

Neutral Citation Number [2020] EWHC 2722 (Ch)

Case No: PT-2020-000217

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

Wednesday, 26 August 2020

Before:

MASTER CLARK

B E T W E E N:

KAREN HEWSON

Claimant

and

(1) COLIN WELLS
(2) BRIAN WELLS
(3) ANTHONY WELLS
(4) PATRICIA WELLS
(5) JEFFREY COHEN

Defendants

AMY BERRY (instructed by Ashtons Legal) appeared on behalf of the Claimant
KIRA KING (instructed by Morgan Rose, Solicitors) appeared on behalf of the First to Third
Defendants

JUDGMENT
(Approved)

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MASTER CLARK:

1. The issue arising for my determination is whether the court should exercise its power under CPR 38.6 to disapply the default rule that the claimant, having filed a notice of discontinuance in respect of parts of her claim, should pay the defendants' costs of those parts. This issue was raised in the claimant's application dated 26 September 2019, filed with a notice of discontinuance of the same date. The claimant seeks an order that there be no order as to the costs of the discontinued claims.

Parties and background to the claim

2. The claimant is the longstanding partner and co-habitee of James Leonard Wells (2the deceased") who died intestate on 21 February 2015. At the date of his death, they were living together at Brickfield Cottage, 32 Green Lane, Burnham-on-Crouch, Essex ("the Property").
3. The defendants are the deceased's adult children, and beneficiaries under his intestacy. It has recently emerged that the deceased remained married to the mother of the defendants, Patricia Wells, so that she is also a beneficiary; but she was added to the claim after the notice of discontinuance, so her position does not arise for consideration in this application.

The Deed

4. The defendants hold the legal title to the Property. They do so as a result of a Deed dated 25 March 2003 ("the Deed").
5. The parties to the Deed were the deceased, the defendants, and the claimant. The Deed is in unusual terms. It sets out that the deceased has agreed to buy the Property, "in the name of" the defendants and two other plots of land next to it, "in the sole name of" the claimant. The recitals of the Deed set out that the deceased currently lives with the claimant as man and wife, and that they intend to reside in the Property following its purchase as their acknowledged "matrimonial home", despite the absence of a formal marriage union between them. However, the Deed contains no express provisions as to the Property, and is, accordingly, silent as to its beneficial ownership.

Chronology

6. I turn now to the chronology leading up to this application. On 7 July 2016, the claimant's solicitors wrote to the first defendant, raising the issue of whether the claimant had an interest in the Property. The letter requested provision of documents, and enclosed a copy of the CPR Practice Direction entitled, "Pre-action Conduct and Protocols". The letter included the following requests:
"Please provide a copy of any Trust Deed if one exists and copies of all other relevant documents relating to this proposed trust", and

"Please assist by providing any documents which show that either your brother or you held a beneficial entitlement to the property Brickfield Cottage".

It continued,

“we do not want to issue without knowing your position and without trying to attempt a reasonable settlement outside court. You are invited to comply with the protocol to provide all documents evidencing any trusts on Brickfield Cottage, to reply substantively with all documents showing how Brickfield Cottage was purchased....

If you do not assist and we have to issue to get these documents then we will rely on the provision of CPR 44 on costs and we will say to the court that we had to issue to find out the strength of your case as you would not cooperate with reasonable requests made pursuant to the protocol”.

The letter also asked for the address of the third defendant, Anthony Wells.

