



Neutral Citation Number: [2019] EWHC 3530 (Ch)

BL-2019-001900; BL-2019-001921

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

Royal Courts of Justice  
Rolls Building

Date: 18 December 2019

**Before :**

**MR JUSTICE ZACAROLI**

**Between :**

**SOUTH LODGE FLATS LIMITED**

**Claimant**

- and -

**(1) IFTIKHAR AHMAD MALIK**

**1<sup>st</sup> Defendant/Part 20 Claimant/Defendant to Counterclaim/Respondent**

- and -

**(2) VAQAR MALIK**

**(3) FAHIM MALIK**

**(4) RAHIM MALIK**

**2<sup>nd</sup> to 4<sup>th</sup> Defendants/ Part 20 Defendants/Counterclaimants/Applicants**

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**James Kinman** (instructed by Stephenson Harwood LLP) for the **1<sup>st</sup> Defendant**  
**Ian Mayes QC, Simon Jones** (instructed on a Direct Access basis) for the **2<sup>nd</sup> Defendant**

Hearing date: 10 December 2019

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**Judgment Approved**

**Mr Justice Zacaroli:**

1. This matter came before the Applications Court on 10 December 2019, pursuant to an order of Mann J made on 6 December 2019. The intention behind that order was that - in circumstances where there appeared to be a number of potentially urgent

applications and parallel proceedings in the County Court and the High Court – the parties should attend court for directions as to how best to cut through the complexities.

2. As I will explain, the principal matter is an application to transfer proceedings from the County Court to the High Court. This arises in the context of a family dispute that begun in the mid to late 1980s.
3. The County Court proceedings relate to a flat - known as Flat 7, South Lodge, 245 Kensington Road, London (the “Flat”). The lease of the Flat was purchased in the name of the first defendant in the County Court proceedings, Iftikhar Ahmad Malik (“Iftikhar”) in 1978. Iftikhar says it was bought with his own money. His brother, the second defendant in the County Court Proceedings, Vaqar Malik (“Vaqar”), says it was purchased with family money, as part of a family partnership business, at the head of which sat Iftikhar's and Vaqar's late father Bilal. Vaqar and/or one or other of his sons has been in occupation of the Flat for many years. Vaqar claims that it was purchased in order for him to have a home to live in in 1978 (although he returned to Pakistan in the early 1980s for a few years). Iftikhar accepts that one or other of Vaqar or his sons has lived in the Flat since 1987.
4. Proceedings were first issued in 1987. Iftikhar sought possession of the Flat. Vaqar commenced proceedings in England and in Pakistan, in both of which he claimed that the Flat had been purchased as a partnership asset and had been appropriated to him as part of an appropriation of his share of the partnership assets. The Pakistani proceedings were dismissed in 1988 and an appeal abandoned in 1999. The English proceedings were stayed, in part originally due to Iftikhar's failure to provide security for costs, but all of the then extant proceedings were subject to an automatic stay in 2000, having fallen into abeyance long before that.
5. Iftikhar sought to have the stay lifted in 2012, at a time when Vaqar was bankrupt, in respect of both English actions. That was resisted by Vaqar’s trustee in bankruptcy (with Vaqar also addressing the court on behalf of his wife), and dismissed by John Jarvis QC sitting as a deputy High Court Judge.
6. In November 2017 the freeholder of the Flat, South Lodge Flats Limited, commenced the County Court proceedings. It sought an interim injunction to allow access in order to investigate a leak. This seemingly straightforward claim has blossomed into complex proceedings, requiring a 10-day trial set to commence - or more accurately re-commence - on 20 January 2020. The short history of the proceedings is as follows. The defendants included both Iftikhar (as legal owner of the lease) and Vaqar and his sons, as occupiers. Vaqar and his sons filed a defence and counterclaim on 2 February 2018, claiming that the Flat was held by Iftikhar on trust for them. On 17 April 2018 Iftikhar issued a part 20 claim against Vaqar and his sons for possession.
7. At a case management conference on 20 April 2018, directions were given for the filing of a defence to the part 20 claim. A defence was filed on 29 June 2018, settled by Leading Counsel. Vaqar issued an application to strike out Iftikhar's claim. He also applied for summary judgment on the basis of adverse possession and sought security for costs. These applications came before HHJ Gerald in February 2019.

Vaqar was represented by Counsel. All applications were dismissed with indemnity costs. Vaqar and his sons were directed to file a cross-claim asserting their right to the flat. Directions for trial were agreed to by Vaqar's Counsel, culminating in a trial in October 2019. There were other interlocutory hearings over the ensuing months at which Vaqar was represented by Leading Counsel.

