

JERSEY / JUDGMENT

Marett -v- Marett [2014] JRC 213 (07 November 2014)

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judgment

the bailiff: 1. This is an appeal by the appellant ("Jonathan") against a decision of the Master dated 2 nd April, 2014, whereby he struck out Jonathan's counterclaim and gave summary judgment for the respondent ("Stephen") in respect of certain proceedings which Stephen had brought against Jonathan seeking possession of the property in which Jonathan was residing. 2. Shortly after the hearing, we dismissed the appeal (although varying the date for possession to take account of the passage of time for the appeal) and we now give our reasons. The background 3. Stephen and Jonathan are brothers. The backdrop to the present proceedings is the divorce between Jonathan and his wife Debra. In those divorce proceedings, Debra alleged that Stephen and Jonathan had in effect hatched a plan to transfer certain assets to Stephen so as to minimise the assets apparently belonging to Jonathan. In those proceedings, the Court ordered that a preliminary issue be determined as to the extent of Jonathan's interest (if any) in a company called Marett Homes Limited and a development known as Field 1218. We should add that Stephen had been joined to the divorce proceedings as third party and Stephen's wife Annette had also joined these proceedings as intervener. 4. The preliminary issue in respect of Marett Homes Limited and Field 1218 was in due course compromised by an agreement dated 29 th May, 2007, but there was no agreement as to the costs of the preliminary issue and this was accordingly referred back to the Royal Court. 5. The Royal Court (Bailhache, Bailiff) ordered Jonathan and Stephen to pay the costs of the preliminary issue on the indemnity basis. A subsequent appeal to the Court of Appeal by Jonathan and Stephen was dismissed. The Court of Appeal summarised the Royal Court's decision as being made on the basis that Jonathan and Stephen " had engaged in a scheme, a sham, to disguise the true beneficial ownership of [Marett Homes Limited] and that [Stephen] and [Jonathan] had abused the process of the court". (S Marett v J Marett and O'Brien

[2008] JLR 384 at para 26). 6. In due course a mediation was held in order to try and resolve the ancillary relief dispute in the divorce between Jonathan and Debra. The mediation was held on 29 th and 30 th September, 2009. It was attended by Jonathan, Debra, Stephen and Annette together with their legal advisers and was conducted by Timothy Scott QC. The mediation was successful and heads of agreement ("the Mediation Agreement") were signed by all four parties together with their advocates as well as the mediator. Clauses

(viii) and (ix) provided as follows:- "(viii) The Petitioner abandons and withdraws all claims that she has made in these proceedings against the Third Party and the Intervenor and the Petitioner and the Respondent agree that they will not make any allegations in the future that the property of the Respondent is or has ever been held by the Third Party or Intervenor on trust or otherwise; (ix) The Respondent, Third Party and Intervenor have simultaneously agreed that the Respondent abandons all rights that he has or may have had in respect of Third Party and Intervenor's assets and that the Third Party will take over the Respondent's liabilities to JFMS. Furthermore, the petitioner will resign forthwith as a director of JFMS without compensation for loss of office." To assist in understanding these clauses, given the different terminology in these proceedings, they can be restated as follows:- "(viii) Debra abandons and withdraws all claims that she has made in these proceedings against Stephen and Annette and Debra and Jonathan agree that they will not make any allegations in the future that the property of Jonathan is or has ever been held by Stephen or Annette on trust or otherwise; (ix) Jonathan, Stephen and Annette have simultaneously agreed that Jonathan abandons all rights that he has or may have had in respect of Stephen and Annette's assets and that Stephen will take over Jonathan's liabilities to JFMS. Furthermore Debra will resign forthwith as a director of JMFS without compensation for loss of office." 7. The Mediation Agreement was subsequently converted into an order of the Court dated 14 January, 2010, following a hearing before Sir Philip Bailhache, Commissioner. 8. On 5 th August, 2010, ("the August 2010 Agreement") Jonathan and Stephen entered into a second agreement. Clauses 6 and 12 of that agreement were as follows:- "6. That Stephen Marett will allow Jonathan Marett to continue to occupy Les (sic) Frenaie free of charge until December 2012 and will provide Jonathan with an allowance of £2000 per calendar month until 30 June 2011. ...

