Neutral Citation Number: [2020] EWHC 625

Case No: PT-2018-000322

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: 23/3/2020

Before:

MASTER CLARK

- -

Between:

MILES BAYNTON-WILLIAMS	**Claimant**
- and -	
ASHLEY MARK BAYNTON-WILLIAMS	**Defendant**

- -
- -

Harry Martin (instructed by **Penningtons Manches**) for the **Claimant**
The **Defendant** in person

- -

Approved Judgment

This is the approved judgment handed down on the above date and is to be treated as authentic.

.....

Master Clark:

1. This is my judgment on the only remaining issue in this claim, namely the amount payable by the defendant, Ashley Baynton-Williams, in respect of his occupation of 17 Marble Hill Close, Twickenham, Middlesex TW1 3AY ("the Property") from 25 April 2009 to 22 June 2015.

Parties and the background

2. The claimant, Miles Baynton-Williams and the defendant, Ashley Baynton-Williams are brothers. Their mother, Margaret Baynton-Williams died intestate on 6 November 2013, aged 76.

3. The parties were the only children of the deceased, and the only beneficiaries entitled to her estate under the intestacy rules. On 15 April 2015 a grant of letters of administration was made to them jointly.

4. The defendant had moved into his mother's house, 17 Marble Hill Close, Twickenham, Middlesex TW1 3AY ("the Property") on 25 April 2009, after she had been admitted to hospital on 19 February 2009. He was appointed Mrs Baynton-Williams' Deputy by the Court of Protection on 24 September 2009. She never returned to live at the Property, moving from hospital to a nursing home, where she remained until she died. The defendant remained living there after her death, until completion of its sale on 22 June 2015. His evidence is that he contributed significant funds in respect of his mother's bills, including her care home bills; and that delay by the solicitors acting in the administration of the estate (Stone Rowe Brewer) in reimbursing him meant that he was unable to re-house himself. He has had no permanent place to live since 22 June 2015.

5. The claim, which was commenced on 26 April 2018, sought the defendant's removal as administrator and required him to account to the estate for his rent free occupation of the Property. This included the period when their mother was alive, on the basis that she lacked capacity to consent to his occupation. The defendant did not respond to the claim: he did not acknowledge service or file any evidence in opposition to it.

6. On 21 August 2018 I made an order removing the defendant as administrator and requiring him to account for his rent free occupation of the Property from 25 April 2009 to 1 July 2015 (the latter date is, it is common ground, an error, and was later amended to 22 June 2015). The background to that order and the events following it are set out in my judgment dated 19 August 2019.

7. On 3 September 2019, I made an order consequent upon that judgment granting permission to the defendant to rely on the evidence which he had filed and served late; and to file further evidence limited to his case as to:
   (1) the defects (set out in list form) in the Property additional to those listed in paragraph 12(3)(i) below, and in respect of each defect, the date on which it arose;
   (2) the date (or dates) on which those defects arose

   The claimant was granted permission to reply to that evidence, including as to his case as to

(3) the condition of the Property at the commencement of the defendant's occupation;
(4) any defects in the Property which arose during the defendant's occupation, and in respect of each defect, the date or dates it arose.

8. I also ordered that there be further expert evidence as to:
(1) Whether, if placed on the market, the Property would in fact have been rented, if it was in:
(i) the condition alleged by the claimant;
(ii) the condition alleged by the defendant, as set out in (3) below;
(2) If so, its market rent on the assumed basis that its condition was as alleged by the claimant;
alternatively
(3) If so, its market rent on the assumed basis that its condition was as alleged by the defendant, namely
(i) on the dates alleged by the defendant, there were the following defects, which remained unrepaired or unremedied until the end of his occupation of the Property:
(a) Structural damage to the ceiling of the bathroom and kitchen and two walls of the kitchen, resulting from a flood from the attic water tank through the roof of the bathroom into the kitchen;
(b) Visible structural damage affecting the wall of the upstairs front large bedroom, possibly indicating subsidence;
(c) The carpets were threadbare;
(d) There was damp at various points throughout the Property;
(e) The electrical system of the Property was not safe;
(f) The plumbing system was leaky;
(g) The wood of the garage doors and rear garden fences were rotten beyond repair;
(h) The kitchen units were 40 years old;
(i) The cooker, washing machine and fridge were 20 years old, and the washing machine and fridge were at the end of their working life;
(ii) The boiler was not working for the last 2 years of the defendant's occupation;
(iii) Any other defects set out in the defendant's evidence permitted by the order.

9. The order also provided for the parties to file written submissions limited to: (a) any further directions which were requested; and (b) the assessment of the amount payable by the defendant for his occupation of the Property. Finally, it provided for the court to decide whether any further directions were necessary and whether to make an assessment of the amount payable by the defendant for his occupation of the Property on the papers or whether to list a further hearing.

10. The defendant's additional evidence (in a witness statement dated 9 September 2019) set out the following additional matters:
(1) estate agents visiting the Property had expressed concern about gas and electrical safety;
(2) the bathroom (and sole) toilet was not working and had not been functioning for possibly a year previously.