7. On 29 July 2016, the first defendant’s solicitor replied: “my client will make searches for relevant documentation (this may take some time)”. On 31 October 2016, the claimant’s solicitors wrote to Booth & Co, the solicitors who acted in the purchase of the Property and prepared the Deed, to ask if they had any papers. Booth & Co replied on 5 September 2016, saying that all files held by them had been returned to the defendants.
8. The first defendant’s solicitors replied substantively to the claimant’s solicitor’s letter of 7 July 2016 on 15 September 2016, where they said, amongst other things:
 - “our client is not aware of a will”
 - “our client has done nothing in relation to the administration of his father’s estate”
 - “our client has no papers”
 - “My client is the legal owner of Brickfield Cottage along with his brothers. From what I have been able to discern, your client has no interest”.
9. A year later, on 27 September 2017, this Part 8 claim was issued by the claimant in the County Court at Chelmsford. It is not a well drafted document. It is repetitive, amongst other things. I discuss it in detail later. It is possible to discern in it the following causes of action:
 - (1) a claim under the Inheritance (Provision for Family and Dependents) Act 1975;
 - (2) a claim to a beneficial interest in the Property on the part of the claimant;
 - (3) a claim under what is referred to as proprietary/promissory estoppel;
 - (4) a claim to a right to occupy the Property under a missing deed or declaration of trust;
 - (5) claims to declarations of ownership by the deceased of the Property, and of his carpet business.
10. On 5 December 2017, there was a directions hearing before District Judge Shanks in the County Court at Chelmsford. The District Judge was critical of the claimant’s failure to seek pre-action disclosure, and referred to her claim form as taking a scattergun approach. She ordered that the claim under the 1975 Act be stayed, that

the balance of the claim was to proceed as a Part 7 claim, and that the claimant was to file and serve particulars of claim.

11. On 10 January 2018, the particulars of claim were served, followed, on 25 January 2018, by a slightly amended particulars of claim. On 9 February 2018, the defence was served. This referred to the Deed, or a copy of it, as being attached, but it was not. On 14 February 2018, the defendants served a copy of the Deed, but this was badly copied so that the number “2” was omitted. The effect of this was that its provisions appeared to jump from 1(iii) to 3.
12. On 22 February 2018, the claimant’s solicitors requested sight of the original of the Deed. On 2 March 2018, the defendants sent a further copy of the Deed, still apparently incomplete.
13. On 9 April 2018, District Judge Mitchell refused an application by the claimant to lift the stay on the 1975 Act claim, gave directions to trial of the balance of the claim, and approved costs budgets. On 17 April 2018, the claimant’s solicitors again asked to examine the original of the Deed. On the same day, the defendants’ solicitors refused that request, stating that inspection would be permitted on 7 May 2018 in accordance with the directions order. On 23 May 2018, the defendants’ solicitors sent scanned copies of original documents, although scanned copy of the Deed was still in incomplete form.
14. In late May and early June 2018, the defendants’ solicitors did offer inspection of the original of the Deed. There was correspondence about arranging a date, but none was eventually agreed. That was because, on 11 June 2018, the defendants provided a better copy of the Deed, showing the numbering of paragraph 2, which had been omitted from the copies previously provided. This appeared to show that the Deed, as produced, was the whole Deed, and that no part was missing.
15. On 11 July 2018, there was a consent order extending time for exchange of witness statements to 13 July 2018; and, although these were not in the papers before me, I assume that that took place. The next relevant event is the notice of discontinuance dated 26 September 2018 and the accompanying application. Finally, on 4 February 2019, letters of administration to the deceased’s estate were granted to a solicitor, Joseph Bell, on the claimant’s application. The grant appears to be a limited grant because the gross and net value of the estate were stated to be nil.

Discontinuance, the relevant legal principles.

16. There is no dispute as to the applicable legal principles, CPR 38.6 provides that:

‘Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant’.
17. Also relevant is CPR 44.2 which sets out the considerations the court is to take into account when making an order about costs. CPR 44.2.4 provides that the court will

have regard to all the circumstances, including the conduct of all the parties. The context for the court's consideration in all the circumstances under CPR 44.2 is the determination of whether there is good reason to depart from the presumption laid down by CPR 38.6: see *Nelson's Yard Management Co Ltd & Ors v Eziefula* [2016] EWCA Civ 235 at [15] by Moore-Bick LJ.

18. CPR 44.2.5 provides that the conduct of the parties includes:
 - (1) conduct before as well as during the proceedings and in particular the extent to which the parties followed the practice direction on pre-action conduct or any relevant pre-action protocol;
 - (2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and
 - (3) the manner in which a party has pursued or defended its case or particular allegation or issue.

