IN THE HIGH COURT OF JUSTICE PT-2018-000651
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
[2020] EWHC 3040 (Ch)

The Rolls Building
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Fetter Lane
Holborn
London, EC4A 1NL

Friday, 16 October 2020

Before:

HIS HONOUR JUDGE JARMAN QC

(Sitting as a judge of the High Court)

B E T W E E N :

TAMARA JANE LAURA LUCAS — Claimant

- and -

(1) ALEXANDER JAMES RICHARD GATWARD
(2) LAURA LANGLEY — Defendants

MR J. BALANCE appeared on behalf of the Claimant.

MS C. MCDONNELL QC appeared on behalf of the First Defendant.

THE SECOND DEFENDANT appeared in Person.

J U D G M E N T

JUDGE MILWYN JARMAN QC:

1 The parties to this claim are the adult children of Alan and Mel Gatward. It concerns the former family home at Sandleford Place, Newtown, Newbury, which I shall refer to as "the property". The first defendant, Alexander Gatward, has been the sole legal and beneficial owner of the property since his mother gifted it to him in January 2018. Even before then, there was solicitors' correspondence whereby the claimant asserted an interest in the property, but that was denied by her mother. She in these proceedings says that she is entitled to a one-third beneficial interest in the property under a constructive trust or by virtue of the doctrine of proprietary estoppel, arising as a result of assurances said to have been made to her by her father and / or mother, and her detrimental reliance thereon.

2 The parties' experts have valued the current market value of the property at between £2.65 million and just under £3 million respectively. The claimant also claims damages as against her sister, the second defendant, on the basis of unlawful interference or negligent misstatement. Her brother counterclaims for a declaration that she has no interest in the property, damages arising out of the claim that she has left chattels at the property since January 2018, and a declaration that he may dispose of them.

3 The trial of the claim is listed between 30 November and 14 December this year. The claimant now makes three applications:

i. To vacate the trial for lack of time and / or because of COVID 19 restrictions.

ii. To join her parents as parties, and it is clear that if that is granted, there may be a consequence that the trial will be vacated.

iii. To amend the particulars of claim.

4 In these applications, the claimant was represented by counsel, Mr Balance. The first defendant was represented also by counsel, Ms McDonnell QC. The second defendant appeared in person, and I heard from her via a video link. She hopes to get legal representation at trial, but that is dependent upon cost. I also heard from Mr and Mrs Gatward via video link.

5 At the heart of these applications before me is the assertion on the part of the claimant that she was always told she would have a third share in the wealth of the family. She says that it only became clear in exchange of witness statements in May of this year that her parents were saying that they had given more financial assistance to her than to her siblings, and that is the context in which she makes these applications.

6 I shall deal with them in turn, and shall deal first of all with the application to vacate the trial. In August the claimant and the first defendant agreed the time estimate should go up by one day to nine days, and that was on the basis or with the thought that there might be a break between evidence and submissions. Now it is said on behalf of the claimant that the trial will take twelve days, and it is accepted that if that is the case, and if the matter is adjourned, then the trial will not be listed before January 2022, subject to any expedition direction.

7 The claimant says that ten days is just not enough. There are sixteen main witnesses, some of whom are elderly. Mr Gatward, for example, is eighty-nine. Nine of the defendants'

witnesses are over seventy-five. There are two experts on valuation. As I have indicated, the margin between them at the moment is some 10 per cent. A joint statement has yet to be filed, and it is not clear to me why it is that that joint statement has not yet been filed. I am now told that it can be done by Friday next week. It appears that there is some difference in relation to potential changes in planning policy, and how that might affect planning potential in respect of the grounds of the property. That in my judgment is no good reason to delay the filing of the joint statement.

8 On behalf of the claimant it is also said that the court may decide to satisfy any equity in a monetary award. There are a large number of documents; there are factual issues going back to 1985; there are issues of credibility and character. For example, the defendants' evidence suggests that the claimant and her husband, who are the only witnesses for the claimant, have a skewed perception of what was said in family meetings. There are also attacks on her character, such as an allegation that she sneaked onto her mother's computer, and sent emails to herself, as part of a longstanding plan to manufacture evidence. References are also made to her behaviour as a child.

