Married Women's Property Act 1882 proceedings in parallel with financial remedy proceedings. (see for example: *Fielding v Fielding* [1977] 1 WLR 1146 Ormrod LJ);
- iv) Such a course would, in any event, be unnecessary as:
 - a) Pursuant to the Matrimonial Causes Act 1973, section 24, the court can make such Orders as it thinks just, regardless of the legal or beneficial ownership of the property, and
 - b) All other things being equal, the matrimonial home will be treated as matrimonial property and subject to the sharing principle (*Miller v Miller* [2006] 2 AC 618 [22]);
- v) By the Family Law Act 1996 (FLA) section 30, the wife had, during the course of the marriage, statutory home rights and a legal right not to be evicted. Further, by section 31 (2) FLA the wife's home rights are a charge on the estate. Where matrimonial property is held in the sole name of the husband, solicitors routinely, as in this case, protect those rights against third parties, such as mortgagees or purchasers, by registering them under the Land Charges Act 1972 (Class F Land Charge) where the matrimonial home is unregistered land or by notice in the register of title in accordance with the provisions of the Land Registration Act 2002 where, as here, the matrimonial home is registered land (see s31(10) FLA). By s31(8)(b) FLA, the wife's home rights are brought to an end by the termination of the marriage i.e decree absolute;
- vi) An Order can be made during the marriage under s33(5) FLA extending the home rights beyond decree absolute.

The Proceedings

- 26. On 24 March 2017, the husband served a notice on the wife requiring her either to vacate the former matrimonial home within four weeks, or alternatively to pay rent at the rate of £5,000 per week for her continued occupation. A further notice to a similar effect was served on 24 October 2017. Upon the wife declining either to leave or to pay rent, the husband issued proceedings in the county court seeking possession of the matrimonial home and damages for trespass in the sum of £600,000.
- 27. The possession proceedings came before the first instance judge initially to determine two preliminary points, namely: whether (i) the effect of the Order was to permit the wife to occupy the matrimonial home until sale; and (ii) whilst she remained in the property whether her financial obligation was limited to the payment of outgoings.
- 28. The first instance judge decided the preliminary issues in favour of the husband, declaring that from the date of the Order the wife occupied the matrimonial home as "*a gratuitous licensee terminable on reasonable notice where-after she would be a trespasser liable to pay damages for use and occupation thereof until delivering vacant possession.*"

29. The first instance judge held that, by the wife accepting that the husband was the absolute beneficial owner of the matrimonial home (para.14 of the Order), the legal consequence was that he had an unfettered right to occupation. At the time of the making of the Order, the wife, HHJ Gerald held, was in “consensual occupation determinable upon reasonable notice”. Had the parties, he said, intended that the wife’s home rights would be continued after decree absolute, an application could have been made by her under section 33(5) FLA. The wife’s agreement to the removal of the notices registered in her favour indicated he said that she did not intend to rely on those rights.
30. The first instance judge had therefore held that, as the husband was the sole beneficial owner of the matrimonial home, the wife was a gratuitous licensee even before the approval of the Order. Mr Glaser QC on behalf of the husband, conceded before Fancourt J on appeal that HHJ Gerald was in error in this respect and that the wife was not a gratuitous licensee prior to the making of the Consent Order, but had legal rights of occupation until decree absolute.
31. Permission to appeal the Order of the first instance judge was granted by Arnold J on 21 June 2019. In allowing the appeal on 18 November 2019, the judge, whose judgment can be found at [2019] EWHC 3286 (Ch), set out nine reasons for concluding that the first instance judge had erred in his interpretation of the Order and that the reasons he gave for reaching the conclusion that the wife was a gratuitous licensee were mistaken.
32. On 12 February 2020, permission to appeal was granted against the judge’s Order, reversing the declarations made by the first instance judge. Males LJ in granting permission was satisfied, pursuant to CPR 52.7, that the second appeals test was satisfied and that there was, therefore, a matter of practice or principle for this court to consider or some other compelling reason for the appeal to be heard.
33. The Grounds of Appeal are somewhat discursive but were helpfully distilled by Mr Glaser in oral argument into three essential submissions:
 - (i) The principle raised on the appeal is that the judge was wrong in setting a precedent for implying into every Financial Remedy Order where the property is to be sold, an implied licence for the party in occupation to occupy until sale, irrespective of the legal ownership of the property or the absence of words granting such a license;
 - (ii) The judge effectively wrote a provision into the Order akin to implication rather than construction and applied hindsight when imposing his view as to what the parties might have negotiated had they known that the sale would take so long;
 - (iii) the judge failed properly to take into account, in particular, that it was agreed that the husband owned the property legally and beneficially and that the wife gave up any interest in the property confirmed by her agreement to withdraw the matrimonial home rights notice.