19. The principles applicable to the exercise of the court's discretion under CPR 38.6 were summarised by the Court of Appeal in *Brookes v HSBC Bank Plc* [2011] EWCA Civ 354 (para 6):
 - “(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
 - (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
 - (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
 - (4) the mere fact that the claimant's decision to discontinue may have been motivated by a practical, pragmatic, or financial reasons, as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
 - (5) if the claimant is to succeed in displacing the presumption, he would usually need to show a change of circumstances to which he himself has not contributed;
 - (6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule’.

20. The court observed in *Brookes* at [10] that,

“[it] is clear therefore from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances.”

21. The 6 point summary from *Brookes* was adopted and approved by the Court of Appeal in *Nelson's Yard*. There, it was reiterated that it is not the function of the court considering costs to determine whether the claim would have succeeded, although the court is permitted to consider whether the unreasonableness of the defendant's conduct provides a good reason to depart from the default rule. The court

may take account of matters relating to conduct where it does not have to resolve disputed questions as to the merits of the substantive claims.

22. In *Nelson's Yard*, the defendant had failed to respond to pre-action correspondence relating to excavation work he was carrying out close to the claimant's property. The claimant subsequently commenced proceedings for, amongst other things, injunctive relief to restrain development and to permit inspection of the foundations of the claimant's property. The defendant then allowed the claimant's surveyor to inspect and proceedings were subsequently discontinued. On costs, the court took account of

“the reasonable perception by the claimants that their property was at risk of collapsing, coupled with the failure of the defendant to respond to pre-action correspondence and his subsequent conduct in giving the claimants in substance what they had requested”. [40]

The claimants were awarded their costs up to service of the defence and thereafter there was no order as to costs.

Effect of the notice of discontinuance and the application to disapply the default rule as to costs.

23. The claimant's counsel took a preliminary point that on its proper construction, the claimant's application was not to disapply the default rule as to costs, but an application for permission to amend. She did so on the basis that paragraph 6 of the claim form made it clear that all the claims referred to in it were conditional upon production of the Deed and/or determination of the beneficial ownership of the Property. The claimant's decision not to pursue those claims once the Deed had been produced was not therefore, her counsel submitted, a discontinuance but an application to amend the claim.
24. This argument was first raised in the claimant's skeleton argument. It is unsustainable on the face of the notice of discontinuance, the application notice, and the evidence in support of the application, all of which refer to discontinuance. Furthermore, even if paragraph 6 of the claim form is properly construed as advancing causes of action on a conditional basis, the only cause of action in addition to the 1975 Act claim referred to in that paragraph is estoppel. Paragraphs 9 to 13, which assert a beneficial interest/right to occupy and the transfer of the deceased's share in his carpet business are not expressed to be conditional.

Disapplication of the costs rule on discontinuance

25. I turn therefore to consider the application of the principles in *Brookes* and *Nelson's Yard* to this case.
26. Although it is not the function of the court to consider whether the claim would have succeeded, the court can, as it did in *Nelson's Yard*, take into account whether the claimant achieved in substance what she was seeking. She did so to a limited extent, in that the defendants did disclose the Deed. However, as discussed later, the Deed was also of direct relevance to other parts of the claim.

27. Paragraph 3 of the claim form seeks:

“an order that the defendants produce any trust deed, declaration of trust, deed or will dealing with the beneficial interest held by the claimant and/or by [the deceased] in [the Property] to the claimant and to the court.”

28. The defendants’ counsel submitted that the claimant did not succeed in obtaining the relief sought in paragraph 3 of the claim form, because the Deed, on its face, does not deal with the beneficial interest in the Property. However, the defendants’ case, as advanced in its own evidence and correspondence, was that the Deed was determinative as to the beneficial interest in the Property: see for example, the first defendant’s witness statement dated 12 July 2018 at para 14, the defendants’ solicitor’s witness statement dated 13 February 2019 at para 19 and the defendants’ solicitor’s letter dated 3 May 2019. I therefore reject that submission.