9 She asserts that she is a litigant who needs to participate in this hearing, but cannot with the present COVID 19 restrictions. She and her husband are vulnerable by virtue of various medical conditions. They also have a son who has special needs, and who, if school were closed, would need to be taken care of.

10 The need for a fair trial is fundamental, that is not in dispute. A litigant whose presence is needed but is unable to be present through no fault of his own will usually have to be granted an adjournment, however inconvenient that may be to the court and staff resources and to the other parties: See *Solanki v Intercity Telecom Limited* [2018] EWCA Civ 101.

11 Guidance has been given to adjournments in the context of the present restrictions in a number of cases, one of which is *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) by HHJ Eyre QC:

i. Regard is to be had to the importance of the continued administration of justice.
ii. There should be a recognition of the extent to which disputes can fairly be resolved by remote hearings.
iii. The courts must be prepared to hold remote hearings in circumstances which would not have been considered previously.
iv. But there is also to be a rigorous examination of the possibility of a remote hearing, and whether a remote hearing can be fair. That is fact specific.

12 If the application to adjourn is granted, the question of when the hearing could take place, face to face, apart from the relisting difficulties, is a matter of some speculation. Litigants and the courts have been adapting to hearings by video platform for the last few months, and I have conducted several. I have also conducted hearings where some lawyers and parties attend court, and others attend by video platform. The hearings have included elderly witnesses giving evidence remotely with assistance, sometimes from, for example, a hotel room. They include cross-examination via video link, even when dishonesty is alleged against a witness or a party.

13 The courts have in a number of cases considered these sorts of arrangements. In *Re One Blackfriars Limited (In liquidation)* [2020] EWHC 845 the court refused to adjourn an application of a five-week trial due to take place in June 2020. The court there emphasised

that planning and cooperation is important to allow video hearings to run as smooth as possible.

14 In May 2020 another case, *A Local Authority v Mother and Father and SX* [2020] EWHC 1086 (Fam), the court refused an application to adjourn a care case after hearing five days of expert evidence by video, and prior to hearing lay witnesses. The judge found that the giving of factual evidence remotely by video link did not undermine the fairness of the process, either for the individuals concerned or other parties, and further observed that demeanour will often not be a good guide to truthfulness.

15 That and those cases were on very different facts, but those principles, very much reflect my own experience of conducting hearings by video and hybrid hearings as well as face to face hearings, in the last six months or so, including where, as I have indicated, there are issues of honesty. The judge in the latter case made the further point that some witnesses may need help with technology and with documents, whether in paper or electronic form. That again accords with my experience.

16 In this case, on behalf of the claimant, it is submitted that it is a bitter family dispute involving credibility. It is accepted that the demeanour may be of limited weight, but it cannot be ignored. There is a great deal of witness evidence, and many of the disputed conversations or representations are not documented. The stakes are high, and the claimant needs to defend herself against the allegations.

17 On this latter point, the issue remains in the case, as presently pleaded, as to whether the claimant has an interest in the property or some other equity. In such cases, which sometimes are far more bitter than they ought to be, many issues are raised very often going back to childhood, in the belief that the parties consider them to be important to the issues to be determined by the court, and relevant to those issues.

18 However very often, many such issues are not relevant to the issues which the parties have chosen in their statements of case to put before the court, and listening to Mr Balance going through the allegations in this case, some of which go back to how the claimant behaved in childhood, in my judgment it is likely that many of those issues will fall into that category.

19 I take into account that some of the witnesses in the present claim are elderly. To adjourn the trial without any certainty as to when a hearing would take place involves a risk of witnesses, for one reason and another, not being available to give live evidence. I also take into account the strain of this bitter family dispute on the parties, all of the parties, and their elderly parents. And, as I have indicated, I have heard from the second defendant and her parents directly.

20 I also take into account that an adjournment would lead to a further increase in the costs of this case, which are already £300,000 to over £500,000 for each of the claimant and the first defendant.

21 The claimant relies upon the age and health of the witnesses on both sides, meaning that they will not be safe in attending at court, and I accept that that may well be the case, but I do not accept that their credibility cannot be assessed by giving evidence via video link.

22 I have made enquiries with the listing office, and it is likely that ten days in the present listing can be made available. The focus at the trial will or should be on the key issues:

i. Whether any representations were made to the claimant.
ii. Whether she relied upon such representations.
iii. Whether she suffered detriment as a result.

