



Neutral Citation Number: [2019] EWHC 1810 (Ch)

Case No: HC-2017-000112

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/7/2019

Before:

MASTER CLARK

Between:

JHANGIR MOHAMMED BASHIR
(by his litigation friend SAMANTHA LOUISE
HAMILTON)

Claimant

- and -

RABIA BASHIR
(by her litigation friend SATPAL SINGH BHATT)

Defendant

Naomi Hawkes (instructed by Mullis & Peake LLP) for the Claimant
Satpal Bhatt, the Defendant's litigation friend, in person

Hearing dates: 3 & 4 April 2019

Approved Judgment

This is the judgment as handed down by the Court

.....

Master Clark:

1. This is a Part 8 claim seeking an order for sale of the property 7 St Heliers Road, Leyton, London E10 6BD (“the Property”), which is registered in the sole name of the defendant, Rabia Bashir. The claimant, Jhangir Mohammed Bashir, lacks capacity to conduct litigation, and sues by his litigation friend, Samantha Louise Hamilton, who is his deputy appointed by the Court of Protection. The defendant also lacks capacity and defends the claim by her litigation friend, Satpal Singh Bhatt. Mr Bhatt appeared in person.
2. The claim is based on a charging order dated 9 January 2014 (“the charging order”), which itself is based on a judgment in the sum of about £550,000 plus interest (“the judgment debt”), obtained in circumstances which I set out below.

Factual background

3. The claimant sustained brain injuries in an attack which occurred in 1993. He was awarded compensation in respect of the attack by the Criminal Injuries Compensation Authority in the sum of £1,773,611. This was paid in 3 instalments between January 2007 and February 2010.
4. As a result of his brain injuries, the claimant was unable to deal with his financial and property affairs. The defendant, who is his sister, was appointed as his deputy by an order of the Court of Protection dated 7 February 2008.
5. Between March 2008 and April 2011, the defendant withdrew funds from the Court Funds Office, of which the sum of £1,389,611 was unaccounted for.
6. Following a report to the Court of Protection raising concerns about the use of these funds, an investigation was ordered; and the defendant was removed as the claimant’s deputy by order of 4 July 2011.
7. By an order of the Court of Protection dated 19 August 2011, Melinda Giles was appointed as the claimant’s deputy.
8. In September 2011, Ms Giles obtained a freezing injunction against the defendant; and commenced a claim against her for breach of trust and breach of fiduciary duty in her role as deputy. The sum claimed was the whole amount received by the defendant, less £50,000, which it was accepted had been paid to the claimant. On 25 April 2013, HHJ David Cooke held that the claimant was entitled to summary judgment for the judgment debt.
9. On 16 May 2013, the defendant filed an appellant’s notice. The following day, 17 May 2013, her solicitors, Brett Wilson LLP, wrote to Ms Giles, on a “without prejudice save as to costs” basis (“the Offer letter”):

“We are instructed to enquire as to whether your client would be willing to settle this claim for the sum of £140,000. The offer is subject to: –

- (1) Our client being able to sell/re-mortgage her property in order to free its equity (believed to be in the region of £150,000). The mechanics of this would be complicated, but we understand that this is a viable option.

- (2) Your client consenting to the necessary variation of the freezing injunction; and
- (3) the order of HHJ Cooke being varied by consent and the terms of settlement being set out in a Tomlin order (essentially that all outstanding liabilities would be discharged, and the claim dismissed/freezing injunction discharged upon receipt of £140,000 from our client).”

The offer was expressed to be open for 7 days.

10. The documentary evidence before me included a letter dated 11 July 2013, apparently signed by the claimant (this is not accepted by the claimant, although there is no evidence before me on this issue) addressed to Ms Giles:

“I have been trying to contact you since last week, but have had no reply from you regarding the settlement for the summary judgment against Rabia Bashir. I have considered the offer of £140,000 that has been sent to you by Rabia’s solicitors dated 17th May 2013, and I do want to accept the offer without further delay. I do not want any further action against the summary judgment. I consider this as a full and final settlement and no further action to be taken and case to be closed.”

