



Neutral Citation Number: [2023] EWHC 3307 (Ch)

Case No: HC-2015-002330

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2023

Before :

LOUISE HUTTON KC
Sitting as a Deputy Judge of the High Court

Between :

BC PENTHOUSE LIMITED	<u>Applicant</u>
- and -	
SHEIKHA HIND SALIM HOMOUD AL-JABER	<u>Respondent</u>
AL-SABAH	

Jonathan D. King (instructed by **WE Solicitors LLP**) for the **Applicant**
The Respondent appeared in person

Hearing date: 18 October 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10AM on 21 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

.....

LOUISE HUTTON KC

Louise Hutton KC :

1. By this application, BC Penthouse Limited (“BCP”) seeks to set aside part of an order made by Mr Justice Peter Smith on 3 November 2015 (the “November 2015 Order”). BCP is the Fourth Defendant to these proceedings. The only named Respondent to the application is the Third Claimant, Sheikha Hind Salim Homoud Al-Jaber Al-Sabah (“Sheikha Hind”).
2. The application was supported by the witness statement of Mr Wingate, a solicitor representing BCP. BCP also filed witness statements of Mr Fahim, Sheikha Salem (the sister of Sheikha Hind) and the fourth witness statement of Mr Wingate in support of its application. BCP was represented by Mr King.
3. Included in the hearing bundle was a witness statement made by the First Defendant (“Mr Al Baho”) in support of a different application in these proceedings (not listed with the application before me) made by Mr Al Baho.
4. Sheikha Hind appeared in person at the remote hearing. She filed a witness statement dated 15 October 2023 in answer to the application and opposed the relief sought.
5. The November 2015 Order was made at a CMC at which a number of substantive applications were also listed for hearing. Those applications included:
 - i) An application by Sheikha Hind for summary judgment in respect of her claims against Mr Al Baho, the Second Defendant (“Mr Pinnell”) and/or BCP; and
 - ii) An application by Sheikha Hind in the alternative for default judgment against Mr Al Baho and/or BCP.
6. The background to the proceedings before the Judge at the October 2015 CMC is set out in his judgment, [2015] EWHC 3154 (Ch) (the “November 2015 Judgment”). In very short summary, the claim brought by Sheikha Hind was said to be brought by her on behalf of the estate of her late father (“the Estate”). He had owned the shares in two Gibraltar companies which owned two properties at Porchester Gate in London. Those properties were sold by an agent of the beneficiaries of the estate.
7. The allegations made by Sheikha Hind against Mr Al Baho (as set out in the November 2015 Judgment) were that he was retained to assist on the sale of the properties by introducing a buyer and, in that role, owed fiduciary duties to the estate including not to make a profit at its expense and not to take bribes from third parties. It was said that Mr Al Baho had received sums totalling £300,000 into bank accounts opened by companies established by him, which sums were the proceeds of two bankers’ drafts paid in addition to the purchase price of the Porchester Gate properties which had been declared to the estate.
8. Sheikha Hind’s claim was that the £300,000 was a bribe. The November 2015 Judgment recorded at paragraph 72 that, at the CMC, Sheikha Hind accepted that whether the £300,000 was a bribe was an issue that had to go to trial.
9. In addition, two payments, one of £47,500 and one of £88,339 were said to have been paid out from the proceeds of sale of the Porchester Gate property and by Mr Al Baho.

10. Peter Smith J summarised the claims made by Sheikha Hind, who he referred to as the Third Claimant, as follows at paragraphs 74 to 78 of the November 2015 Judgment (emphasis in the original):

“74. The Third Claimant at this stage contends that she is entitled to judgment against Mr Al Baho in relation to the sum of £300,000.00. In addition she contends that she is entitled to a declaration that the monies currently held by MA Law belong to the Estate by reason of the misconduct of Mr Al Baho as a fiduciary. The monies which he obtained in breach of his fiduciary duties were used to acquire the penthouse and that figure represents the net profit made from the misuse of the Estate’s monies so that he should be liable to account for that money. Alternatively it is held that upon constructive trust for the estate. It is not necessary the Third Claimant contends to establish that the £300,000.00 was obtained by¹ a bribe because Mr Al Baho would be liable by reason of breach of his fiduciary duty in any event.