23 In terms of the experts, it is said that they may take a day to give their evidence. In my judgment that is unlikely. It is unlikely to be proportionate for the trial judge to listen to experts being cross-examined for a day or anything like it on a margin of 10 per cent. These matters will be essentially a matter for the trial judge, and there is a pre-trial review listed in the usual way, but I have to take into account what I regard as likely to occur on the evidence and the submissions before me.

24 I have to have regard to the overriding objective and in particular the need for fairness, proportionality and expedition. Taking all these points into account, in my judgment it is reasonably proper and feasible that the trial can take place and be completed comfortably within ten days; and it is also fair and proportionate and just that those witnesses who do not wish to attend court for health reasons can attend the hearing by video link. I would urge the parties' solicitors to cooperate with one another to ensure that all technological and other assistance in terms of documentation is made available for such witnesses. Accordingly, I refuse the application to vacate.

25 The next application is to join Mr and Mrs Gatward as defendants. The Civil Procedure Rules governing such a joinder are set out in Rule 19.2. That provides as follows:

> "The court may order a person to be added as a new party if-
> (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings, or
> (b) there is an issue involving the new party and an existent party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

26 The overriding objective is of paramount importance in considering these matters: See *Welsh Ministers v Price, Re Pablo Star Limited* [2018] 1 WLR 738 per the Master of the Rolls, Sir Terence Etherton. He said:

> "In considering whether or not it is desirable to add a new party pursuant to CPR 19.2(2), two loadstars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case, and the overriding objective in CPR Part 1."

27 In this case, neither Mr and Mrs Gatward wish to be added as parties. But the claimant submits that it is desirable so that the court can consider all potential remedies, including those which do not include the property, so that all potential persons who might be able to satisfy the minimum equity are parties. It is also said that there is a need for such joinder due to the fact that the witness statements filed on behalf of the defendants say that the claimant has been given substantial sums by her parents, who continue to occupy parts of the property.

28 Mr Balance was frank enough to accept that the joinder of the claimant's parents as parties has been considered throughout, but she took an active decision not to do so because of a natural reluctance to join her parents in. I accept that a relief in wide discretionary terms may involve an order that the person making a representation relied on or a successor should pay the claimant a sum of money, for example see *Jennings v Rice* [2003] 1 P & CR 8. I

accept also that it may be the case that even if the claimant fails in her claim to a third interest in the property, some equity other than such an interest, for example, a payment of sums by her parents, might be ordered. So, I accept that there is a reasonable case for saying that that might happen. But it is not bound to happen, and in my judgment it is rather unlikely. If the claimant is going to succeed, she will succeed in claiming an interest in the property.

29 Mr Balance also accepted that the parents could have been joined at an earlier stage. He says that they engaged in the disclosure process on a voluntary basis. They have given witness statements. It is difficult to see what additional material will be needed to be dealt with as parties. Their defence is likely to mirror that of the present defendants, and any further disclosure will be dealt with in a disclosure application which has already been made against them, and any supplementary evidence is likely to be limited.

30 Against that, Ms McDonnell submits that voluntary disclosure is different to an obligation of disclosure as a party. If joined, the parents would have to instruct solicitors or at least have the choice to instruct solicitors, who may take time to read the voluminous documents, to instruct counsel, and to draft the defence, even before disclosure is considered.

31 There are possibilities of documents relating to trusts, family trusts, in Bermuda. There would also be a duty on the claimant to reconsider disclosure, although I accept on the evidence that is unlikely to be substantial.

32 In my judgment it is unrealistic to say that it is likely that all of these steps can be taken so as to avoid the need to vacate the hearing, on that basis. In my judgment such joinder would lead to a significant risk that the hearing may have to be vacated. Ms McDonnell also made the point that it was clear in the present defences that detriment was denied, and that a balance would have to be taken of what benefits were given to the claimant by her parents, and it would have to be determined if there was net detriment. She submits that was clear from the pleadings, and she took me to the defence. The claimant chose not to file a reply. She obtained permission to do so last June but did not do so. These matters were also in correspondence before the proceedings were commenced. I accept Ms McDonell's submissions on this point.