Was the wife a Gratuitous Licensee?

34. As the first judgment turned on the finding that the wife was a gratuitous licensee, it is useful to deal with that issue now. The judge said in his appeal judgment at para.[3]:

“It was, initially, common ground that the consent order gave the appellant a right to continue living in the house for some time. As the argument developed, it became clear that that was only common ground up to the point in time of the decree absolute in the divorce proceedings. Nevertheless, given that the appellant had a right to remain in occupation for some time at least after the consent order, the relevant question, which seems to me to be an open question of interpretation of the order, is for how long she would have a right to remain.”

35. The judge rightly said that this was “a matter of interpretation of the whole of the order in its relevant factual context”. The judge went on:

“34. The judge was also wrong to conclude that the appellant was a gratuitous licensee before the consent order was made. Before and after it, until decree absolute, the appellant had statutory “home rights” to remain in occupation. That position is now accepted on behalf of the respondent on this appeal. It is, therefore, accepted that the judge was wrong to conclude that the appellant was before the consent order a gratuitous licensee and therefore remained a gratuitous licensee after the consent order. The judge’s conclusion that the appellant was a gratuitous licensee has no proper legal foundation. If the Judge’s interpretation was right, the appellant would automatically become a trespasser on the decree absolute being pronounced, and liable to pay damages. Mr Glaser QC’s assertion that a licence was thereupon granted by the respondent to the appellant had no factual foundation at all”.

36. Mr Dyer QC, on behalf of the wife, submits that the husband’s case on the issue of construction has been equivocal and inconsistent as to if, when and in what form any rights of occupation were enjoyed by the wife following the making of the Order. That would certainly appear to be the case from the papers.
37. Somewhat confusingly, the approach of the first instance judge is endorsed in the skeleton argument filed on behalf of the husband. It had been said by the first instance judge that from the date of the Order onwards, the wife occupied the property as a gratuitous licensee which licence was terminable on reasonable notice. That would seem to suggest an acceptance that the Order conferred rights of occupation which continued after decree absolute until such time as the husband served notice to terminate and a reasonable period had elapsed. Such an acceptance does not seem to sit easily with Mr Glaser’s submission that the wife’s right to occupy came to an end at decree absolute and that, thereafter, her right to remain was dependant on the husband’s forbearance in not taking steps to regain possession of the property. It was that forbearance, Mr Glaser says, that led to it being implied that the wife was a gratuitous licensee from the date of decree absolute.
38. Mr Glaser skilfully, but not wholly successfully, sought to finesse these inconsistencies away during oral argument. I agree with the judge that there was no factual foundation for saying that the wife was granted a licence, and consequently upon the husband’s

case the wife became a trespasser upon the granting of decree absolute and liable to pay damages.

39. This confusion, in my judgment, serves to confirm that the solution to this case, as was emphasised by the judge, does not essentially lie in an examination of the legal ownership of the property and whether the wife was in law a gratuitous occupier, but upon a conventional construction of the Order conducted in accordance with the well-known judgment of Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [15], in which he reviewed the speech of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 110, which principles were more recently distilled in *Wood v Capital Insurances Ltd* [2017] UKSC 4, [2017] AC 1173 by Lord Hodge at paragraph 10 -15. In saying this I do not seek to suggest that the fact that the husband was the sole beneficial owner of the property and that the wife recognised that to be so within the Order is wholly irrelevant, it is undoubtedly part of the background and as such an aid to the interpretation of the Order.