75. However there is a difference in that if the money is a bribe the Third Claimant can recover that but they can also seek damages for breach of fiduciary duty and do not have to give credit for the bribe against those damages.

76. It seems to me therefore, that if the Third Claimant sought a final judgment for the £300,000.00 at this stage that would inevitably involve them electing to give up the claim as against Mr Al Baho that the monies was received by him as a bribe. There would be no subsequent hearing at trial against Mr Al Baho to establish that it was a bribe because they would have obtained the full sum by way of a final judgment.

77. I raised this with Mr Tager QC and after consideration he accepted that analysis. On that basis he contended that the £300,000.00 should be payable to the Third Claimant as an interim payment in advance of a determination as to whether or not Mr Al Baho was in breach of fiduciary duty or had received the sum as a bribe.

78. It seems to me that in the absence of an explanation from Mr Baho the two sums of £47,500 and £88,339 are properly claimable by the Claimants as interim payments because there is no basis set out and the criteria set out in CPR 25.7(c) below are clearly satisfied.”

11. Peter Smith J went on to hold that he would have found the Claimants had made out the grounds for summary judgment for an account in respect of the £300,000 or damages for breach of fiduciary duty. As summary judgment was not ultimately sought at the hearing before him (for the reasons the Judge gave at paragraph 77) and the Claimants instead sought an interim payment, Peter Smith J held that it was appropriate to make an order for an interim payment under CPR 25.7(c) which requires the Court to be satisfied that *“if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is*

¹ The word “by” here appears to be a typographical error for “as”: see the first line of paragraph 75, paragraph 76 and the last line of paragraph 77.

seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim.”

12. The Judge then went on to consider the claim against BCP. As set out at paragraph 74 of the November 2015 Judgment (set out above), Sheikha Hind claimed that monies then held by MA Law (solicitors for BCP, pursuant to an undertaking that they would hold the monies pending the resolution of Sheikha Hind’s claim against BCP) belonged to the Estate because they represented the net proceeds of the misuse of the Estate’s monies so that Mr Al Baho was liable to account for them to the Estate, or they were held on constructive trust for the Estate. As set out in paragraph 74, it was said to be unnecessary to establish that the £300,000 was obtained as a bribe because Mr Al Baho would be liable by reason of his breach of fiduciary duty in any event.

13. At paragraphs 84-85 of the November 2015 Judgment, the Judge held:

“84. Mr Al Baho has not sought to make any representations as to the entitlement of the monies held by MA Law. Neither has BCP. I am satisfied on the evidence provided by the Third Claimant that valid service of the application against BCP has been effected. I am further satisfied on the material provided by the Third Claimant that it is clear that Mr Holtz knew about the proceedings. That appears from paragraph 3 of his email that he sent to my Clerk on the second day of the hearing at 3.00pm. In that email he suggests that he only found out about the litigation from another litigant (which must be Mr Al Baho over the weekend. I do not accept that. Second he says that his company has not been served with the new claim (i.e. the Third Action). I do not accept that for the reasons I have set out above. In paragraph 3 of the email he refers to the Claimants relying on the advice of the lawyer in Gibraltar a Mr Bullock. His advice was as to service which shows that Mr Holtz must have known about the application because he could have only discerned that by having the papers.

85. I am therefore satisfied that BCP has been validly served, was aware of the proceedings and has not filed an acknowledgment of intention to defend. Accordingly the Third Claimant is entitled to judgment against BCP under CPR 12. Alternatively they are entitled to judgment under CPR 24 as I will give them permission to make the present application despite the fact there has been no acknowledgement for service. As there is no other party seeking entitlement as to those proceeds I can see no reason why they should not be paid out to the Third Claimant for the benefit of the Estate.”