11. This letter appears to have been sent to the defendant’s solicitors, because it contains a handwritten amendment at the top “To, Ian Wilson”; and has a “Received” stamp dated 15 July 2013 of the defendant’s solicitors.

12. A letter dated 24 July 2013, also apparently signed by the claimant (again, the claimant does not accept that he signed it, but no evidence as to this has been adduced on his behalf) was sent to the Court of Protection, complaining about Ms Giles’ conduct as a deputy, and seeking her removal. It included:

“I was very disappointed the way she was dealing with all my affairs, including the case against Rabia, no information has been relayed to me properly. I heard from my sister Rabina (*sic*) that there has been an offer made by Rabia’s solicitors which sounded very reasonable, but I was not told by Ms Giles regarding this offer. I then found out that Ms Giles has replied to Rabia’s solicitors that my client Jhangir does not agree with the offer which was a lie.”

13. On 9 September 2013, the claimant was assessed (pursuant to s.58(1)(d) of the Mental Capacity Act 2005) by a visitor of the Court of Protection, Dr David Thompson, who produced a written report dated 2 October 2013. This records that the visitor discussed the letter of 24 July 2013 with the claimant:

“the client acknowledged that he had had help to write this letter when it was shown to him. The need for him to have had help was evident from the difficulty he had reading it.”

14. The report continued:

“The client and his family said that they had seen documents where the (*sic*) through the previous deputy’s solicitor, an offer had been made to the client solicitors to settle the civil case. They said that the previous deputy was willing to pay the client £140K. They had also been told by the previous deputy that the offer had been declined by the current deputy. The family were concerned about not having been advised that the offer had been made, or having opportunity to express their opinion as to whether it should have been accepted prior to the deputy declining the offer.

...

The family said that they were not involved in the current deputy’s decision to decline a settlement from the old deputy for £140K.

...

The client, his wife and family members present at the visit had very reasonable expectations of the deputy which they said were not being met. The difficulties they had included: ... not having been involved in the decision to reject the offer of £140K”

15. As to capacity, the visitor refers to “the client’s considerable capacity to make his own decisions”, and states that he has not identified any clear evidence that the client would not be able to manage his property and affairs during the visit.
16. On 7 October 2013, an Assessment of Capacity form in the Court of Protection was apparently completed by the claimant’s GP, Dr Kwadwo Dwamena. Part of it is completed (in manuscript), it would seem, by the claimant himself, setting out that he considered that he had regained “most of my capacity” and was able to handle his own affairs with the help of his wife. The part completed by Dr Dwamena states that he has carried out a cognitive assessment using “GPLog” on which the claimant has scored 9/9; and that the claimant has “satisfactory” mental capacity and is capable of making decisions on his own.
17. It appears that on 21 October 2013, the claimant applied to the Court of Protection to manage his own affairs. Ms Giles filed a Position Statement on 13 January 2014, setting out that she was entirely satisfied that the claimant lacked capacity on matters of property and affairs; referring to a “full capacity assessment” carried out by a Ms Surtees in June 2013 (this was not in evidence before me); and sought a direction that Ms Surtees carry out a fresh assessment, and that, if it confirmed the previous one, the application be dismissed on the papers.
18. On 6 November 2013, the defendant’s solicitors wrote to the Court of Appeal requesting the dismissal of her application for permission to appeal and for a stay; and an order was made for that dismissal on 18 November 2013.
19. On 20 December 2013, the claimant attended at the offices of a firm of solicitors, Trident Solicitors, and apparently instructed them in his application to manage his own affairs.
20. At the hearing of the claimant’s application on 16 January 2014, the court directed that expert neuropsychiatric evidence be obtained. The order provided at para 3:

“Trident Solicitors may act for Mr Bashir solely in relation to this Court of Protection application to determine capacity and on condition that the firm and or their servants and agents may only take instructions from Mr Mohammed Jhangir Bashir and not any agent or person said to be authorised to provide instructions on his behalf. Trident solicitors may not take instructions from Mr Mohammed Jhangir Bashir in the presence of any other person.”