8. Shortly before trial commenced, an issue arose (prompted by Iftikhar himself) as to whether the County Court had jurisdiction to hear Vaqar's cross-claim (in light of the value of the Flat which is the subject matter of that cross-claim), and inviting Vaqar to sign a memorandum conferring jurisdiction on the County Court. Vaqar refused. At the commencement of the trial HHJ Gerald concluded that the County Court did have jurisdiction. The trial was, however, adjourned for various reasons to January 2020.
9. In the meantime, again very shortly prior to the commencement of the trial, Vaqar issued new High Court proceedings. These make essentially the same claims in relation to the Flat as are contained in Vaqar's pleading in the County Court proceedings. In addition, however, they go further and seek declarations as to a number of other properties in London which Vaqar claims are partnership assets. Vaqar also commenced new proceedings in Pakistan, which were stamped by the Lahore courts on 12 September 2019, seeking similar relief in relation to alleged partnership property in Pakistan.
10. No permission has yet been obtained to serve the new High Court proceedings on Iftikhar and the other defendants. Iftikhar says he will, if so advised, oppose jurisdiction under Part 11 of the CPR, on various bases.
11. Against that background, the following applications are outstanding:
  - i) Vaqar has applied to transfer the County Court proceedings to the High Court on grounds which I will refer to in more detail in a moment, but broadly on the basis that there is very substantial overlap between the two sets of proceedings. In fact two transfer applications have been made, one under title number BL-2019-001921 (which relates to no substantive proceedings) and one under title number BL-2019-001900 (the new High Court proceedings). There is in substance, however, a single application to transfer the County Court proceedings.
  - ii) Vaqar has applied for permission to appeal the order of HHJ Gerald in relation to the County Court's jurisdiction to hear Vaqar's cross-claim in the County Court proceedings. I am told that the papers were only submitted, in a form where the application for permission could be considered on the papers, on Monday 9 December 2019. Mr Mayes QC, who appears for Vaqar, estimates that the appeal (assuming permission were granted) would need about a day of court time.
  - iii) There is also a pending application for service out of the High Court proceedings.
12. I considered with counsel the possibility of having both the appeal and the transfer application heard together on an expedited basis before the end of this term. But on further investigation, although the appeal looked at first instance to be something that

needed resolution before the start of the trial, I was told that there were potential work-arounds even if the appeal was successful: for example, a County Court Judge with a s.9(1) ticket could hear the case, or the High Court would in any event have jurisdiction to re-transfer the case to the County Court - even if it exceeded the County Court's jurisdiction. Mr Mayes submitted, therefore, that the essential and urgent question was the transfer issue.

13. Accordingly, I invited substantive submissions on the transfer application.
14. The jurisdiction in relation to the transfer is found in s.41(1) of County Courts Act 1984:

“If at any stage in proceedings commenced in the county court or transferred to the county court under section 40, the High Court thinks it desirable that the proceedings, or any part of them, should be heard and determined in the High Court, it may order the transfer to the High Court of the proceedings or, as the case may be, of that part of them.”

15. Pursuant to CPR 30.3(1)(a), this discretion must be exercised with regard to the criteria set out in CPR 30.3(2):

“The matters to which the court must have regard include -

(a) the financial value of the claim and the amount in dispute, if different;

(b) whether it would be more convenient or fair for hearings (including the trial) to be held in some other court;

(c) the availability of a judge specialising in the type of claim in question and in particular the availability of a specialist judge sitting in an appropriate regional specialist court;

(d) whether the facts, legal issues, remedies or procedures involved are simple or complex;

(e) the importance of the outcome of the claim to the public in general;

(f) the facilities available to the court at which the claim is being dealt with, particularly in relation to -

(i) any disabilities of a party or potential witness;

(ii) any special measures needed for potential witnesses; or

(iii) security;

(g) whether the making of a declaration of incompatibility under section 4 of the Human Rights Act 1998 has arisen or may arise;

(h) in the case of civil proceedings by or against the Crown, as defined in rule 66.1(2), the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London.”

16. Paragraph 2.4 of Practice Direction 29 provides:

“The decision to transfer may be made at any stage in the proceedings but should, subject to paragraph 2.5, be made as soon as possible and in any event not later than the date for the filing of pre-trial check lists (listing questionnaires).”