The Judge's Judgment on Appeal

40. The approach set out in para.[15] in *Arnold v Britton* was summarised by the judge as follows:

“24. In *Arnold v Britton*, Lord Neuberger indicated that the meaning of the relevant clause which was in a lease, had to be assessed in the light of (1) the natural and ordinary meaning of the clause;(2) any other relevant provisions of the contract; (3) the overall purpose of the clause and the contract; (4) the facts and circumstances known or assumed by the parties at the time the document was executed, and (5) commercial common sense but (6) disregarding subjective evidence of the party's intentions. Lord Hoffman in *Chartbrook*, said that the meaning of a contract was to be assessed by reference to “what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean.”

41. I would add also from para.[15] that in identifying the intention of the parties, the court does so by focusing on the relevant words in their “documentary, factual and commercial context”.

42. The judge concluded:

“35 Ninth, the overriding factors, in my judgment, are the provision for the immediate sale and the sharing out of the proceeds of sale and the fact that the appellant was, and had been, living in the house with her daughters, and the respondent had been living elsewhere. The appellant's liability for the outgoings reflected an understanding that she was to continue to live there until the sale took place. The obvious answer to the question, when would the appellant's rights to occupy the house cease, is when it is sold and when she is obliged to move out, as the judge held that she would be at that stage.

36. The reality, of course, is that the parties did not foresee the long delay that took place. The idea that, in a short period before a sale was effected, the respondent would be able to require the appellant to move out and either move in himself or let the property, is so surprising in these circumstances that if that is what the parties really meant they would certainly have made some express provision for it. If the respondent was not intending to be able to move in or let out the home, then there was no reason for the appellant and her daughters to have to move out.

37. Any suggestion that the appellant should have to pay rent also runs up against the provisions of paras.12 and 26 of the consent order, which provide for full and final settlement of all claims that may arise between the parties and for no adjustment for any reason of the agreed terms to be made at a later stage. The consent order did not leave space for a further dispute about money or rights in relation to the properties. The silence of the consent order on the appellant's right to continue to occupy is, therefore, in my judgment, only a literal silence, but the surrounding circumstances and the other terms of the order strongly indicate that the parties' agreement had the effect that the appellant was entitled to stay in occupation until the house was sold.”

43. In his oral submissions, Mr Glaser submitted that factors such as the joint conduct of the sale, the agreement that the husband would give 24 hours' notice before attending the property and the transfer of all the standing orders for the running costs of the house to the wife, do not indicate a right on the part of the wife to occupy. The judge, he submits, failed properly to take into account the impact of para. 38 of the Order (set out again below for convenience). Had he done so, Mr Glaser submits, the judge would have upheld the first instance Order. Contrary to what the judge said at para.[37] of his judgment (see above), there was, says Mr Glaser, no 'literal silence' in relation to the wife's rights to occupy because of the terms of para 38 of the Order.

“38. The applicant undertakes to the court and agrees with the respondent to remove the notices registered in her favour against:

- a. St Mary's Place forthwith upon the respondent's reasonable request so as to effect a sale or within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below; and
- b. Stonelands within 7 days of the date of the payment to her of the lump sum referred to at paragraph 42(a) below.”