11. The claimant's witness statement dated 30 September 2019 in response challenges or does not admit the defendant's evidence as to the Property's condition. However, his counsel's skeleton argument formally concedes that the condition of the Property was as alleged by the defendant, and in those circumstances the claimant's evidence as to this is no longer relevant.

12. Both sides have requested that the disposal of the issue be dealt with without a further hearing. I have been willing to do so, for reasons of proportionality and given the low value of the claim. This has meant, however, that to the limited extent that factual issues arise, it has been necessary to determine them on the balance of the written evidence without cross-examination.

The Expert's evidence

13. I turn therefore to the Expert's opinion dated 15 November 2019. He accepts that the Property in the state alleged by the defendant would not be fit to be rented out. He goes on however to state that a competent landlord would have remedied any defects before a tenancy commenced, and provides an estimate of the cost of doing so: £14,650. On this basis he concludes that what he refers to as "the net rental achievable" would be £116,666 (the amount in his first report) less those costs = £102,016.

14. There are several difficulties with this approach. First, there is no evidence that funds were available to carry out the remedial steps set out by the Expert. Indeed, the available evidence is that funds were not available. In the defendant's witness statement dated 18 September 2018, he states that, in about 2009:

> "The defendant asked a letting agent from St Margaret's Village to look at the property. The agent made a cursory visual inspection, in which he stated that the property could not be rented "as was" and would need substantial repair and redecoration to render it so. When it was clear there was no prospect of the property being repaired, rental agent left.
>
> Defendant repeated this to plaintiff and asked whether plaintiff could contribute to the repairs, which he could not; defendant subsequently reported to the solicitors that the property was not rentable state. By circumstance, the property had been allowed to degrade, while our mother looked after our grandmother; in particular a flood from the loft, which damage the bathroom and kitchen, had never been repaired, this among a host of defects."

15. Similarly, in his witness statement of 19 December 2018, the defendant states:

> "As part of the preparation [for an application to appoint the defendant as his mother's Deputy], SRB [Stone Rose Brewer – solicitors instructed to make the application] asked for a valuation of the house and of its rental potential. A local estate agent visited, provided a value of the house for court, and informed defendant that the condition of the house prevented it being rented, without substantial repair.

SRB and plaintiff were informed of this, SRB informing the defendant that he could not use the deceased's money to repair the property; plaintiff was not prepared to commit money to repair and this remained so throughout the occupation of the house."

16. This evidence is not contradicted by the claimant.

17. Following Mrs Baynton-Williams' death, it remained the case that no funds were available for repairs, the net distributable value of the estate being substantially less than the value of the Property.

18. There is therefore no factual basis for the Expert's assumption that the repairs he outlines could have been carried out.

19. A more fundamental flaw of this approach is that it fails to reflect the relevant legal test, or indeed, the terms of my order namely that the defendant should account for his rent-free occupation of the Property. The amount payable by the defendant is the value to him of the use of the Property in the condition it was in when he occupied it. There is no basis in law for importing a hypothetical calculation in which the Property has been repaired. By seeking to do so, the Expert has exceeded the limits of his expertise and, again, regrettably, failed to understand and adhere to the requirements of his role.

20. In determining the value of the defendant's occupation of the Property, I therefore derive very limited assistance from the Expert's evidence.

Discussion and conclusions

21. I approach this issue on the following basis. First, the Property, being unfit to be let, has no "ordinary letting value". It follows that the decision of *Swordheath Properties v Tabet* [1979] 1 WLR 285, relied upon by the claimant, is not relevant.

22. It does not however follow that there was no value to the defendant from his occupation of the Property. It provided him with a place to live, with washing and cooking facilities, and, until the boiler failed, heating and hot water. In addition, it follows from the price of £875,000 achieved on the sale of the Property that some value must be attributed to its use, where, as here, it was habitable, albeit not lettable.

23. The only evidence available as to the value of the defendant's occupation is the Expert's report dated 6 August 2018. He describes the Property as a mid-terraced 3-bedroom 2-storey house constructed in the 1930s, with a private garden, a garage and off-street parking. Marble Hill Close is a cul de sac, near St Margaret's village.

24. The Expert sets out a number of comparables (obtained from local estate agents and various online sources) and a graphical representation of the index for private rentals in London provided by the Office of National Statistics. I set out his conclusions as to rental value:

"For the years commencing
25 April 2009 - £1,750 pcm or £21,000 pa [£403 pw]

25 April 2010 -£1,750 pcm or £21,000 pa [*£403 pw*]
25 April 2011 - £1,800 pcm or £21,600 pa [*£414 pw*]
25 April 2012 - £1,900 pcm or £22,800 pa [*£437 pw*]
25 April 2013 -£2,050 pcm or £24,500 pa [*£471 pw*]
25 April 2014 - £2,200 pcm or £26,400 pa [*£506 pw*]
25 April 2015
to 1 July 2015 – £2,300 pcm or £5,175 [*sic*] pa [*£527 pw*]
The total rental achievable during the period was £132,575."

25. The Expert then deducts a figure of 10% plus VAT of the gross rental to reflect the cost of letting and management fees to the landlord, reaching the figure referred to above of £116,666.