17. The essential reason advanced on behalf of Vaqar for a transfer is that it is preferable that all claims are heard together given the commonality of issues. Mr Mayes accepts (as pointed out by Mr Kinman) that the amended particulars of claim in the High Court proceedings repeat the points made in Vaqar's pleading in the County Court claim. That is not surprising, however, since the claim that the Flat is partnership property is part of a wider claim that there was a partnership, and it is that wider partnership claim which is the subject matter of the High Court proceedings.
18. The substantial overlap of facts and issues in the two claims will result, it is said, in inevitable overlap of documentary and oral evidence. Both matters are substantial: the County Court trial is set for 10 days. It is likely that the High Court trial would be of a greater length, given its broader scope. Mr Mayes submits that it would be inefficient and potentially unfair to parties and witnesses to run essentially the same issues in two separate trials.
19. Mr Mayes submits that there is a more than fanciful claim that a partnership exists. I am not in a position to assess the merits of that claim, but I proceed on the basis that he is right – i.e. that there is a sufficiently arguable claim to go to trial (although I note, but am equally in no position at this stage to comment on its merits, Mr Kinman's submission that there are good grounds to oppose service out including on the basis that the claim is an abuse of process).
20. Mr Mayes also points to the unfairness of having to resolve the wider partnership questions raised by the High Court proceedings in the County Court proceedings, where the other alleged partners are not parties, and where Vaqar will not have the opportunity either to cross-examine relevant witnesses or draw inferences from the failure of witnesses to give evidence. He referred in particular to other family members who received properties, which Vaqar alleges were all as a result of distribution of partnership assets. He also says that the partnership issues will be resolved in the County Court without access to the wider disclosure which could be obtained in the High Court proceedings. I note in this respect that a recent application for additional disclosure in the County Court proceedings was recently refused, on the ground that the judge was satisfied that the disclosure sought, insofar as relevant to the County Court proceedings, had already been given.
21. Mr Mayes recognises that the effect of the transfer would be that the trial currently listed for January 2020 could not go ahead. Indeed, a combined trial of the High Court and County Court actions would not realistically be ready for trial for a long

time, potentially a further two years. He submits, however, that insofar as this creates more delay, then that is of little relevance given the 30 or so years of delay on the part of Iftikhar. It is Vaqar's case that the claims brought by Iftikhar in the County Court are themselves a wholly opportunistic attempt (on the back of a claim relating to a water leak) to re-litigate a possession claim brought in 1988 and long ago stayed, a stay which Iftikhar sought, but failed, to lift in 2012.

22. He also says that the delay is explained by the fact that it was only in September 2019, as a result of disclosure made in the County Court proceedings, that he received documentation which gave him a partnership claim with prospects of success.
23. Mr Mayes submits that, having regard to the best use of the limited resources of the court, and balancing the further delay against the need to have everything dealt with together, transferring the County Court proceedings is the least worst option.
24. I have carefully considered these submissions, but I cannot accept them.
25. Turning to the relevant criteria set out in CPR 30.3(2):
  - i) While the value of the Flat the subject of the claim in the County Court proceedings is in the region of £3m, I accept Mr Kinman's submission that this is within the usual run of cases heard in the specialist Chancery List of the Central London County Court.
  - ii) Considerations of convenience and fairness are neutral as between the two competing venues: The Thomas More building or The Rolls building. On the other hand, there is considerable inconvenience in substantially delaying a trial which the parties are fully prepared for in January 2020. I reject, in this regard, the submission that further delay is of less relevance given Iftikhar's failure, first, to attempt to revive his originally stayed possession claim until 2012 and, when that itself failed, secondly, to attempt to revive his claim until 2018. To the extent that the prior delay made it improper for Iftikhar to make his claims in the County Court proceedings, that is something relevant to be considered within those proceedings. More pertinent, in my judgment, in considering a transfer that will derail a trial listed in January 2020, is the fact that Vaqar, with the benefit of a legal team, including various Leading Counsel, has fully participated in the County Court proceedings, to the extent of making a cross-claim based on the same underlying allegations he now wishes to advance in the High Court proceedings, and attending many interlocutory hearings. Moreover, the first time he sought a transfer to the High Court was on 14 October 2019, the day the County Court trial was first due to commence. I take into account that the application in this case was made long after the final date identified in paragraph 2.4 of PD29.
26. As to Mr Mayes' point that it is unfair that his client has to face resolution of an issue (the existence, scope and effect of the alleged partnership) in the County Court proceedings without full disclosure or witness evidence, if such disclosure and evidence is relevant then arguments as to its admissibility - or inferences to be drawn from failure to produce it - can all be made in the County Court proceedings. This does not justify transfer of the proceedings to the High Court to be consolidated with new High Court proceedings.

27. The remainder of the criteria - availability of a specialist judge, complexity, public importance, and availability of facilities - are at best neutral and certainly provide no support for a transfer.
28. Mr Kinman characterised this application as, in essence, an application to amend the County Court proceedings, many months too late, to introduce broad allegations about the alleged partnership, and its properties, more generally. I accept that characterisation. He disputes that the new allegations are prompted by disclosure made in September, but even if they were, that would at best have been possibly relevant to an application to amend the County Court proceedings.
29. Had an application for consolidation been made at an early stage in the County Court proceedings, then there would have been much to be said for it (although, even in those circumstances, it would not necessarily follow that the consolidated proceedings would be in the High Court as opposed to the County Court). Balancing all the factors I have mentioned that are relevant to the exercise of discretion in considering a transfer, and placing particular weight on the extreme lateness of the application, I conclude that the appropriate order is to refuse the application for transfer.