14. Mr King identified the parts of the November 2015 Order made against BCP as:

- i) The declaration that *“the monies held by MA Law LLP pursuant to its undertaking arising from the sale of the Penthouse at Bryan Court, Seymour Place, London W1H 2NE together with any accrued or accruing interest thereon represent the traceable proceeds of the monies received by [Mr Al Baho] from the sale of the properties being Flats 61 and 62, 3-8 Porchester Gate, London W2 3HS”;*
- ii) The order at paragraph 5 headed *“Relief against the Fourth Defendant”* as follows:

“5.1 MA Law LLP shall by 4.00pm on 17 November 2015 pay into Hughmans Client Account with Barclays Bank at 1 Churchill Place, London E14 5HP (Sort Code: 20-77-67, Account: 23625753) the sum of £576,628.34 together with any further interest that may have accrued thereon held by them pursuant to their undertaking on the completion of the sale of the Penthouse at Bryan Court, Seymour Place, London W1H 2NE together with any further interest accruing thereon.

5.2 The Fourth Defendant [BCP] do pay

(a) 35% of the Third Claimant’s costs of and occasioned by her application dated 21 September 2015 and shall make a payment on account of those costs in the sum of £19,826.53 by 4.00pm on 17 November 2015; and

(b) the Third Claimant’s costs of and occasioned by the Claims against it, the same to be subject to a detailed assessment upon the standard basis if not agreed. Nothing in sub-paragraph (a) shall prejudice the Third Claimant’s ability to apply in that assessment for a payment on account of these costs.”

15. BCP applies to set aside these provisions of the November 2015 Order on the grounds that, it says:
- i) The order was procured by Sheikha Hind on the basis that she acted as administratrix, whereas it has recently been confirmed by a court order dated 3 June 2023 that she was not entitled to do so; and
 - ii) The order was made on Sheikha Hind’s representation that she would collect in monies for the benefit of the beneficiaries of her late father’s estate, but BCP has learned that she did not in fact do so, and infers that she never intended to do so but fraudulently misrepresented her intentions.

Sheikha Hind’s position as administratrix

16. Although the Court did not have before it on this application a complete history of the relevant proceedings, it is clear (and Sheikha Hind did not dispute) that at least by the time of the October 2015 CMC, Sheikha Hind pursued her claims on the basis that she was acting not only on her own behalf but also as administratrix of the estate of her late father. This is clear from the heading to the November 2015 Judgment and the November 2015 Order, and paragraph 29 of the November 2015 Judgment (reflecting the arguments that Sheikha Hind did not have title to sue in the first and second actions because she did not obtain a grant of letters of administration until 8 March 2012, after which she started the third action). By order of Master Price dated 19 March 2014, the grant of letters of administration to Sheikha Salem (a grant which, by reason of a mix up, had been made a day after the grant on which Sheikha Hind relied) was revoked, so enabling Sheikha Hind to pursue the claims as administratrix. The consequence was that at the time of the October 2015 hearing and the November 2015 Judgment and Order, Sheikha Hind had a grant of letters of administration which did entitle her to pursue the claims she advanced as administratrix.
17. The November 2015 Judgment shows that the basis of the order made in favour of Sheikha Hind and against BCP was that Sheikha Hind was acting on behalf of the Estate

and would apply the sums paid to her from BCP as required for the proper administration of the Estate. As set out above, at paragraph 85, the Judge said that he could “*see no reason why they [the monies held by MA Law] should not be paid out to the Third Claimant for the benefit of the Estate*” (emphasis added).

