



Barristers' Chambers

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Consent Orders – A Guide to Interpretation

-an analysis of *Derhalli v Derhalli* [2021] EWCA Civ 112

Introduction:

Interpretation of Consent Orders is an exercise often embarked upon a considerable time after an order was made and invariably after the financial geography of the respective parties has altered considerably from that which formed the basis of the negotiation leading to the order in the first place. Such changes can result in the party worst affected by the subsequent changes to take up stances as to the meaning of the words used in the Consent Order which would have been untenable if raised at the time. The Court of Appeal's decision in ***Derhalli v Derhalli*** is, therefore, a welcome guidance to matrimonial practitioners of the route to be adopted in such situations as borrowed from commercial decisions on interpretation of contracts

Facts:

This was a second appeal to the Court of Appeal following a first appeal to Fancourt J from the first instance decision of the Circuit Judge.

H and W were married in 1989 and had lived together with their two children in the London family home registered in H's sole name. On separation in 2014, H moved out and W and the children remained there until the sale of the property in 2019. The divorce was in 2015 and in 2016 the parties reached an agreement compromising their financial claims, which was then incorporated in a Consent Order approved by Holman J. The decree absolute was pronounced a month later in October 2016.

The Consent Order provided for the immediate sale of the Fmh and three lump sum payments to W upon a clean break – part of the lump sum payments were to come from the sale proceeds, but specifically the Order expressly prohibited any variation of the lump sums and any change in H's companies being used as a subsequent Barder event. Save for

transferring the payment to W and registered notices, specific provision



property bills
W withdrawing her
there was no other
on W's occupation.

Whilst the parties had anticipated an early sale at £7m of the Fmh, in fact ,with the effect of Brexit and its high value, the property did not sell until 2019 and then only for £5.9m at which point the W and children moved out.

In the interim in 2017, H, as the sole owner of the Fmh, had issued possession proceedings against W and claimed she was trespassing and seeking £600k in damages. These proceedings had resulted in an order from the County Court that W was merely a gratuitous licensee. On the first appeal, from the Circuit Judge to Fancourt J against that finding, the County Court order was set aside and it was held W had, on the true meaning of the Consent Order, a right to stay pending sale paying the outgoings but no rent. H was given permission to appeal.

Appeal to Court of Appeal:

The Court of Appeal hearing this second appeal determined that whilst a Consent Order is not a contract (see **Macleod v Macleod** (2010) AC 298 – Lady Hale) the approach to interpreting a Consent Order was the same as interpreting any commercial contract (see **Besharova v Besharova** (2016) EWCA 161).

King LJ observed that H would have been able to have claimed possession of the Fmh under **s 24A** of the **MCA 1973**, which allows a Court to make any consequential provision as it thinks fit after an order for sale has been made, which includes an order for possession “to any person” (see **FPR 2010 Rule 9.2.2**) and also there is a power to vary such a sale order under **s31 (2) f**). However, King LJ was clear that, whilst the County Court had jurisdiction, any dispute as to the interpretation of a financial remedy order made upon divorce should be placed before the FRC, which has the specialism required in such circumstances. Hence, King LJ was of the view (albeit the other two LJJs sitting without argument having been advanced preferred to leave this issue open) the possession proceedings taken by H were inappropriate and any action by him should have been under **s 24A** and **s 31** as above.

King LJ, therefore, concluded that the finding that W was merely a gratuitous licensee had no legal basis, particularly as before decree absolute W had statutory rights (see **FLA 1996 s 30** and **s 31 (2)**) to remain at the Fmh. In addition, there was no factual basis that H had ever granted such a licence by H. The question therefore was King LJ held that the answer to the

case lay not in the
by H but upon a
interpretation of
made by Holman J.



strict legal title held
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the Consent Order

Interpreting a

Consent order:

King LJ referred to **Arnold v Britton** [2015] AC 1619 where Lord Neuberger had stated that the meaning (in that case of a lease provision) of a contract had to be assessed in the light of:-