33 I further accept that there is no justification for joining the parents as defendants simply because they are key witnesses, or because their evidence is in support of their son, which is consistent with his defence, because they can assist the court to resolve matters by appearing as witnesses, which they will do: See, for example, *Molavi v Hibbert* [2020] EWHC 121 (Ch).

34 Ms McDonnell also submitted that the condition in Part 19 as to a connected issue does not arise. The claimant's father has not been a beneficial owner of the property at any material time. The references to family wealth and claims to the entitlement of some of it are over and above the claim as presently pleaded, which concerns only the property.

35 The claimant must show that it is desirable to join her mother, as the owner of the property, who gifted it to her son, to resolve a connected issue. Again, the fact that her claim, as presently pleaded, relates to the property is relevant.

36 In the particulars of claim it is made clear that the allegation is that the property was bought at a time when Mr Gatward Senior had sold significant business interests, which he had inherited from his father. In the defence it is also clear, I accept, that the allegation is denied

and asserted that the value of the business interests is the product of his own efforts and not that from his father. I accept that this was clearly an issue raised in the pleadings, and there was no reply. Again, weighing up all these matters, I am not satisfied that it is desirable to join in the parents under either limb of Part 19, and I refuse that application.

37 I now turn to the application for permission to amend the particulars of claim. The principles applied were not in dispute before me. They were helpfully summarised by Carr J, as she then was, in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). The facts are very different, but the principles, it was accepted, apply. Those principles may be summarised as follows:

i. It is a matter of discretion for the court in which the overriding objective is of great importance. The court must strike a balance between injustice to the claimant if the amendment is refused, and injustice to the other parties and other litigants in general if the amendment is permitted.

ii. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case, and why justice to her, her opponent, and other court users requires her to be able to pursue it; and the risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

iii. A very late amendment is one made when the trial date has been fixed, and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.

iv. In considering lateness, the court must take into account the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.

v. Nowadays it is more readily recognised that payment of costs may not be adequate compensation.

vi. The obligation not only serves the purpose of ensuring that parties conduct litigation proportionately in order to ensure their own costs are kept within proportionate bounds, but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately.

38 That case was cited with approval by the Chancellor, Sir Geoffrey Vos, in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268. It was applied by HHJ Keyser QC, sitting as a judge of the High Court, in *Gregor Fiskin Limited v Karl* (?) [2019] EWHC 336 (Comm). In the latter case the possibility of bringing a new claim to deal with the amendments was considered. The court held that the risk that such a new claim might be struck out, as it could have been included in the original claim, results from the claimant's own failure to bring the claim forward in the original claim.

39 That is relevant here because the claimant has now recently, last month, issued proceedings against her parents with several allegations similar to the amendments now sought to be made. Those amendments fall into five broad categories:

i. There is what Mr Balance calls a "minor recasting of the family wealth issue and how it was created".

ii. There are disclosure-based amendments. The claimant thought, for example, that a company was the original owner of the property, and disclosure has shed more light on that. Those he accepts are fairly minor matters.

iii. The first substantial category is the allegation that the parents controlled great family wealth derived from Mr Gatward Senior's family, that the claimant was told by her parents that she had an entitlement to a share in that wealth, that the property was financed by that wealth, and mother paid no consideration. Mr Balance says that it is an unfair impression that she has been given more financial assistance by her parents than her siblings. It is not recasting the claim or expanding the relief. It is not to make a claim to the family wealth generally, but he says this needs to be set out to defend allegations. It is already in issue in the claimant's witness statement.

iv. The next substantial category is a new representation of a third interest in the property, and also one new instance of reliance. This, says, Mr Balance, is fleshing out and clarifying.

v. Finally, there is a new claim of conspiracy to injure, but the vast majority of the facts underlying that claim are drawn from the claimant's first witness statement or emails. He accepts that they are serious allegations.

40 Insofar as the proposed amendments amount to further tidying-up, Ms McDonnell makes the overarching point that the costs of this claim are already in danger, if not having reached a state, of being disproportionate to the amount at stake. A one-third interest would be approximately £1 million. But, as I have indicated, the claimant's costs are over £300,000, and the first defendant's costs are over £500,000.

