# ORDER MEANS ORDER!

## *Sangha v Amicus Finance Plc* (2020) EWHC 1074 (Ch) AND AN UPDATE ON SETTING ASIDE ORDERS FOR POSSESSION

The recent High Court (Business and Property) decision of *Sangha v Amicus Finance Plc* handed down on 5th May 2020 draws attention to the finality of possession orders and the regime for seeking to set aside the same. It also offers the perfect opportunity to re-consider the basis and legal tests for seeking to set-aside possession orders and provide a case law update on *Sangha v Amicus Finance Plc* itself.

### Where the Defendant does not attend the hearing

The authority of *Forcelux Ltd v Binnie [2009] EWCA Civ 854* sets out that the 3 stage test at CPR 39.3(5) applies by analogy, but not as strictly and is relevant as a matter of discretion, to possession orders made at a hearing, which is not a trial, in the absence of a Defendant.

CPR 39.3(5) sets out the following 3 stage test;

> (a) acted promptly when he found out that the court had exercised its power to strike out(GL) or to enter judgment or make an order against him;
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> (b) had a good reason for not attending the trial; and
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> (c) has a reasonable prospect of success at the trial.

As per *Regency Rolls v Carnall [2000] EWCA Civ 379* all three stages of the test must be satisfied. There is perhaps some argument that in its application by analogy that requirement ought not to be as rigid, however there is little guidance.

Further, to act promptly means to act "with alacrity" or with "all reasonable celerity in the circumstances" (*Regency Rolls v Carnall*). In *Regency Rolls,* 4 weeks was held to be too long a delay. It is worth considering, by comparison, that CPR 52.12(2)(b) allows only 21 days (3 weeks) to lodge an appeal, whilst CPR 55.19 in dealing with accelerated s.21 proceedings where order are regularly made without a hearing in the absence of a Defendant allows a mere 14 days (2 weeks) for the lodging of an application to set aside.

**Where the Defendant has attended the hearing**

Under CPR 3.1(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order. If the Defendant attended the hearing and an order was made in his/her presence, this is the only provision by which the order may be capable of being set aside.

As per *Daniel Terry v BCS Corporate Acceptances Limited [2018] EWCA Civ 2422* *"In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see Hackney London Borough Council v Findlay [2011] EWCA Civ 8, [2011] HLR 15*."

The importance of the finality of orders is also a matter consistently referred to within the body of case law. As per *Tibbles v SIG PLC* [2012] EWCA Civ 518 "*considerations of finality, the undesirability of litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all push towards a principle of curtailment of an otherwise apparently open discretion*."

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*Sangha* was an application for set aside brought under CPR 3.1(7) but where it was also argued that CPR 39.3(5) ought to be engaged as the Defendant's attendance at the hearing had been "ineffectual" and analogous to non-attendance as in *Forcelux v Binnie*.

*Background*

By way of brief background a possession order was made on 27 January 2017 by Deputy District Judge Anthony in favour of the Claimant in relation to a property at The Mount in Reservoir Road, Edgbaston, Birmingham. The possession by Mr Sangha of the Mound itself is somewhat convoluted and involves loans, legal charges, debentures and the such. It is largely irrelevant to the ration of the case.

In any event, a possession order was made, Mr Sangha failed to give up possession and Amicus applied for a warrant to execute the Possession order. Mr Sangha applied to suspend the warrant for possession and a first hearing was adjourned to enable him to file further evidence and

submissions on a number of issues. None were filed. However Mr Sangha then made an an application to set aside the possession order under CPR Rule 3.1(7).

Mr Sangha's evidence is that he had a conference with counsel on 30 November 2017, at which point he became aware that he had a potential defence to the possession proceedings, That defence was set out in his draft defence and counterclaim filed alongside the 1st December 2017 application. The application to set aside the possession order came before Deputy District Judge Sharp on 6 April 2018, when it was dismissed.

That dismissal was the subject of the appeal to the High Court.

*Judgment*

As set out in paragraph 22 of the Judgment of Zacaroli J, the grounds of appeal filed on behalf of Mr Sangha, drafted by his previous counsel, it was contended that the Deputy District Judge adopted an overly restrictive interpretation of the Court's power to vary or revoke its own orders under CPR 3.1(7). In particular, it was contended that:

> i) The judge adopted a too rigid dichotomy between interim orders and final orders which was not reflected in key authorities: namely *Forcelux v Binnie [2009] EWCA Civ 854* and *Roult v North West Strategic Health Authority* [2010] 1 WLR 48 the judge was wrong to do so given that the rule itself is in broad and unfettered terms;
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> ii) The judge elevated the importance of finality to an extent unwarranted by the terms of the rule, and paid correspondingly insufficient regard to the interaction with other related proceedings;
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> iii) Further or alternatively, the judge gave undue weight to finality in the current proceedings and the perceived delay in the application, when the current proceedings were not entirely concluded and could be consolidated with other proceedings. The judge also gave insufficient regard to the risk of irreconcilable decisions.

The High Court firmly rejected the suggestion that a possession order was anything other than a final order. It was a final determination of all rights claimed by Amicus in the proceedings so far as its claim to possession was concerned: there was no further decision of the Court required in order to establish Amicus's right to possession [28]. Furthermore, the simple fact that the order had not

yet been executed or because there was a statutory right to stay or suspend execution, or to postpone the date for possession did not remove the finality of a possession order.

Given the final nature of the order for possession, three things were clear [35];

***(1)*** in relation to a final order, it is not sufficient to show that there was a change in circumstances or that the facts were misstated at the time of the original decision
***(2)*** the importance of finality is a critical consideration in an application to set aside a final order
***(3)*** the circumstances in which it might be appropriate to set aside a final order will be very rare.

It was noted that previous case law had suggested that nothing less than fraud would do to set aside a final order and that it will be the truly exceptional case where the power to set aside a final order might be exercised.

The Court rejected the argument that the "ineffectual" attendance of Mr Sangha, i.e. without legal representation and failing to take a point on misrepresentation which may have provided him with. Defence, was comparable to his non-attendance at the hearing. Attendance, or non-attendance, at a hearing is a simple, binary issue [44]. It was noted that "*In this case, Mr Sangha was unrepresented at the hearing, but that cannot sensibly be equated with "ineffectual" attendance. The notion of "ineffectual" attendance would appear, therefore, to relate to the failure to take the point which it is sought to take subsequently. To identify that as the touchstone for being able to set aside an order would, however, drive a coach and horses through the required focus on the importance of finality. As I point out below, the mere fact that a point was not taken at the original hearing would normally not be enough to set aside an interim order, let alone a final one*[45]."

In any event, even if "ineffectual" attendance engaged the non-attendance test at CPR 39.3(5), Mr Sangha delayed by 10 months to lodge an application to set aside, had been legal represented prior to the hearing and shortly thereafter it and in fact all the facts of the alleged misrepresentation defence were known to him at the time of DDJ Anthony's original order.

The appeal was dismissed.

**Conclusion**

This article was intended to be a quick re-cap on the set aside provisions for possession order and it is advisable that all practitioners avail themselves to a copy of *Sangha v Amicus* which is an easily

digestible judgment with a well set out array of the arguments and caselaw often deployed in such applications.

*Sangha* has reinforced the rarity of setting aside final orders made with the attendance of the Defendant and indeed makes abundantly clear that the lack of legal representation or failing to take a readily available point, does not meet the exceptionality required in setting aside such final orders.

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