12. The parties have carefully read this Agreement, and freely and voluntarily agree to all of its terms and conditions. Each party acknowledges that it has been represented by or has a right to independent legal counsel of its choice throughout all the negotiations that preceded the execution of this Agreement, and this Agreement has been executed with the consent and upon the advice of such independent legal counsel." The Agreement was drawn up by Messrs Sinels, who represented Stephen. It was signed by Jonathan and Stephen and was witnessed by Advocate Chiddicks, an employee of Sinels. Jonathan states that he did not take legal advice in respect of this agreement. He had been represented by Advocate Temple of Ozannes in relation to the divorce and at the time of the Mediation Agreement. 9. La Frenaie ("the Property"), being the property referred to in the August 2010 Agreement (despite being incorrectly referred to in clause 6 as Les Frenaie), was inherited by Jonathan and Stephen upon the death of their grandmother in 1993. Jonathan has apparently been living there since 2008, more recently with his partner. 10. On 27 th February, 2009, Jonathan transferred his half share in the property to Stephen who, the same day, transferred the Property into the joint names of himself and his wife Annette. The current proceedings 11. As can be seen, the August 2010 Agreement provided for Jonathan to occupy the Property free of charge until December 2012, with Stephen also paying Jonathan an allowance of £2000 per

calendar month until June 2011. That duly occurred. Jonathan having made it clear that he would not be vacating the premises at the end of December 2012, Sinels (who then still acted for Stephen) served a notice of eviction and subsequently instituted proceedings for possession before the Petty Debts Court on 6 th March, 2013. At a hearing on 20 th March, the Petty Debts Court determined that Jonathan's occupation was under a licence rather than a tenancy and accordingly referred the matter to the Royal Court. On 2 nd May, 2013, Sinels duly filed particulars of claim on behalf of Stephen reciting the August 2010 Agreement and seeking possession together with damages and costs. 12. Jonathan subsequently filed an answer and counterclaim. The answer in effect asserted that he had transferred the Property to Stephen in February 2007 and had entered the August 2010 Agreement under the undue influence of Stephen. The counterclaim pleaded that he had also transferred a number of other assets to Stephen (as well as the Property) when under the undue influence of Stephen and sought damages by reason of Stephen's failure to re-transfer them. Stephen filed a reply on 16 th July, 2013, and further and better particulars of the answer and counterclaim were provided by Messrs Voisins, who then represented Jonathan, on 2 nd September, 2013. These quantified the damages claimed by Jonathan at just under £12m. 13. The Master subsequently raised the position as to whether Sinels could properly continue to represent Stephen given certain matters alleged in the further and better particulars about the conduct of Advocate Sinel, which might lead to him being a witness. Messrs Carey Olsen were subsequently instructed by Stephen in place of Sinels. 14. A mediation took place but regrettably this proved to be unsuccessful. In due course the current summons came before the Master with Stephen seeking to strike out the answer and counterclaim and also seeking summary judgment on the claim. Jonathan was by now acting in person, legal aid having been withdrawn. The Master's decision 15. Stephen argued before the Master that the counterclaim should be struck out on two alternative grounds:- i) Jonathan had transferred the various properties pursuant to an illegal contract and he was not therefore entitled to recover the property so transferred; or ii) Jonathan's claims had been compromised by the Mediation Agreement (subsequently approved by the Court on 10 th January, 2010,) and he could not go behind that Agreement. 16. The Master agreed that Jonathan's case (albeit denied by Stephen) was that he and Stephen were parties to an illegal contract in that they had agreed to transfer assets so as to conceal the extent of Jonathan's assets for the purposes of his wife's claim for ancillary relief. On the face of it therefore Jonathan could not recover any property transferred to Stephen pursuant to that contract. However, the Master also held that Jonathan had an arguable claim that that contract had been brought about by Stephen's undue influence. The Master felt that it would be inappropriate on a strike out application to consider the difficult point as to whether a person could recover property transferred under an illegal contract if that contract had been induced by the undue influence of the opposing party. He therefore declined to strike out the counterclaim on the first ground. 17. However, he considered that it would be both vexatious and an abuse of process to allow the counterclaim to continue given the existence of clause (ix) of the Mediation Agreement. Although Jonathan had pleaded undue influence in relation to the transfer of the assets (including the Property) and in relation to the August