29. The defendants’ counsel also submitted that the claim for disclosure was inappropriately sought in the claim form, and should have been made by way of an application for pre-action disclosure. However, applications which could be made by application notice are capable of being included in Part 8 claims, for example, applications to extend time to bring the claim. Applications for disclosure under the *Norwich Pharmacal* jurisdiction are made by a Part 8 claim. In the circumstances where the claim under the 1975 Act was made as an alternative to asserting a direct interest in the Property, I do not consider that the claimant is to be criticised for including an application for disclosure in her Part 8 claim.

30. Paragraph 4 of the claim form asserts

‘No grant of probate has been taken out by the defendants and the claimant seeks directions from the court pursuant to CPR 57.16.3(a) as to who is to take out a grant of probate or letters of administration’.

The defendants’ counsel submitted that this part of the claim was bound to fail, because the claimant had not satisfied the evidential requirements of CPR 57.16.3(a). However, these evidential requirements could have been met by additional evidence, and this part of the claim was not bound to fail. Although it is also a minor part of the claim, in my judgment, the claimant was plainly entitled to a direction under CPR 57.16.3(a) as to the representation of the estate in the claim. For reasons that are unclear to me, she took the different route of seeking the appointment of an independent administrator.

31. Paragraph 5 of the claim form seeks an order determining whether the deceased held a beneficial interest in the Property. As her counsel accepted, the claimant had no direct standing to seek this effectively declaratory relief. However, this issue would and will need to be determined in the 1975 Act claim. Consequent upon the deceased having a beneficial interest, the claimant claims, in para 6 of the claim form, an interest by way of proprietary/promissory estoppel and a right to occupy the Property under the 1975 Act. In addition, in paragraphs 12 and 13 of the claim form, the

claimant asserts that she has a beneficial interest in the Property and seeks relief consequent upon that interest.

32. As to the claims to a beneficial interest and under proprietary/promissory estoppel (and the consequential relief), the defendants' counsel submitted that it was plain that they would fail. She relied upon the presumption that the beneficial interest follows the legal interest in the absence of a contrary intention, see *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [56] and *Whitlock v Moree* [2017] UKPC 44, 20 I.T.E.L.R. 658 at [25].
33. In this case, she submitted, there was no evidence of a contrary intention and therefore that, since the defendants hold the legal interest in the Property, it is plain that they are also the beneficial owners; and, accordingly, that neither the deceased nor the claimant are beneficial owners of the Property. I reject that submission. In my judgment, the claimant has (at the very least) a reasonable argument that the effect of the Deed was that the deceased retained a beneficial interest in the Property, or to create a trust in favour of the deceased and the claimant.
34. The recitals in the Deed show that the deceased intended the Property to be, as indeed it was, the quasi-matrimonial home of himself and the claimant. There is no suggestion that the deceased ever paid the defendants to occupy the Property. In addition, the phrase, "in the name of", is indicative of the defendants holding the legal title only, and not being entitled to the beneficial interest in the Property. Finally, the deceased paid at least £117,000 of the purchase price of the Property (the position as to the remainder is unclear at this stage); and the presumption of advancement is at the very least arguably displaced by the evidence of his intentions contained in the Deed.
35. Paragraph 9 of the claim form seeks an order that the court is satisfied that there is a missing deed or declaration of trust which gives the claimant a right to occupy the said Property. Following the production of the Deed, this part of the claim no longer needed to be pursued, because the defendants had produced the missing deed.
36. Paragraphs 10 and 11 of the claim form seek an order that the claimant is entitled to occupy the said Property and to retain the chattels of the deceased, during her lifetime; and a declaration of the deceased's interest in his carpet business and a transfer of his share (if any) in this business to the claimant during her lifetime. Both of these paragraphs, in my judgment, seek relief pursuant to the 1975 Act claim, which is continuing, following the lifting of the stay by me.
37. The key issues for consideration in determining this matter are those at points (5) and (6) of *Brookes*, to which I now turn.