The course of the proceedings after the November 2015 Order

18. The course of the proceedings after the November 2015 Order is not entirely clear. Mr Wingate noted in his first witness statement that he had not been provided with a complete set of the relevant documents concerning the claim and so was unable to provide a full picture.
19. It appears that it is recorded in a consent order dated 9 March 2016 that the proceedings were discontinued against Mr Pinnell and Sheikha Salem with no order as to costs.
20. It appears from Sheikha Hind’s witness statement and Mr Al-Baho's witness statement and the documents they exhibit that Sheikha Hind’s claim against Mr Al-Baho was struck out following her failure to comply with an unless order made by Birss J on 30 January 2017 and that on 9 February 2017 the First and Second Claimants discontinued their claim against him.
21. By an order dated 6 June 2023 made on the application of Sheikha Salem in the probate proceedings PT-2012-000003, the order of Master Price made on 19 March 2014 (see [16] above) was “*set aside as if it had never been made*”. I was not shown any evidence filed in support of that application, and Mr King did not submit that it automatically or necessarily followed from the making of that order (without more) that the November 2015 Order should be set aside. As set out above, at the time of the November 2015 Order, Sheikha Hind had the benefit of orders in the probate proceedings recognising her entitlement to pursue the claim before Peter Smith J as administratrix.

The application under CPR 3.1(7)

22. Mr King referred to the principles in Tibbles v SIG plc [2012] 1 WLR 2591 and in Roult v North West Strategic Health Authority [2010] 1 WLR 487. In Tibbles, Rix LJ (with whom Etherton LJ and Lewison LJ agreed) said at [39(ii)] that although the cases all warned “*against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise*”, subject to that, “*the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.*”
23. Mr King submitted that it did not matter for the purposes of his application whether the order made by Peter Smith J was a final order as against BCP or not. He submitted the Court could (and in this case should) in either case set aside the November 2015 Order under CPR 3.1(7) on the basis that there was, he submitted, both a material misstatement, which he identified as “*the status/standing of Sheikha Hind and her alleged intent to collect in for the benefit of the beneficiaries of the Estate*”, and a material change of circumstances, namely “*each of the subsequent, recent,*

determination as to the right to act for the beneficiaries of the Estate and BCP's understanding as to Sheikha Hind's actual or inferred intentions".

24. In the context of an application to set aside the order under CPR 3.1(7), the nature of the order is relevant. In Kojima v HSBC Bank plc [2011] EWHC 611 (Ch), Briggs J (as he then was) said at [30] that the considerations of a subsequent material change of circumstances or that the judge who made the original order was misled in some way, whether innocently or otherwise, as to the factual position before him or her would, in the case of a final order, "*generally be displaced by the much larger, if not indeed overriding, public interest in finality, subject of course to the dissatisfied party's qualified right of appeal*".
25. I find that the provisions of the November 2015 Order which BCP seeks to set aside are a final order. As set out above, Peter Smith J held that Sheikha Hind was entitled to judgment under CPR 12 or CPR 24 and the order directed the payment of funds held by BCP's solicitors to Sheikha Hind, directed BCP to pay the costs of the claims brought against it, and the order proceeded (as Mr King accepted) on the basis that BCP would have no further involvement in the proceedings. It was, it seems to me, as against BCP a final order bringing an end to the claims against it in the proceedings.
26. Mr Wingate stated at paragraph 35 of his witness statement that the fact that by the application before the Court at the October 2015 CMC Sheikha Hind sought either summary judgment against the First, Third and Fourth Defendants or alternatively judgment in default against the Fourth Defendant (only) "*reflects the fact that any judgment against the Fourth Defendant (unless granted by default,) was dependent on the Claimants (or the Third Claimant) establishing the 'liability' of the First and Third Defendants, on which any liability on the part of the Fourth Defendant was premised.*"
27. As to this, the November 2015 Judgment stated that Sheikha Hind was entitled to judgment against BCP under CPR 12, alternatively under CPR 24, and that the money held by their solicitors should be paid out to Sheikha Hind for the benefit of the Estate. There is nothing conditional in that decision, nor in the terms of the November 2015 Order giving it effect, which are set out above.
28. It follows that I do not agree with Mr King's submission that BCP's application to set aside the order is "*reinforced by the fact that any liability on the part of BCP to pay monies to the Estate necessarily depends on there having been a determination that the First Defendant made a secret profit for which he is liable to account. The First Defendant's liability to Sheikha Hind has never been established. In turn, the Order rests on a premise which has never been established.*" For the reasons set out above, I do not consider that this is the correct characterisation of the order made against BCP. I also note that, as Mr King's submission recognised, this was not the basis on which BCP's application to set aside the order was made.
29. Accordingly, the authorities do not support the submission that it would be open to the Court now to set aside the order against BCP under CPR 3.1(7) on the basis of a subsequent material change of circumstances or that the Court was misled when it made its decision.
30. In addition and in any event, for the reasons set out more fully below in relation to the application to set aside the order as having been procured by fraud (in short, that the

matters relied on are not material to the claim against BCP and the reasons for which the order against it was made), I do not consider that the matters relied on by BCP in support of its application (set out at [23] above) provide proper grounds to set aside the order under CPR 3.1(7).