2010 Agreement, he had not pleaded any such allegation in relation to the Mediation Agreement. The Master noted that the Mediation Agreement was reached after mediation which took over a day and a half where each party had a legal representative present throughout and where their legal advisers had counter-signed the Mediation Agreement. 18. Turning to the application for summary judgment in respect of the claim (i.e. the claim for possession of the Property), the Master noted that Jonathan's case was that he had been told by Stephen that he (Jonathan) could stay in the Property until he was paid out his share of the assets transferred to Stephen pursuant to the Agreement referred to earlier seeking to conceal the extent of Jonathan's assets. Stephen had said " When the dust has settled we can sort out the money " or words to that effect. 19. The Master held firstly that Jonathan had an arguable case to set aside the August 2010 Agreement on the basis of undue influence. The effect of that, of course, would be to remove any reference to a particular period of occupation of the Property and mean that Stephen could bring Jonathan's licence to occupy the Property to an end at any time on giving appropriate notice. 20. However, the Master went on to consider whether Jonathan had a case that Stephen was estopped from seeking possession by virtue of what he had said about Jonathan being able to reside in the Property until Stephen had paid Jonathan his share of the various properties transferred by Jonathan to Stephen. He held that the claim to estoppel could not stand up in view of his decision that Jonathan and Stephen had compromised their dispute by virtue of clause (ix) of the Mediation Agreement, so that there was no obligation on Stephen to transfer any of the properties back to Jonathan. As the Master pointed out, Jonathan was therefore left with only part of a promise, namely that he could stay in the Property. But that was not the unequivocal promise that he was relying on. A promise to stay in a property indefinitely without any qualification was very different from a promise to allow someone to stay in the property until payment of a sum of money. He would be re-writing the position if he were to allow Jonathan to argue that he enjoyed an unequivocal promise from Stephen to stay in the Property for the rest of his (Jonathan's) life. The Master held therefore that the promise relied upon by Jonathan was not one that was capable of amounting to an estoppel because part of the promise had been compromised by the Mediation Agreement. 21. The Master therefore concluded that there was no defence to Stephen's claim for summary judgment in respect of his claim to possession of the Property because Jonathan had no promise that he could ask the Court to enforce by way of estoppel. This decision was given in a judgment dated 2 nd April, 2014. In a subsequent judgment dated 28 th April the Master ordered that possession should be given up by 2 nd May and that Jonathan should pay the costs of the proceedings on the standard basis. Grounds for appeal 22. Jonathan has represented himself on appeal. The only ground of appeal (which is to be found in the notice of appeal dated 11 th April, the grounds of appeal of the same date and an affidavit dated 15 th April) relates to the mediation which was held in connection with the current proceedings. Jonathan argues that the mediation was ineffective because his advocate did not represent him forcefully enough and, in particular, that Stephen was represented at the mediation by both Sinels and Carey Olsen, with there being no real effort on Stephen's part to settle. 23. It is true that, in his supplementary judgment of 28 th April, the Master expressed some criticism of Messrs

Sinels in connection with the mediation and we can acknowledge Jonathan's feeling that the odds were stacked against him at the mediation. 24. However, this cannot possibly give rise to any ground of appeal against the Master's decision. The issue for the Master was whether the counterclaim should be struck out on the grounds that it was vexatious or an abuse of process and whether summary judgment should be granted on the claim because there was no real issue to be tried by way of defence. That decision had to be made on the basis of the pleadings and materials before the Court. What is said at mediation is not before the Court. It was irrelevant to the Master's decision as to how the mediation was carried out. The fact that Jonathan feels that, in other circumstances, the mediation might have been more successful cannot have any bearing on whether the Master was right or wrong to strike out the counterclaim and give summary judgment in respect of the claim. That decision must stand or fall on the material before the Master. 25. Jonathan went on to explain to us in some detail the stress which he was under at the material time and how this affected him mentally. He said that Stephen had suggested that he (Jonathan) transfer his assets into Stephen's name with a view to ensuring that these assets did not go to his wife but were preserved for his children. The latter point was the only reason that he (Jonathan) entered into these arrangements. He fell in with the plan as he was not really in a fit condition to withstand the suggestion. The plan had been catastrophic in its effect. He had, pursuant to the Mediation Agreement, paid over to his wife virtually everything which he apparently owned at that time. Since then, Stephen had refused to re-transfer any of the other assets, so that he was left with nothing. Now Stephen was attempting to evict him from his home. In fairness to Stephen, we should add that he strongly denies Jonathan's versions of events. 26. We understand the strength of feeling with which Jonathan put forward these submissions. However, they do not assist him in relation to his appeal against the Master's decision. His submissions go to the question of whether he entered into the agreement to transfer the assets to Stephen and into the August 2010 agreement under Stephen's undue influence. The Master accepted in his judgment that this contention was arguable. Jonathan therefore succeeded on that aspect before the Master and we proceed on a similar basis.