26. In the light of the claimant's concession as to the condition of the Property, these figures can be no more than a starting point. The appropriate figure is inevitably a matter of value judgment by the court. In forming that judgment, I take into account the matters set out in para 21 above; and the fact that the overall condition of the Property was very poor, and that it was not fit to let. Particularly significant is the absence of heating and hot water in the last 2 years that the defendant lived at the Property.

27. In my judgment, the value of occupation of the Property as a whole must be considered in 2 separate periods:

    (1) the period when the boiler was functioning: April 2009 to June 2013 ("the first period") = 4 years and 2 months;
    (2) the remaining period, when the boiler was not working and latterly, the toilet also not working: June 2013 to June 2015 ("the second period") = 2 years.

28. I consider that the appropriate average figures for the occupation of the whole Property are amounts substantially discounted from the notional market rental of the Property in the condition initially alleged by the claimant; and are as follows:
    (1) the first period - £200 per week, which equates to £869 pcm or £10,428 pa.; and totals £43,450;
    (2) the second period - £100 per week, equating to £435 pcm or £5,214 pa; and totals £10,428.

    These total £53,878 of which the defendant is liable for one half = £26,939.

Interest

29. The claimant also seeks interest on the sums payable pursuant to the court's equitable jurisdiction and/or section 35A of the Senior Courts Act 1981. The date from which interest is sought is the completion date of the sale, 22 June 2015.

30. The relevant principles are summarised in the White Book at 16AI.6:

> "The overriding principle is that interest should be awarded to the claimant not as compensation for the damage done but as compensation for being kept out of money which ought to have been paid to them (per Lord Herschell L.C. in *London, Chatham and Dover Ry Co v South Eastern Ry Co* [1893] A.C. 429 at 437).

> …
> The award is discretionary. A relevant factor in the exercise of such discretion is whether the successful claimant has sought payment of the money in question promptly."

31. I turn therefore to the chronology of the claim and the claimant's conduct in bringing it.

32. In making his claim, the claimant relied upon an email dated 28 June 2009 from the defendant to Stone Rose Brewer in which he said:

> "As regards the house, while I'm living there, I will be responsible for paying the council tax/utility bills, and contribute a small amount of rent, so the property will not be a drain on my mother's resources."

33. The claimant's evidence is that

> "when Ashley first moved into the Property I had repeatedly pressed him on the payment of rent suggesting that he should pay to my mother the same level of rent that he had been paying for his previous property in Wanstead."

and that the defendant's email dated 26 September 2016 was the first occasion on which the defendant told the claimant that he had not been paying rent to their mother.

34. The claimant's evidence is, however, not consistent with his email of 26 September 2016. In that email he responded to the defendant's request that he instruct Stone Rose Brewer to pay him the balance of his expenses incurred on behalf of the estate – said to be "Off the top of my head … about £1,800". The claimant replied:

> "I suggest you withdraw your claim for the £1,800 and I will credit you that amount in the post-settlement settlement.
> This is now:
> Your expenses (you say 'of the top of your head', so let me know what the full amount is) Half my capital gains tax as agreed Rent on MHC (I suggested half of what your rent was in Wanstead).

35. First, the rent suggested by the claimant in his email is one half of the defendant's rent of his Wanstead flat, not "the same level" as that rent, as stated in his evidence. Secondly, there is nothing in the claimant's email to indicate this is the first occasion on which he became aware that the defendant has not been paying rent to their mother – it proceeds on the assumption that rent has not to date been paid. In addition, although not all the correspondence in the administration of the estate was before me, a significant amount was. There is no mention in any of that correspondence of rent paid or payable by the defendant in respect of the Property. On the balance of this evidence, I find that the first occasion when the claimant sought payment of rent by the defendant was in his email of 26 September 2016.

36. On 22 March 2017, the claimant's solicitors sent the defendant a letter before claim seeking the following "occupation rent":

(1) for the period 25 April 2009 to 4 November 2013 (4½ years) in respect of the whole of the Property at a rent of £1,800 pcm = £97,200;
(2) for the period 4 November 2013 to 1 July 2015 (20 months) in respect of one half of the Property (£900 pcm) = £18,000.

The total claimed was therefore £115,200. This was the first occasion on which payment in respect of the defendant's occupation was formally sought by the claimant. The payment sought for the whole of Property (over a period of 4 and a half years) was an excessive and misconceived demand, and was not maintained in the claim itself.

37. The claim was not issued until 26 April 2018, 3 years after the grant to the claimant and the defendant.

38. The delay by the claimant in pursuing the claim and the excessive demand made in the letter before claim mean, in my discretion, that the appropriate date for interest to run is from 28 days after the issue of the claim.

39. As to the rate of interest, this is also a matter of discretion to be exercised in accordance with established principles. In this case, during the period when the defendant occupied the Property, it formed part of the deceased's estate during her lifetime and on her death in administration. In my judgment the appropriate rate of interest is one which reflects the return which the estate would have received from placing the funds in an interest bearing account, which on a broad basis, would be 1%.

40. I will deal with the question of costs initially by way of written submissions and will consider then whether to direct a hearing.