21. The claimant’s application to manage his own affairs was apparently refused on a subsequent date, although there was no order formally doing so in the court bundle. The current deputy, Ms Hamilton, was appointed by order dated 21 May 2014. The order appointing her recited

“UPON the court being satisfied that Mohammed Jhangir Bashir lacks capacity to make various decisions for himself in relation to a matter or matters concerning his property and affairs...”

and continued at paragraph 2:

“2. Authority of deputy

- (a) The court confers general authority on the deputy to take possession or control of the property and affairs of Mohammed Jhangir Bashir...”

22. It would seem that Ms Hamilton also received further representations from the claimant that he wished to manage his own affairs, in response to which she instructed Dr Charlotte Fuller, a consultant neuropsychologist, to prepare a report on the claimant’s neuropsychological status.
23. Dr Fuller examined the claimant on 8 August 2014, and reported on 19 August 2014. She reviewed Dr Dwamena’s report, the claimant’s application dated 21 October 2019 to the Court of Protection to manage his own affairs, his position statement in support of that application and Ms Giles’s position statement in opposition.
24. Dr Fuller carried out what she describes, and I accept, as being a “comprehensive neurological assessment” of the claimant. She set out her conclusions at para 12.3:

“Based on the available evidence and on the balance of probabilities, it would seem that Mr Bashir does not have capacity to manage his legal and financial affairs because of the effects of the brain injury, in terms of the Mental Capacity Act 2005. There are no problems with comprehension or communication and, although Mr Bashir’s mild memory problems could be circumvented through the provision of written information, he has marked executive impairment due to damage to the frontal lobes; this will impair his judgment and compromises his ability to weigh up information and make a rational decision by taking account of likely consequences and implications.”

25. On 19 May 2016, the defendant was tried and convicted (in relation to the events set out above) of dishonestly making false representations to make gain for herself or another.

Procedural background

26. This claim was issued on 17 January 2017. Following service of the claim, the defendant's solicitors asserted that she lacked capacity to conduct the litigation; and eventually, in June 2017, filed a certificate of suitability to act as her litigation friend signed by her daughter, Sania Munsab.
27. On 29 August 2017, Ms Munsab made a witness statement in the claim in which she stated that:
- (1) the Property had been owned jointly by her grandfather, Mohammed Bashir and the defendant;
 - (2) Mohammed Bashir died in 2008;
 - (3) on his death, the Property passed into the defendant's sole name
 - (4) Ms Munsab had become aware "about 6 months ago" that Mohammed Bashir had made a will;
 - (5) she believed that Mohammed Bashir left his share of the Property to her in that will;
 - (6) she hoped to get a copy of the will "within the next 2 weeks".
28. Since this evidence gave rise to potential conflict of interest between Ms Munsab and her mother, on the defendant's application, she was replaced as litigation friend by Satpal Singh Bhatt by an order dated 23 April 2018.
29. The trial was listed to take place on 11 and 12 December 2018. On the first day of the trial, there were 2 late developments. First, Nasim & Co, solicitors instructed on behalf of Ms Munsab, sent an email to the court stating:

"We act on behalf of Ms Sania Bashir in relation to her claim for grant of probate of her late grandfather's estate...."

Please note that we have applied for grant of probate which remains pending with the probate department and the distribution of estate is disputed. Our client also wishes to become a party to this claim therefore we request that these proceedings be stayed."

This was followed on the same day by a further email which included:

"She instructed us that pursuant to a will by her grandfather Mr Mohammed Bashir, his share of the property 7 St Helier's Road was to be transferred to her. The property... was held as tenants in common by Mr Mohammed Bashir and our Sania's mother Ms Rabia Bashir."

30. The second development was that on that day the defendant's solicitors filed an application to come off the court record, and appeared at the trial to make that application. I granted the application. Mr Bhatt appeared in person. He successfully applied for an adjournment of the trial, on the basis that he wished to instruct new solicitors to appear on the defendant's behalf. The trial was adjourned

to 3 April 2019. There was in no substantive communication between Mr Bhatt and the court or the claimant's solicitors in the intervening period before the new trial date.