44. Mr Glaser went on to submit that even if the court is against him in relation to para. 38, the fact that the property is in the sole name of the husband, taken together with the combined effects of the clean break provisions found at paragraphs 12 and 14 of the Order, demonstrate that upon a proper construction of the Order, the wife had no rights of occupation after the granting of decree absolute.
45. Mr Dyer, for his part, emphasised the importance of looking for signposts in the Order. The reasonable reader, he says, would therefore have known that the matrimonial home was bought in 2004 and was the main home, and that the husband had left in December 2014 leaving the wife and children in occupation. The reader would have also, he submits, known that the parties had come to terms in June 2016, terms which were to lead forthwith to the sale of the matrimonial home upon the joint instruction of both parties and that from the date of the agreement, the husband would cease to be responsible for all the outgoings. Looking at the matter objectively, Mr Dyer rhetorically asks, why would the parties have gone to the trouble of swapping over all the standing Orders into the name of the wife if she could be required to leave the property at short notice at the behest of the husband? At the date of the Order, therefore, says Mr Dyer, the established living arrangements were that the wife and children had been living in the house for almost two years. In order to bring the Order into effect, it was necessary to apply for decree absolute. The fact that the wife applied for decree absolute had no relevance to her continued occupation under the Order but was simply the necessary vehicle in order to put the agreed Order into effect.
46. For the reasons given by the judge, I do not agree with Mr Glaser that the factors outlined by the judge, and relied upon by Mr Dyer, have no relevance to the issue of occupation of the property. In my judgment, they are relevant terms of the Order which shed light on the intentions of the parties and, in my judgment, undoubtedly favour the interpretation of the Order as held by the judge. The question, therefore, remains as to whether the terms of para.38, or the fact that the husband was the sole beneficial owner of the property taken with the clean break provisions, undermine the judge's conclusions?
47. Mr Dyer suggests that an approach whereby the presence or absence of the wife's home rights is regarded as being a critical issue is a red herring, given that those home rights had come to an end upon the grant of the decree absolute. The terms of para 38, he says, were simply an administrative provision designed to ensure that the two properties became free of encumbrances, either on sale (in relation to the matrimonial home) or, in any event, on a specified date in respect of both properties.

Discussion

48. Mr Glaser stresses the importance of a 'pure' approach to the construction of this contract which should not be infected by importing so called family law principles. I entirely agree. Lord Hoffmann's approach requires the court to consider what a reasonable person, having all the background knowledge which would be available to the parties, would have understood the contract to mean. That background knowledge would, in my view, include the fact that this was an Order made in financial remedy proceedings which Order had been approved by the judge who would, before approving the Order, have considered all the circumstances of the case, including the s25 Matrimonial Causes Act 1973 factors. Such a consideration by Holman J would have been conducted against the backdrop of the matrimonial jurisprudence, including

Miller, and the proper approach of the courts to the legal interests in a matrimonial home.

49. This is a second appeal. It follows, therefore, that before permission to appeal could be justified, the proposed appellant had to, pursuant to CPR 52.7, have satisfied the Lord or Lady Justice considering the matter, not only that there was a real prospect of succeeding on appeal, but also that the appeal raises an important principle or practice or there was some other compelling reason for the Court of Appeal to hear the appeal. At the early permission stage, Males LJ was satisfied that the second appeals test was satisfied on the basis suggested by the husband, namely that the judgment “sets a precedent for implying into every single financial remedy order made under the Matrimonial Causes Act 1973... an implied licence to occupy ... until sale”.
50. Having had the benefit of further argument and analysis beyond that which was available to Males LJ when giving permission to appeal, I am entirely satisfied that the judge’s judgment neither sets a precedent nor implies a licence to occupy into the Order.
51. The wife’s case has never been argued on the basis of an implied term. The case has throughout proceeded on the basis of analysing the true purpose and effect of the Order. This is clear by the form of Orders which led to the trial on the preliminary issue and, further, there is no hint in his judgment that the judge reached his decision based on an implied term. The first time a suggestion of an implied term is raised is in Ground 1 of the Grounds of Appeal drafted in support of the second limb of the second appeals test.
52. Mr Glaser properly referred the court to *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey)Ltd and another* [2015] UKSC 72, [2016] AC 742. He relied, in particular, on paras. [14] and [15] in support of his submission that where there is no express provision, an obligation can only be established by reference to an implied term. Whilst it is common ground that the Order contains no express provision granting the wife a right of rent free occupation until sale, to analyse the position in such a way without more, risks conflating what should be the two stage process as identified by Lord Neuberger at para [26] of *Marks and Spencer* when he said that: “construing the words used and implying additional words are different processes governed by different rules.” Lord Neuberger went on, at para. [28], to say that, given that no term can be implied into a contract if it contradicts an express term, then it logically follows that “until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied.”
53. The factors to be taken into account when construing a contract are, as is agreed, those found in *Arnold v Britton*. The judge carried out this exercise and, unless he had fallen into error in the interpretation of the Order which had led him to conclude that “the terms of the Order strongly indicate that the parties’ agreement had the effect that the appellant was entitled to stay in occupation until the house was sold”, there was no necessity for him to move on to consider whether he could properly imply a right of occupation as a term of the contract. It is Mr Glaser’s case that a proper application of *Arnold v Britton* would not support the construction found by the judge but rather supports that held by HHJ Gerald. It follows, if Mr Glaser is right, that the only basis upon which the judge could conclude that the wife had a right of occupation was by his imputation of such a right into the body of the Order.