The application under the inherent jurisdiction to set aside a judgment procured by fraud

31. Mr King relied alternatively on the Court’s inherent jurisdiction to set aside a judgment procured by fraud. The relevant principles were summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] 1 CLC 596 at [106] (approved by Lord Kerr (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed) in Takhar v Gracefield Developments Ltd [2020] AC at [57]) as follows:

“The principles are, briefly: first, there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be ‘material’. ‘Material’ means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court’s decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.”

32. In support of the application to set aside the relevant parts of the order as having been procured by fraud, BCP relies on the same matters as it does in respect of the application under CPR 3.1(7), namely:
- i) *“a material misstatement (i.e. the status/standing of Sheikha Hind and her alleged intent to collect in for the benefit of the beneficiaries of the Estate)”*, and
 - ii) *“a material change of circumstances (i.e. each of the subsequent, recent, determination as to the right to act for the beneficiaries of the Estate and BCP’s understanding as to Sheikha Hind’s actual or inferred intentions)”*.
33. The application was not advanced on the basis of any alleged misstatement relating to BCP’s liability to the duly appointed representative of the Estate (whoever that may be), although there were statements and allegations made in the evidence before me to the broad effect that the underlying claim against BCP was not well-founded. Given that the application was not advanced on this basis, I have left it out of account. Given that it is not the basis on which the application was advanced, I am not in a position to resolve any such issues.

34. At the time of the October 2015 Hearing and the November 2015 Order, Sheikha Hind had in fact been appointed by this Court to claim on behalf of the Estate and to collect in the proceeds of any such claims for the benefit of the beneficiaries of the Estate, at least in the sense that she was recognised by this Court as duly appointed to pursue such claims. The fact that that position has now changed (and that the Court considers Sheikha Salem and not Sheikha Hind should have been recognised as representing the Estate in October and November 2015) does not mean that the judgment and order Sheikha Hind obtained as a representative of the Estate and on its behalf against BCP should be set aside. That is because the identity of the person representing the Estate does not affect the merits of the claim against BCP. The change in representative is not “*material*” in the sense that requirement is used by Aikens LJ in RBS v Highland (above). The change of representative does have consequences for Sheikha Hind, and the current representative can pursue such claims as are available to her to ensure that monies received on behalf of the Estate are accounted for and applied as required by law, but the change in representation does not seem to me to provide any basis for BCP to have the November 2015 Order against it set aside.
35. Insofar as the references to Sheikha Hind’s “*alleged intent to collect in for the benefit of the beneficiaries of the Estate*” and to “*BCP’s understanding as to Sheikha Hind’s actual or inferred intentions*” are said to add to the application by amounting to an active misleading of BCP and the Court, they do not seem to me to change the analysis. In acting as representative of the Estate, Sheikha Hind was obliged to collect in assets for the benefit of the beneficiaries of the Estate and to deal with funds received in accordance with her duties to them. If she intended to do otherwise, that did not affect her obligations in respect of the claims she pursued and the funds she received, and (as set out above) she will remain liable to any claims properly available to the current representative of the estate.
36. Accordingly, I do not consider that any of the matters relied on by BCP provide a proper basis to set aside the November 2015 Order against BCP for fraud.
37. There was (it seems to me, correctly) no suggestion in the evidence or submissions before me that the order made against BCP by Peter Smith J should be set aside simply as a consequence of the order made on 6 June 2023, without more.
38. BCP’s application is therefore dismissed.