31. At the adjourned trial, there was effectively a repetition of the events that had taken place before the previous hearing. On 29 March 2019 Ms Munsab's solicitors sent to the court an email in similar terms to their previous email. At 00.06 on the day of the trial, Mr Bhatt sent an email to the court seeking a further adjournment of the trial. Ms Munsab's solicitors' email was followed on 3 April 2019 by letter enclosing an unissued application notice stating that she opposed the claim and had a claim on the Property. This was accompanied by a photocopy of an apparent will by Mohammed Bashir dated 17 May 2008, and certified translation of it from Urdu to English.
32. On the first day of the trial I heard and rejected Mr Bhatt's application for an adjournment. I heard Ms Munsab's application for a stay on 4 April 2019. I also rejected that application, stating I would give reasons in this judgment.
33. My reasons for not granting a stay of this claim are as follows. First, on her own evidence Ms Munsab has known about the alleged will since early 2017. In August 2017, she said it would take about 2 weeks to locate it. In her oral evidence at this trial she was extremely vague about when (and indeed how) she had found the will, eventually stating that she had not obtained it by the date of the last hearing on 11 December 2018. This is directly inconsistent with her solicitors' email sent to the court on 11 December 2018.
34. There is no evidence before the court that the will has in fact been sent to the Probate Registry. The only evidence attached to Nasim & Co's letter is an (undated) confirmation of an application to the Registry, together with guidance notes as to what documents need to be sent to them: these include the original will. I note that the confirmation states that the grant of probate will be received within 20 working days of the required documents being received by the Registry. If probate of the alleged will was obtainable, there is no reason why this could not have been done in the period since the original trial date on 11 December 2018.
35. There is also no evidence at all in support of the assertion that Mohammed Bashir and the defendant were tenants in common; and in the absence of such evidence, the court presumes that the beneficial interests follow the legal interests, so that the property would be held on a beneficial joint tenancy. On Mohammed Bashir's death his interest would have passed to the defendant, and no interest could have passed under the alleged will: see s. 3 (4) Administration of Estates Act 1925; *Carr-Glynn v Frearsons (A Firm)* [1999] Ch 326. On the available evidence therefore, the alleged will does not give rise to a defence to the claim with any real prospect of success.
36. No reasons have been provided for the delay in providing a copy of the alleged will or the delay in applying for a stay; even though I indicated in my directions given on 29 March 2019 that such evidence would be necessary.

37. The overwhelming inference to be drawn from the above is in my judgment that this application is deployed as a delaying tactic, and is a last-minute attempt to derail the determination of this claim.

Issues in the claim

38. The primary basis on which the claim is defended is that the claimant, having regained capacity, entered into a valid settlement agreement with the defendant.
39. Ms Munsab did not give details of the alleged agreement in her witness statement of 29 August 2017; and accepted that for such an agreement to be valid it ought to have been made with the consent of the deputy. She set out in her witness statement that she was seeking advice and taking active steps to make a retrospective application to the Court of Protection for an order that the claimant was capable of dealing with his matters so that the settlement agreement was binding. She also set out various matters which, she said, showed that the claimant had sufficient capacity at the relevant time. No application to the Court of Protection for such a retrospective order has been made.
40. Mr Bhatt's evidence was that a settlement was reached between the parties informally, following which a formal offer was made by the defendant's solicitors to the claimant's then solicitors. He said that the claimant instructed his solicitors to accept the offer; and that it was on the basis of the settlement that the defendant's application seeking permission to appeal was withdrawn.
41. In the course of the trial, he produced additional documents, the admission of which the claimant did not object to. These were letters in early 2014 showing that the claimant had attended at the offices of Trident Solicitors, and containing advice to him from them and from counsel.
42. The claimant's counsel adopted the list of issues put forward on the defendant's behalf at the case management hearing (on 26 October 2017):
- (1) But for the issue of capacity, did the Claimant enter into a binding agreement with the Defendant such that the Claimant is not owed the full judgment debt and/or is the Claimant estopped from asserting otherwise;
 - (2) Did the Claimant have capacity to enter into a binding agreement and/or estop himself;
 - (3) If so, has the Defendant paid the Claimant the £140,000 – it is common ground that this was not paid;
 - (4) If so, what effect does this have on the 2014 Charging Order; and
 - (5) If no to any of (1) to (3), then is the Claimant entitled to the remedy sought – namely, an Order for sale.
43. However, this list omits an important issue which is capable of being determinative of this claim, namely whether, even if the claimant had regained capacity by the date of the alleged settlement agreement, he could enter into a binding agreement whilst he remained under the jurisdiction of the Court of Protection. Although I raised this issue at the case management hearing, the claimant's counsel made no submissions on it in her skeleton argument, and did not refer me to any authorities on the point in her oral argument. Nonetheless, in my judgment, it is necessary to consider it.

