

JUDGMENT : Blackburne J : Chancery Div. 16th February 2004

1. This is an argument about costs. The background to all of this is a joint venture between the Claimant Karen Meikle and the Defendant Noel Brown involving the acquisition of a number of properties, most of them for rent, and most of which were acquired with the benefit of loans secured by mortgages over the respective properties.
2. Unhappily the parties fell out. Disputes arose. Sensibly they agreed to a mediation of their differences which bore fruit in an agreement on 5 August 2003. There were in place, so to speak, six properties, all, as I say, in the Claimant's name. One of the properties was 171 Wheelright Lane in Coventry (which I shall refer to as Wheelright Lane). Another was a property in north Wales at 77 Pender Avenue. Each was subject to a mortgage in the Claimant's name as proprietor.
3. The agreement recited, so far as relevant, that Miss Meikle would pay the mortgage payments in respect of Wheelright Lane and Mr Brown would pay the mortgage payment in respect of Pender Avenue until the date of completion of transfers referred to in the body of the agreement. By cl 1, it was agreed that Miss Meikle should retain the four other properties which were in her name in any event and that: "Mr N Brown shall withdraw the cautions against those properties forthwith."
4. I should say that one of the problems, if not the main problem, which resulted in the **mediation** was the fact that Mr Brown, the Defendant, had caused to be entered against the titles of each of the six properties a caution, protecting his interest as he claimed it to be in each of these properties.
5. By cl 2 it was provided that upon Mr Brown procuring discharge of the mortgage on Wheelright Lane, Miss Meikle should simultaneously transfer that property to Mr Brown or his nominee and by subclause 2 of that clause, that upon Mr Brown procuring discharge of the mortgage on Pender Avenue, Miss Meikle should simultaneously transfer Pender Avenue to Mr Brown or his nominee. Then was then a provision that any capital gains tax liability arising on the transfer of either of those properties and the costs of transfer should be in effect for Mr Brown's account.
6. Clause 31 then provided: "*If Mr N Brown is unable within three months of the date of this agreement to secure the release of Miss Meikle from either mortgage, the property so affected shall be sold forthwith on the open market at the best price reasonably obtainable and once sold, and after payment of the mortgages and payment of any capital gains tax liabilities, the net sale proceeds shall belong to N Brown absolutely. If there has been no transfer within three months from the date of this agreement, Mr N Brown shall be responsible for the mortgage payment of the Wheelright Line mortgage capital and interest until sale or until discharge of the mortgage and transfer of the property to him.*"
7. Clause 4 then provided that Miss Meikle vacate the Wheelright Lane property upon the date of completion of the transfer, provided she was given seven days' written notice. She also agreed by cl 5 not to part with or share possession (save with her family), let or otherwise deal with the Wheelright Lane property. Then by cl 6 there was a provision whereby Miss Meikle would keep the Wheelright Lane property insured until November 2003 after which insurance should be Mr Brown's responsibility.
8. Unfortunately the parties were not able, notwithstanding that agreement, to resolve all of their difficulties. In agreement with Mr Cray who appears for Miss Meikle, I consider that the responsibility for this falls largely on the shoulders of Mr Brown, in that he did not, as he was obliged by cl 1 to do, secure the immediate withdrawal of the cautions affecting the four properties which Miss Meikle was to retain. Nor did he procure the discharge of the mortgages on the Wheelright Lane and Pender Avenue properties within the three months as provided by clauses 2 and 3.
9. Miss Meikle it appears then took steps to effect a sale of the Wheelright Lane property as by cl 3 she was fully entitled to do.
10. It would not be fair to say that Mr Brown had been entirely idle. By 17 November, admittedly outside the three-month period provided for by cl 3, he had obtained a mortgage offer to be secured on the Wheelright Lane property, securing an advance of an amount sufficient to procure the discharge of both the existing mortgage effecting the Wheelright Lane property and also the mortgage affecting the Pender Avenue property. Indeed, the proposed mortgagee instructed solicitors, a firm called Arch and

Co, who on the 9 December contacted Miss Meikle's solicitors to say that they were instructed on behalf of the proposed mortgagee.

11. By about that time the parties seem to have been unwilling to extend to each other the co-operation to which each was entitled. For example, on 17 December 2003 Mr Brown's solicitors wrote to Miss Meikle's solicitors, this being some time after the mortgage offer had been forthcoming, to say that they had taken instructions from their client, that is Mr Brown, and were instructed to put forward the following offer:

"(1) If your client is prepared to co-operate in the transfer of 171 Wheelright Lane to our client by execution and delivery in escrow of a transfer to Arch and Co or such other conveyancing device as is necessary and would have to be agreed;

(2) Then our client would make an immediate payment of £1,700 in respect of the Pender and Wheelright Lane mortgage instalments in November."

12. I pause to say that not only had Mr Brown not brought about a discharge of the two mortgages affecting the Wheelright Lane and Pender properties, but he had also been in default in respect of mortgages instalments falling due.

13. Continuing:

"(3) Our client must sign the necessary forms to withdraw the cautions in respect of the four properties."