41 I accept that I should not grant permission for any tidying-up of the pleadings at this late stage. As to the new cause of action to allege the tort of conspiracy, that was first referred to in correspondence from solicitors acting for the claimant's husband to the defendants in 2018. It is disputed, and again if there is no interest in the property, it is difficult, submits Ms McDonnell, to see how it could be said there was a conspiracy to injure.

42 Mr Balance submits that there is a real prospect of success, and the contrary was not I think argued. He accepts that the application is late, but submits that is a relative concept, and the amendments could be accommodated in the current listing of the trial. He submits that these amendments could not have been made before the exchange of witness statements in May 2020, but in my judgment, for the reasons submitted by Ms McDonnell, the main amendments were considered before then. The claimant says that the delay since then has been because of COVID restrictions, schools being shut, having to look after her son. I take all those matters into account, and they are weighty matters, but in my judgment that of itself does not wholly explain why it has taken until August of this year, when the application was made, to decide on proposed amendments to her case.

43 In respect of the tort of conspiracy to injure, there are some nineteen particulars which the claimant wishes to rely upon, and these involve a number of oral arguments between herself and her siblings, and the allegations that they were envious of her for the financial assistance

which her parents gave her. On behalf of the first defendant, Ms McDonnell submits that there is no reason why these matters could not have been pursued far earlier, and I accept that submission.

44 To the extent that she will suffer any prejudice by the refusal of permission to amend her claim, she is the author of that prejudice. In my judgment there is likely to be some but not a great deal of prejudice. Weighing up all these matters, I refuse that application too. So, the outcome is that all three of the applications fail. Are there any other matters?

MR BALANCE: My Lord, forgive me, it may be that I did not follow your judgment, but I understood that you had addressed the tidying-up amendments and the disclosure based amendments, and of course the conspiracy allegations. I am not sure that, my Lord, you addressed and decided whether the assurance, the additional allegations of assurance and reliance, should be permitted, or whether you dealt with the family wealth amendments at paragraphs 18A, 23----

JUDGE JARMAN: No, I am not permitting any amendments, Mr Balance.

MR BALANCE: I hear that. What I was not sure was whether you had addressed those in detail, but I hear what you say now.

MS MCDONNELL: My Lord, I think there are two matters that remain, one is costs of this application; the other is that in emails from Chancery Masters, you may recall my learned friend saying at the outset that this was originally supposed to be heard by a master, and Deputy Master Linwood felt that it should be heard by a judge. The Masters' clerk said that they were going to put ad risk for today the pending application by the claimant to expedite the hearing of her disclosure application, which is currently listed on 23 November, and I agree with my learned friend that that is not going to work very well with the trial date. As he-- (overspeaking)----

JUDGE JARMAN: -- had no objection to that application being listed at the same time as the PTR.

MS MCDONNELL: I am grateful, my Lord. I understand through my clerks that that will require a specific direction to that effect, with the time estimate for the PTR currently half a day being enlarged to one day.

JUDGE JARMAN: Well, can that be accommodated on the day of the PTR?

MS MCDONNELL: That is what I am told, yes, it can, because the PTR is in a three-day window at the moment.

JUDGE JARMAN: Very well. Well, yes, I am content to make that direction. Could I ask that someone submit a draft minute of order please.

MR BALANCE: My Lord, certainly, and thank you, I am grateful.

LATER

45 (After discussion re costs) Right, well, can I just say this: The court has great experience of these sorts of family disputes, where it is said that promises were made about property and family assets. They are very, very difficult for parties to deal with at trial, and I have already indicated that not every issue which has been brought up in the witness statements will be relevant. Parties seem to assume that every small family dispute is relevant, but very often it is not.

46 Mediation is the way forward for these sorts of disputes. This dispute is crying out for a settlement between the parties. Very often, they can agree matters which the court cannot order. And very often in such disputes everyone is left with a sense of dissatisfaction. So, I would encourage the parties, however bitter they feel towards one another now, to try and put that aside to the extent that they can work out for themselves the best way forward, and that usually involves give and take on all sides. Yes, anything else?

MR BALANCE: My Lord, only to say that I will draft up that minute, and seek to agree it with my learned friend.

JUDGE JARMAN: Thank you.

MS MCDONNELL: Thank you.

JUDGE JARMAN: Thank you both for your submissions, and thank you, Miss Gatward, and thank you, Mr and Mrs Gatward. Good afternoon.

CERTIFICATE

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