44. Under the framework provided for by previous legislation (most recently, s.99 of the Mental Health Act 1983), it was held that once a patient had been placed under the jurisdiction of the Court of Protection, they could not make any valid lifetime disposition of their property, even in a lucid interval: *Re Beaney* [1978] 1 W.L.R.770 at 772, summarising the effect of *Re Walker* [1905] 1 Ch.160 and *Re Marshall* [1920] 1 Ch.284. This was because upon the making of the order their property had passed out of his control. Any disposition was inconsistent with that control, and therefore void.
45. With effect from 1 October 2007, Pt VII of the Mental Health Act 1983 was repealed and replaced by the provisions of the Mental Capacity Act 2005. This established a new Court of Protection with more comprehensive powers (along with a new statutory office of Public Guardian). The 2005 Act provides that the Court may by order make decisions on behalf of the person incapable or may appoint a “deputy” to make decisions on his or her behalf. The deputy will have such powers as the court determines. The role of the deputy is therefore similar to that formerly of a receiver under the Mental Health Act.
46. There appears to be no direct authority on the effect of the appointment of a deputy on the patient’s ability to dispose of or deal with property: in this case, his rights against the defendant in respect of the judgment debt. However, in my judgment, the principle established under the previous legislative framework applies to mentally incapable persons within the jurisdiction of the new Court of Protection. In this case, the order of 19 August 2011 conferred general authority on Ms Giles to take possession or control of the property and affairs of the claimant; and any purported disposition or dealing with that property would be void.
47. It follows that even if the claimant had regained capacity during the relevant period, he could not, as a matter of law, enter into a binding agreement with the defendant.
48. This is sufficient to dispose of the defence based on the alleged settlement agreement, but I deal briefly with the other issues.

The witnesses

Claimant’s witnesses

49. The persons who gave evidence on the claimant’s behalf were:
 - (1) the claimant’s litigation friend, Ms Hamilton;
 - (2) the claimant’s wife, Shamin Bashir;
 - (3) the claimant’s brother, Mohammed Shabir.
50. Ms Hamilton had very little direct knowledge relevant to the matters in issue, but was an honest and straightforward witness. I have reservations about Ms Bashir’s evidence in that, under cross examination, it transpired she had no direct knowledge of some of the matters set out in her witness statement as being within her direct knowledge; and since she has an interest in the outcome of the claim, was not an independent witness. Mohammed Shabir was a straightforward witness whose evidence I accept.
51. The persons who gave evidence on the defendant’s behalf were:

- (1) Ms Munsab;
- (2) Mr Bhatt.

52. I have serious reservations about Ms Munsab's evidence, which was plainly untrue as to when she first became aware of the alleged will. I prefer Mohammed Bashir's evidence as to the claimant's role in the car repair business called TR Bodyshop (formerly S&J Autos). As for Mr Bhatt, I also have reservations about the credibility of his evidence arising out of Ms Hamilton's evidence as to his receipt of substantial amounts of the money misappropriated by the defendant.

