

Neutral Citation Number: [2023] EWHC 3461 (Ch)

Case No: CH-2021-000195

**IN THE HIGH COURT OF JUSTICE**

7 Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Date: 23 May 2023

**Before:**

**HIS HONOUR JUDGE MONTY KC**  
**Sitting as a Judge of the High Court**

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**Between:**

**SIMON BURKE**

**Claimant/Respondent**

**- and -**

**MISS KHAN**  
**MRS KHAN**

**Defendants/Appellants**

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**MR WALSH** appeared for the **Claimant/Respondent**  
**MR IAN CHAI** and **MR THOMAS JOHNSON** appeared for the **Defendants/Appellants**

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**APPROVED JUDGMENT**

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**HIS HONOUR JUDGE MONTY KC:**

1. The background to this appeal is that in proceedings issued on 18 August 2016 the Respondent (the Claimant) sought a declaration that the Appellants (the Defendant, and the Respondent's Landlord) had unreasonably withheld consent to carry out alteration works. At a Costs and Case Management Conference on 12 May 2017, District Judge MacKenzie made the following order (I need only set out paragraph 3):

“3. Upon the 1st and 2nd Defendants accepting that their concern is in relation to the Claimant's ability to satisfy Building Control of London Borough of Westminster, Kensington and Chelsea, Fulham and Hammersmith or such other suitably qualified person agreed between the parties over these proposed works. Action is stayed for the Claimant to obtain such consent and upon such consent being obtained, the 1st and 2nd Defendants will grant consent. Copies of the application to be provided to the 1st and 2nd Defendant.”

2. On 31 July 2017, Deputy District Judge Elliott made a further order (I need only set out paragraph 1):

“1. Unless the Defendants provide a licence to alter in accordance with the plans sent to building control officer Mr Shane Morely on 23 June 2017 at 18:13 hrs and sent to Defendants by letter on 30 June 2017, the Defendants be debarred from defending and the case be listed for disposal first open date after 07 September 2018 with a time estimate of 30 minutes.”

3. On 12 September 2017, District Judge Parker made the following order:

“... AND UPON the Defendants not having satisfied the terms of the unless order of District Judge Elliot dated 31 July 2017 by failing and/or refusing to provide a licence to alter in accordance with the plans sent by email to Shane Morley of building control at 18:13 on 23 June 2017

AND UPON the Defendants therefore being debarred from defending the claim

1. The Claimant may, as if he had a licence to alter from the Defendants in accordance with sch.5 para.12 of the lease of Flat 38A Leamore Street, London W6 0JZ, proceed to carry out the works identified in the application sent to the said Mr Morley, as above.
2. The Defendants acted unreasonably in delaying and withholding the grant of the said licence to alter, whether within the meaning of the said lease of s.19(2) Landlord and Tenant Act 1985.
3. The Defendants shall pay the Claimant's costs of the claim, excluding the costs of the hearing on 31 July 2017, for which separate provision has been made, to be assessed if not agreed.”
4. On 1 September 2019, District Judge Parker dismissed the Appellant's application to set aside her earlier order, for the following reasons:

“It makes no sense, and appears to be an attempt to set aside or vary an order made on 12 September 2017, which was not appealed, the case having concluded on that date.”
5. On 5 August 2019, the Respondent's costs were assessed by Master Whalan in the sum of £33,803.00. The costs were not paid. The Respondent petitioned for the bankruptcy of each of the Appellants, and bankruptcy orders were made by District Judge Hart on 19 July 2021.
6. On 9 August 2021, the Appellants filed their Notice of Appeal. Permission to appeal was refused on paper by Mr Justice Leech on 25 October 2022. The application for permission was renewed orally, and on 2 December 2022 Mr Justice Leech granted permission in the following terms:

“The Appellants are granted permission to appeal against the First Hart Order and the Second Hart Order and paragraph 3 of the Parker Order limited to the Grounds of Appeal set out in the recital (above). For the avoidance of doubt the Appellants do not have permission to appeal against the declarations in paragraphs 1 and 2 of the Parker

Order or otherwise to challenge the lawfulness of any works carried out pursuant to that Order.”

7. The recital referred to in Mr Justice Leech’s order is as follows:

“AND UPON counsel for the Appellants orally renewing the Appellants’ application for permission to appeal on Ground (7) of the Grounds of Appeal set out in paragraph 3 of the Order dated 25 October 2022 and, in particular, on the grounds that the Appellants had complied with paragraph 1 of the Order of District Judge Elliot dated 31 July 2017 (the “Elliott Order”) or, alternatively, that the Elliott Order was ineffective because it failed to specify a time within which the Appellants were to provide a licence to alter in accordance with CPR PD 40B, paragraph 8.1 and, in either case, that the Order of District Judge Parker dated 12 September 2022 (as amended by the slip rule on 13 November 2022) (the “Parker Order”) should not have been made.”

8. Ground 7 as referred to in that recital was as follows:

“(7) The judgment of District Judge Hart was based on the incorrect assumption that the costs order upon which the petition debt had been appealed. An application to set aside the costs order was made but then dismissed by District Judge Hart.”

9. In the course of hearing this appeal, Mr Chai (counsel for the Appellants) has asked me to extend the scope of this appeal by seeking permission to appeal paragraph 2 of District Judge Parker’s order (in which it was held that the Appellants had acted unreasonably in delaying and withholding the grant of the licence).

10. The delay since the order of 12 September 2017 is something that is substantially of concern here, and the fact this application is made very late. Indeed, it is in my view now far too late to appeal an order from September 2017, particularly where an application to set aside the order was refused and there was no appeal from that decision either. As things stand, the appeal is confined to the question of whether the

costs order of 12 September 2017 was wrong. Were I to accede to this application, the whole basis of the appeal would change, as it would expand into considering the withholding of the licence and other issues. Importantly, Mr Justice Leech expressly dealt with this point when considering the oral application for permission to appeal (in other words, the Appellants stood no reasonable prospect of persuading an appeal court that they had done anything other than act unreasonably in delaying withholding of the permission). Mr Justice Leech expressly refused permission in respect of paragraph 2 of the order of 12 September 2017 and in respect of the declarations in that order, and in the circumstances I have decided that I will not grant permission to extend this appeal beyond the scope of that permitted by Mr Justice Leech in his order.

**(For proceedings after judgment see separate transcript)**