Determination

27. Despite the limited nature of the submissions put forward by Jonathan, we have considered for ourselves whether the Master's decision was correct or whether it should be over-ruled. The test for appeals from a decision by the Master is well known; the Court must reach its own decision whilst paying due regard to the decision of the Master. Having considered the matter afresh, we have concluded that the Master reached the correct decision for the right reasons. We can therefore express our conclusions comparatively shortly. 28. We take first the decision in relation to the counterclaim. In essence, the counterclaim alleges that Jonathan agreed to transfer the Property and the various other assets referred to in the counterclaim to Stephen (or to Stephen and his wife) and entered into the August 2010 Agreement because of the undue influence exercised by Stephen. He argues therefore that both these agreements should be set aside and he should not be held to them. It would

appear from his evidence that he was not separately legally represented when entering into either of these agreements. 29. The difficulty is that, in September 2009, Jonathan entered into the Mediation Agreement. This agreement was reached after a one and a half day mediation during which Jonathan was represented by the firm of Ozannes and Advocate Temple of that firm attended the mediation on his behalf. He was therefore separately legally represented. The Mediation Agreement was signed by all the parties, by all their advocates and by the mediator, an experienced English QC. By clause (ix) of the Mediation Agreement, Jonathan agreed that he abandoned any right that he had or might have in respect of the assets of Stephen and his wife. There was proper cause for the agreement in that Stephen agreed to pay the sum of £350,000 to Jonathan's wife and to take over Jonathan's liabilities to one of the companies. 30. There is no allegation in any of the pleadings that the Mediation Agreement is liable to be challenged or set aside because of undue influence or on any other ground. In the circumstances, there being no challenge to the agreement, Jonathan is bound by it. Thus, whatever may have been the position when he entered into the original agreement to transfer the assets, he has agreed subsequently in a legally binding fashion with the benefit of legal advice that he has no claim to any of the assets of Stephen or his wife. In those circumstances, the counterclaim is doomed to failure and the Master was quite right to strike it out. 31. Turning to the claim itself, the Mediation Agreement applies to the Property just as much as it does to the other assets which Jonathan transferred to Stephen. Accordingly, the Property belongs to Stephen and his wife and Jonathan cannot now challenge their title. 32. The question then is whether Jonathan has any continuing right to occupy the Property as licensee or whether, in accordance with the claim, Stephen and his wife are entitled to regain possession. 33. Stephen relies on the August 2010 Agreement which only confers a right of occupation by Jonathan until December 2012. That date having passed, Stephen is on the face of it entitled to claim possession. 34. Jonathan's first line of defence is that the August 2010 Agreement was also reached under the undue influence of Stephen and can therefore be set aside. The Master held that that was arguable and should be allowed to go to trial if necessary. The difficulty is that, assuming Jonathan were to succeed in setting aside the 2010 Agreement, it would not alter the fact that, pursuant to the Mediation Agreement, the Property is owned by Stephen and his wife. Jonathan has no right to occupy it unless he can show some basis upon which he has a right to do so. 35. What he relies upon is estoppel. He contends that Stephen agreed that he could remain in the Property until after the financial matters with Jonathan's wife were sorted out at which time Stephen would re-transfer half of the assets in question to Jonathan. At that point, Jonathan would be able to provide himself with accommodation. In essence therefore he contends that Stephen agreed that he could remain in the Property until Stephen paid him his half share of the other assets. 36. However, as the Master correctly pointed out, that original agreement has now changed. By the Mediation Agreement, Jonathan has given up any claim to the assets. 50% of them will therefore never be repaid to him. As the Master said, one cannot convert an assurance that someone can remain in occupation until certain assets are transferred to him into an assurance that the person can remain there indefinitely. Estoppel can only act on the basis of a clear and unambiguous assurance. 37.

For these reasons, we agree that, even if the evidence of Jonathan is accepted, estoppel cannot provide a defence to Stephen's claim to possession of the Property. 38. It was for these reasons that we dismissed the appeal against the Master's decision, subject to varying the date for possession to 15 th July in order to allow Jonathan a reasonable period after the outcome of the appeal before having to vacate the Property. Authorities *S Marett v J Marett and O'Brien*

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