- i) The natural and ordinary meaning of the provision in question;
- ii) Any other relevant provisions of the contract;
- iii) The overall purpose of the provision and the contract;
- iv) The facts and circumstances known or assumed by the parties at the time the document was executed;
- v) Commercial common sense; and
- vi) A disregarding of subjective evidence of the parties' intentions.¹³

King LJ also referred to Lord Hoffmann in **Chartbrook v Persimmon Homes Ltd** [2009] 1 AC 110 in which it had been 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 the contract to mean

H had maintained that as the Consent Order had provided for a clean break and he was the sole owner then on decree absolute W had no continuing rights of occupation. He claimed this was supported by the fact he could under the Consent order give 24 hours notice of his wish to visit and that W had undertaken to remove her registered notices against the Fmh and the fact he was to transfer the outgoings standing orders to W did not give her rights of occupation

However, King LJ agreed that the parties' intentions were more revealed by the factors highlighted by W, who maintained any reasonable reader of the Consent Order knowing the history of the parties marriage, the fact the Fmh was the home of the children and the making of the Consent Order with the joint instruction of the Fmh sale provided for and with H transferring the property bills to W pending sale would question why the latter was

necessary if H
leave at short
maintained the
decree absolute
merely to bring the
effect.



could require W to
notice. W
obtaining of the
was required
Consent Order into

King LJ agreed with Fancourt J's interpretation of the Consent Order in W's favour in those circumstances.

Adopting specifically the approach of Lord Hoffmann as above, King LJ considered that the background knowledge would include that this was an order made in financial remedy proceedings made by a judge, who would have considered all the circumstances and factors under the s 25 exercise. The Court could only take into account the circumstances known to the parties at the time of the Consent Order being made. Neither party would have known

that the referendum result would have had serious consequences for the housing market and, therefore, the Court could not take into account that subsequently the property remained unsold for 2 years nor in that light that H had made a bad bargain in providing W with rent free accommodation. In addition, H's case that W should pay a rent would undermine the clear intention expressed in the Consent Order that the parties had intended that the lump sums should not be variable since W had no other means of meeting H's rent demand.

King LJ held that as administrative requirements only, the withdrawal by W of her registered notices against the Fmh was needed to ensure the property could indeed be sold and when set against the totality of the Consent Order made did not mean that W thereby accepted she no longer would have any right to occupy. Fancourt J was, therefore, entitled to hold that on the proper interpretation of the Consent Order the parties had intended by the agreed terms of the Consent Order that W should remain at the Fmh with the children pending the sale – adding that in future cases parties may wish to make more specific provision where one party remains in occupation pending sale. H's appeal was therefore dismissed.

Commentary

It is instructive to reflect upon the excerpts quoted by Lord Bingham in **Bank of Credit and Commerce International SA v Ali** [2002] 1 AC 251 (8) and then of Lord Neuberger in **Arnold's case**, as cited by King LJ in her judgment in two particular respects. First, as to the "*facts and circumstances known to the parties at the time*" at points i) to iv) above and vi):-



“To ascertain the parties the court contract as a whole, their natural and the context of the parties' relationship

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.” Lord Bingham.

intention of the reads the terms of the giving the words ordinary meaning in agreement, the and all the relevant

And then, in particular, as to “commercial common sense” at point v) above:-

“..., 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.” Lord Neuberger.

The common trap is, being aware of the events which have followed a Consent Order, then to seek only to interpret the terms of the Order so as to fill in the omissions now exposed by hindsight. Whereas, the four corners of the Consent Order itself and the natural meaning of the words used therein should be the primary focus assisted where relevant by any surviving material evidencing the negotiations leading up to the Order and possibly also immediately after the Order was made. As emphasised above, the subjective views of the parties of meaning are of little consequence.

As highlighted by King LJ, practitioners should be alive to the need to provide more information in such Orders where one party is to remain in residence at a property pending sale as to for example the parties intentions as to exclusive occupation, rent payment and perhaps also detail of circumstances which may require that party to vacate earlier etc.

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