14. That is a reference to the four properties that in any event Miss Meikle was to retain. The letter continues: *"Perhaps you could take immediate instructions on the above and respond to us by no later than 12 noon on 18 December 2003."*

15. The solicitors had no business whatever to make the withdrawal of the cautions affecting the four properties that Miss Meikle was to retain, dependant on Miss Meikle's co-operation in respect of the re-mortgaging of the Wheelright Lane property. The linking of the two seems to be something that Mr Brown maintained until the time that these proceedings were issued. I will come to those in a moment.

16. Equally, however, Miss Meikle's solicitors ought to have responded to Mr Brown's solicitors' letter and offered co-operation in the provision of a transfer to enable the re-mortgage of the Wheelright Lane property to proceed.

17. What is said on behalf of Miss Meikle is that she was entitled, the three months having passed, to proceed to a sale of the Wheelright Lane and the Pender Avenue properties. It is quite right that she was. But that did not entitle her to withhold co-operation to Mr Brown in relation to his efforts, admittedly belated, in securing a re-mortgage of the two properties or at any rate the Wheelright Lane property, the achievement of which would have enabled Miss Meikle to be free of the two existing mortgages affecting the Wheelright Lane and Pender Avenue properties which it was the object of that part of the **mediation** agreement to bring about.

18. The impression I have is that Miss Meikle seems to have taken the stance that there having been no discharge of the existing mortgages by the due date, she was entitled to withhold co-operation to Mr Brown's belated efforts to secure the discharge of her duties. It is said – and I have some sympathy with this – that Miss Meikle was somewhat disenchanted by Mr Brown who, after all, had not only failed to bring about the discharge of the two mortgages within three months, but was also still evidently refusing to bring about a discharge of the cautions affecting the four properties to which in any event she was entitled, and to which it was agreed that she should retain.

19. It was in that state that Miss Meikle issued these proceedings, which she did on 16 January, claiming the removal of the cautions affecting the six properties, reimbursement of mortgage instalments and a £19,600 payment. I have not so far referred to that. There was a provision in the mediation agreement whereby upon his compliance with paras 2 and 3 of the agreement Mr Brown should pay to Miss Meikle £19,600. On the very day that these proceedings were issued, Mr Brown belatedly took steps to apply for a discharge of the four cautions affecting the properties which Miss Meikle was in any event to obtain.

20. The proceedings came before Evans-Lombe J on 23 January. At that stage the two parties compromised their differences over Wheelright Lane and the Pender Avenue properties by cross-undertakings; Mr Brown undertaking to use his best endeavours to complete a mortgage of the Wheelright Lane property and secure the release of Miss Meikle from the mortgages affecting that property and the Pender Avenue property by 4pm on 6 February, and also undertaking to pay to Miss Meikle's solicitors £7,800-odd; and Miss Meikle for her part undertaking to co-operate reasonably and promptly in Mr Brown's mortgage of the Wheelright Lane property and also to apply the £7,800-odd towards reimbursement of payments which she had made in respect of those two properties (that is to say the Wheelright Lane and Pender Avenue properties) for which Mr Brown was liable under the **mediation** agreement, and to apply any balance towards reducing either mortgage or insurance payments outstanding in respect of the Wheelright Lane and Pender Avenue properties.
21. She also undertook to apply to adjourn certain possession proceedings which she had brought in respect of the Pender Avenue property, that property being occupied, as I understand it, by Mr Brown's parents. On that footing Miss Meikle's application for vacation of the cautions was adjourned until 9 February and the costs of the application were reserved.
22. Happily Mr Brown was able, in the event, to obtain a mortgage to secure a mortgaging of the Wheelright Lane property, and out of the proceeds to procure the release of Miss Meikle from the mortgages in her name against the Wheelright Lane and Pender Avenue properties. Outstanding payment[s] of one kind [or] another were duly settled. That left only the question of costs and today's hearing.
23. I take the view that there was no justification for Mr Brown failing until 16 January or thereabouts to bring about the removal of the cautions affecting the four properties which Miss Meikle was entitled to retain. It seems to me therefore that, on any view, some part of the costs of these proceedings which she incurred should be provided for by him.
24. On the other hand, I take the view that, in relation to the Wheelright Lane and Pender Avenue properties, it is very much of a case of six of one and half a dozen of the other. On the one hand, Miss Meikle was not extending to Mr Brown the co-operation to which, admittedly belatedly, he was entitled in relation to obtaining a mortgage of the Wheelright Lane property in order to enable him to secure her release from the existing mortgages.
25. On the other hand, Mr Brown was not helping himself in that endeavour by using the cautions over the other four properties in effect as a weapon in his dispute with Miss Meikle. I also bear in mind the fact that Mr Cra[ig] has pointed out that, on any view, Mr Brown was late in his compliance with what he undertook to do under the **mediation** agreement and that Miss Meikle many have had some grounds for doubting Mr Brown's good intentions.
26. In my judgment the appropriate order to make in respect of costs reflecting these matters is that Mr Brown should pay to Miss Meikle half of her costs of the claim. That is to say the issue of the claim form and the accompanying particulars of claims and half of the costs of the application which came before Evans-Lombe J on 23 January. Such costs are to include not simply the application itself, but the evidence in support.

A Craig for the Claimant
N Isaac for the Defendant