Capacity

53. In his submissions, Mr Bhatt relies upon the following matters as showing that the claimant had regained capacity at the time of the alleged settlement agreement:
- (1) the evidence of himself and Ms Munsab as to the claimant's ability to function in everyday life: to trade on his own account as a car repair business, to drive a car;
 - (2) the report of Dr Thompson, the visitor;
 - (3) the report of the GP, Dr Dwamena;
 - (4) the fact the claimant was able to instruct Trident Solicitors.
54. The claimant's counsel made the following submissions. First, she said, the defendant's witnesses are not experts; and, in this case, capacity is clearly a matter for expert evidence. This was, she said, because of the physical basis of the claimant's cognitive impairment. This meant, she said, that it was unlikely that the claimant's capacity would have deteriorated between 2013 and 2014.
55. She submitted that Dr Fuller's report was effectively determinative as to the claimant's lack of capacity for the following reasons:
- (1) She had carried out more extensive and appropriate testing of the claimant than any of the other persons who have assessed him;
 - (2) She had taken into account the other medical findings (including those of Dr Dwamena) and the claimant's own position statement; and she is the only person of those whose written reports are in evidence who has done so;
 - (3) She is fully qualified to assess the claimant's capacity and has set out those qualifications, unlike the other persons whose reports are in evidence;
 - (4) Her report speaks for itself in its detail and precision.
56. I accept these submissions, and that the evidence as to the claimant's lack of capacity is very strong. Mr Bhatt (understandably, because he is not a lawyer or a doctor) seemed to treat capacity as an all or nothing matter: submitting that since the claimant did not entirely lack capacity, he therefore had capacity to manage his property and affairs. This is misconceived. It is trite law that capacity is to be assessed by reference to the task to be carried out; and that a person may have sufficient capacity for some tasks and not for others.
57. There is evidence (including in Dr Fuller's report) that the claimant's memory has improved since his injury; and, no doubt, this has enabled him to lead a fuller life. However, this falls far short of regaining sufficient capacity to manage his property and affairs, given the substantial cognitive impairments identified in Dr Fuller's report.

58. In any event, I do not accept Ms Munsab and Mr Bhatt's evidence that the claimant has traded on his own account in the car repair business; and I accept Mohammed Shabir's evidence that it is a family run business, in which the claimant is a "silent partner".

Binding agreement

59. I also find that no binding agreement was, in any event, reached between the claimant and the defendant, even if my conclusions above are wrong.
60. First, the offer in the Offer Letter was expressly limited in time to 7 days from the date of the letter. There is no evidence that it was even purported to be accepted within that time by either the claimant or Ms Giles, so that it had lapsed by 25 May 2013.
61. Secondly, the offer was addressed to Ms Giles. The evidence set out above shows that she rejected the offer, without informing the claimant or his family of it. Her having done so, it was not then open to the claimant to accept it.
62. Thirdly, there is no evidence that either side took any steps towards performing or seeking performance of the alleged agreement. In particular, the claimant did not take any steps towards obtaining the necessary variation of the freezing order to enable the £140,000 to be paid to him, and the defendant did not press him to do so. Mr Bhatt relied upon the withdrawal of the defendant's appeal. I accept the claimant's counsel's submissions that it is highly unlikely that the defendant's solicitors would have sought the dismissal of the appeal on the basis of the alleged agreement, in the absence of a clear formal agreement, and that there are other plausible reasons for seeking dismissal of the appeal. Thus, although there is some evidence that in early 2014 the claimant may have wished to enter into a settlement agreement with the defendant, this is inconsistent with any such agreement having been entered into in mid 2013; and there is no evidence that such an agreement was ever entered into.

Effect on charging order

63. Finally, the charging order remains in place unless and until it is varied or set aside, as does the judgment debt. The claimant's counsel submitted that the order of HHJ David Cooke, being a final order, could not be varied by consent (as envisaged in the offer letter); but I do not consider that that would have prevented a Tomlin order being entered into, the effect of which would have been to have stayed enforcement of the judgment debt. However, as I have concluded, no valid settlement agreement was or could have been entered into.

Conclusion

64. For the reasons set out above, therefore, I will make an order for sale and will hear the parties as to the terms of that order if it cannot be agreed.