54. It is necessary to consider, therefore, whether the judge was in error in concluding that, under the terms of the agreement, the wife was entitled to remain in the property until sale.
55. Mr Glaser submits that the judge effectively wrote into the Consent Order a provision “akin to implication” and “applied the benefit of hindsight when imposing his view as to what the parties might have negotiated had they known the sale would take so long”.
56. This, I apprehend, is a reference to Lord Neuberger’s fourth point in *Arnold v Britton*:
- “Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.”
57. With respect to Mr Glaser, it is strongly arguable that when set against the “documentary, factual and commercial” context of the case, it is the husband who is seeking to apply the benefit of hindsight to the interpretation of this Order. This is a contract which, to the husband’s considerable advantage, is drafted in such a way as successfully to block any possible legal routes to reopen or renegotiate its terms. This is achieved not only by way of the clean break provisions, but also the ‘chipping’ provision at para. 26, and at para. 34 of the Order, the exclusion of *Barder* events.
58. It could be inferred, therefore, that it is the husband, and not the wife, who now seeks to invoke hindsight and to be relieved of the consequences of the Brexit referendum and the impact it had on the sale of the property. This, in turn, feeds into Lord Neuberger’s fifth point which reminds the person interpreting a contract that the court can only take into account the facts, or circumstances, which existed at the time and which were known or reasonably available to the parties at the time or, as put by Lord Bingham in *Bank of Credit and Commerce International SA v Ali and Other* [2002] 1 AC 251 at para.8:
- “To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words their natural and ordinary meaning in the context of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties’ intentions the court does not of course inquire into the parties’ subjective

states of mind but makes an objective judgment based on the materials already identified.”

59. What was known to both parties at the time, and was reflected in the Order, was that the parties were husband and wife and the agreement had been reached in the context of their divorce. The matrimonial home, where the wife and the children of the family lived, was to be put on the market at a price agreed by both of them and that the wife would take over the running costs. Future attendance at the property by the husband was to be regulated. It was anticipated that the house would sell “relatively briskly”. Thereafter, the wife would receive a substantial lump sum from the house. The other lump sum (which was not referable to the sale of the house) would, once paid, remain offshore until the following tax year. It was not known that the referendum result would have serious consequences for the housing market. The court cannot take into account the fact that this expensive property in fact remained unsold for over two years.
60. The judge noted at [22] that the conclusion of the first instance judge was infected by a feeling that it was unfair for the husband to have to provide the wife with rent-free accommodation up to a value of £5,000 a week for, as it turned out, two and a half years. In my judgment, the fact that, to this limited extent, the husband had made a ‘bad bargain’ cannot be taken into account when interpreting the Order and it was the judge at first instance, and not the judge on appeal, who was in error in doing so.
61. The Order built in every possible protection to prevent either party varying the lump sum and, therefore, the distribution of wealth which had been agreed between the parties whether by reference to the *Barder* jurisdiction or otherwise. In my judgment, the husband’s interpretation of the Order would serve to undermine that clear intention by reducing the lump sum payable to the wife by the very significant sum of £600,000, she having no other means to satisfy the husband’s demand for rent at £5,000 per week. The judge, in my judgment, therefore rightly concluded that “the Consent Order did not leave space for a further dispute about money or rights in relation to the properties”.
62. Moving on then to the submissions of Mr Glaser in relation to the relevance of the ownership of the property and para.38 of the Order. The judge was aware that the judge at first instance was influenced by the fact of the husband’s sole beneficial ownership of the property rather than the clauses within the Order which relate specifically to the matrimonial home. The judge said in this regard:

“33. Seventh, the judge was impressed, instead of these provisions, with the fact that the respondent's beneficial ownership was acknowledged and that the appellant agreed to remove her notices at the Land Registry. If the home had been being retained in specie for the respondent's benefit, those would be strong points. But the judge seems to have overlooked a fundamental point, that this home was to be sold immediately and that the proceeds of sale were to be split. There was, therefore, no question of the respondent's paramount rights of ownership being given effect by the order, and the removal of the appellant's notices was self-evidently to facilitate the sale with vacant possession, and because such notices were no longer required as a result of the terms agreed and the impending decree absolute. In my judgment, the judge wrongly placed too much

reliance on clause 14, which acknowledged that the appellant had no beneficial ownership.”

63. In my judgment, this paragraph provides the complete answer to Mr Glaser’s submission in relation to the importance of the husband’s beneficial interest and to para. 38. Whilst the judge does not specifically mention para 38, he clearly had the totality of that paragraph in mind when he said “the removal of the appellant's notices was self-evidently to facilitate the sale with vacant possession, and because such notices were no longer required as a result of the terms agreed and the impending decree absolute”. (my underlining)
64. The charges existed by virtue of s31 FLA and determined automatically upon decree absolute unless extended by s33(5). It follows, therefore, that the charges themselves had lapsed upon decree absolute whilst leaving in place the formal protective notices registered under the Land Charges Act, notices which would inevitably deter a potential purchaser and inhibit the raising of funds on the property until removal, notwithstanding that the charge itself had ceased to have any legal validity upon the grant of decree absolute.
65. In my view, the wife’s agreement in para.38 of the Order to the removal of the notices does not, when considered against the totality of the contract, indicate an acceptance that she no longer had any right to occupy the matrimonial home arising out of the terms of the Order. For my part, I would accept the submission of Mr Dyer that para.38 of the Order was an administrative provision tidying up the loose ends that the continuing presence of the notices would present following decree absolute.
66. In my judgment, therefore, the judge properly took into account both the fact that the matrimonial home was in the sole name of the husband and that the wife agreed to withdraw the matrimonial homes notices.

Conclusion

67. This case turns solely on the proper interpretation of this particular Order. In my judgment, the judge in an unimpeachable judgment applied the law correctly and was entitled to conclude that the effect of the parties’ agreement was that the wife was entitled to stay in occupation of the matrimonial home until such time as the house was sold. I would therefore, if my Lady and My Lord agree, dismiss this appeal.
68. I would only add this as a footnote: It may be that, following this case, in order to avoid a similar dispute arising and perhaps it might be thought in an excess of caution, parties will choose to be more specific as to the precise terms under which a party remains in occupation of a matrimonial home pending sale. I repeat, however, that this case sets no precedent, incorrect or otherwise, and should rather be regarded as a somewhat sorry cautionary tale. This couple had considerable means and such was the personal animosity between them that it drove them to litigate this matter through two appeals. In most cases, the proceeds of sale of the matrimonial home are required to rehouse each of the parties and most couples would have neither the means nor the stomach for such protracted satellite litigation, as was engaged in in this case, in order to ascertain

what was, in my judgment, in the end the rather obvious proper interpretation of the Order.

Lady Justice Asplin:

69. I agree that this appeal should be dismissed for the reasons given by King LJ. My only hesitation concerns King LJ's observations in paragraph 23 concerning the procedure adopted by the husband. While I see the force of what King LJ says, we did not hear argument on this point and in those circumstances I would prefer to reserve my opinion as to the propriety of bringing a claim for possession before the County Court.

Lord Justice Arnold:

70. I too agree that this appeal should be dismissed for the reasons given by King LJ. Like Asplin LJ I would prefer to leave open the propriety of bringing a claim for possession in the County Court.