Change in circumstances

38. The primary change in circumstances was the production of the Deed. As noted, the Deed does not on its face contain any provisions as to the beneficial interest in the Property, and does not expressly grant such an interest to the claimant or the

deceased. Its production established that the claimant did not have a clear, unanswerable claim to a beneficial interest. As to the estoppel claim, the claimant's counsel accepted that once the claim to a beneficial interest was no longer pursued, a pragmatic decision was taken to confine the claim to the 1975 Act claim.

39. In my judgment, the production of the Deed was a change in circumstances which justified discontinuing her claims to a beneficial interest in the Property of her and/or the deceased. As for the pragmatic decision to abandon the other causes of action, I accept that this was not directly consequent upon the production of the Deed. Nonetheless, the fact that the claimant was no longer pursuing her claim to a beneficial interest was an indirect factor in her decision to confine the claim to the 1975 Act claim, and not therefore pursue the estoppel claim.
40. The defendants' counsel submitted that since the claimant was a signatory to the Deed, she must be assumed to have knowledge of its contents, so that its production could not amount to a change in circumstances. However, the Deed was executed 26 years earlier; and the first defendant appears not to have had any recollection of its contents until it was found. In my judgment, it is unrealistic to expect a lay person to have a detailed recollection of such a document, and the fact that the claimant was a signatory to the Deed does not prevent its production by the Defendants from being a change in circumstances.
41. The defendants' counsel also submitted that, since the notice of discontinuance was served 7 months after a copy of the Deed was provided, it was not to be inferred that this was the change of circumstance which caused the decision to discontinue. I reject that submission. The claimant's solicitors repeatedly sought inspection of the original Deed and were, in my judgment, justified in pressing for it. They have still not inspected the original of the Deed. In my judgment, it cannot be inferred from the time spent trying to inspect the original that the decision to discontinue was not caused by the production of the Deed.

Unreasonable behaviour by the defendants

42. In my judgment, the change in circumstances was brought about by unreasonable behaviour by the defendants. The defendants' solicitors did not properly engage with pre-action correspondence. Although the available evidence indicates that their clients had the Deed, having been sent the relevant files by Booth & Co, they did not produce a copy of it until 18 months after the claimant's initial request. Even now, no explanation has been given as to why the Deed was not produced in September 2016, what steps were taken by the first defendant to look for it, what enquiries he made and searches he carried out and when and where the Deed was found.
43. The defendants' counsel relied upon the fact that the claimant's solicitors did not write to the second defendant and the third defendant. However, the claimant's solicitors requested, and were not provided with, the third defendant's address; and were not informed of the second defendant's contact details. In addition, no evidence has been adduced as to enquiries made by the first defendant of his brothers. It would have been reasonable to make such enquiries; either, unreasonably, none were made;

or, if they were made, neither the claimant nor the court have been informed of their outcome.

Other factors.

44. Finally, I also take into account the following matters. The first is that there was a period of some 3 months between a complete copy of the Deed being provided to the claimant. and service of the notice of discontinuance, during which period witness statements were exchanged. That period of delay, in my judgment, tips the balance away from making any order for costs in the claimant's favour.
45. The second matter is that the evidence adduced by the claimant in support of her claims to a beneficial interest and an interest under an estoppel is evidence which will be relevant and admissible in her claim under the 1975 Act. For this reason, I do not consider that the claimant should be required to pay the defendants' costs of that evidence or in respect of the 3-month period up to the notice of discontinuance.

Conclusion

46. For the reasons I have given, I consider that this is an appropriate case to disapply the default rule as to costs on discontinuance. The fact that most of the evidence to date will be relevant and admissible in the 1975 Act claim means that no order as to costs would not in my judgment be the appropriate order. That fact should, in my judgment, be reflected in an order that the costs of the discontinued claims are costs in the case.

End of Judgment

Transcript from a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

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This transcript has been approved by the judge.