Neutral Citation Number: [2024] EWHC 2209 (Ch)

Case No: PT-2021-001068

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 August 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

MASUDUR RAHMAN	**Claimant**
- and -	
(1) DEWAN RAISUL HASSAN	**Defendants**
(2) LANA BASNEED ZAMAN	
(3) AMANI ZAMAN	
(4) FARIHAH ZAMAN	

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Kuldip Singh KC (instructed by **direct access**) for the **Claimant**
Owen Curry (instructed by **Trowers**) for the **Defendants**

Consequential matters dealt with on paper

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 23 August 2024.

HHJ Paul Matthews :

Introduction

1. On 30 May 2024 I handed down my reserved judgment (under neutral citation number [2024] EWHC 1290 (Ch)) on the trial of the substantive claim relating to alleged *donationes mortis causa*, or "gifts in contemplation of death". I held that in large part the claim succeeded. On the handing down of the judgment, I adjourned the hearing so that consequential matters could be dealt with on paper.

2. I subsequently received detailed written submissions on various matters, and handed down a supplementary judgment (under neutral citation number [2024] EWHC 2038 (Ch)), running to some 70 paragraphs, on 1 August 2024. This judgment, amongst other things, dealt with costs, and gave permission to the defendants to appeal on certain grounds, and subject to certain conditions.

3. Unfortunately, this supplementary judgment has not proved sufficient to resolve matters, nor even to enable a form of order to be sealed, and there are a number of matters still disputed between the parties. I am informed that, as a consequence, no appellant's notice can yet be lodged with the Court of Appeal, although the time for lodging that notice (as extended by me) will expire next week. I will come back to that briefly later on.

4. In relation to these further disputed matters, I have received yet more written submissions from both sides. These run to more than 30 pages of single space typing, in addition to numerous additional attachments, including authorities and drafts, and redrafts, of the proposed order.

5. The submissions include (i) an email from Mr Singh KC dated 5 August 2024, pointing out an error (since corrected by me) in my supplementary judgment concerning the amount of the payment to be made on account of costs, (ii) an email from Mr Curry dated 7 August 2024, (iii) an email in reply from Mr Singh KC dated 8 August 2024, (iv) a "holding" email in response from Mr Curry on the evening of the same day, and a fuller, follow-up email from him dated the next day, 9 August 2024, (v) an email in reply to them dated 11 August 2024 from Mr Singh KC attaching separate written submissions, and (vi) an email in reply to those dated 13 August 2024 from Mr Curry (apparently sent to everyone else concerned the day before, but, by a slip, not to me), (vi) a yet further email from Mr Curry dated 21 August 2024 raising two questions of urgency in relation to (a) the payment on account and (b) the need for a sealed order in order to proceed with the appeal, and (vii) a yet further response by email from Mr Singh KC in the evening of the same day. In relation to Mr Curry's final email, I dealt with the first point he raised by return email on the same day, and indicated that I would think further about the second, and respond later the same day or the next. In fact, it has taken me until this morning to do so.

6. The present, further judgment is the result of those further submissions. I have written it, in some haste, on my annual leave, because the matter is represented to me to be urgent, and hence in my judgment cannot await my return to Bristol

in September. I trust that the parties will excuse any resulting infelicities of style, spelling mistakes or other clerical errors, and infirmities of grammar.

Matters still in dispute

7. The matters which, despite the two judgments already delivered by me, remain in dispute between the parties appear to me to be as follows:

(1) a question (which seems to be the most important one) as to the continued application of undertakings previously given by the parties in relation to the dealing with or disposal of assets in the estate of the late Mr Al-Mahmood;

(2) a question arising out of the first question above (but in effect a fresh question), which asks the court to revisit the imposition of conditions on the grant of permission to appeal and in particular seeks the removal of the obligation of the defendants to make a payment on account of costs;

(3) a question whether the order should contain a statement that the defendants are entitled to deduct from the rents and profits received by them in respect of the leasehold properties costs properly incurred by them in relation to those properties;

(4) a question whether the order should state that the first and second defendants are entitled to an indemnity out of the estate for expenses and liabilities properly incurred in relation to them, *specifically including* the costs of providing an account to the claimant of what they have received in relation to the assets held by me to have been validly given to him;

(5) a question whether the order should state that the defendants may make a further application to the Court of Appeal for permission to appeal.

The first question

8. As to the first question, signed written undertakings as to dealings with estate assets were given by both the claimant on the one side and the first and second defendants on the other in August 2022, when both sides were represented. The undertakings of the first and second defendants are dated 2 August 2022 (although, despite being legally represented, the first defendant dated his undertakings in the American rather than English way; given that these are *English* proceedings, I am afraid that this does have the potential to confuse). The undertakings of the claimant are dated 3 August 2022.

9. Both sets of undertakings are made in documents formally intituled in the proceedings, and they are endorsed with a penal notice. They were filed with the court on 5 August 2022. There can be no doubt that they were meant to be taken seriously. But the undertakings are expressed not to apply to actions "otherwise agreed" by the parties or ordered by the court.

10. Moreover, up until the present, the undertakings have not been incorporated in any formal order of the court. The defendants now seek the inclusion in the order resulting from the trial of a provision that the assets referred to in the order

remain subject to those undertakings save for the transfer of assets otherwise provided for in the order and for the payment of inheritance tax (as also intended to be provided for in the order).

11. The claimant objects to the inclusion of this provision. The primary objection appears to be a point not previously raised by him, namely, that because they never formed part of any formal court order, being neither formally "accepted" by the court nor included in any sealed order, they are not enforceable anyway. This position is vigorously challenged by the defendants. The debate between them (or, rather, their lawyers) has mushroomed out of all proportion, and I have been treated to elaborate written arguments citing copious authority.

12. I do not see the necessity of this. Either the undertakings are valid and enforceable, whether as undertakings to the court, or as contracts between the parties, or they are not. Nothing in this order is going to change the pre-existing status of the undertakings (though I accept it may have an impact on their scope for the future). The post-trial discussions on the form of the order are simply not the right place to discuss and decide such matters. And, if the parties believe that this needs to be resolved now, before the order I make can be implemented, then I disagree.

13. The undertakings as presented to me contain sensible carve-outs for actions by agreement and by order of the court. To the extent that the order I make requires actions which would otherwise contravene the undertakings, therefore, they are *expressly* not breaches. Moreover, and in any event, compliance with the order of a court of competent jurisdiction cannot *pro tanto* be a breach of an earlier undertaking to the same court. If any question arises hereafter as to whether any person has breached any undertaking, then that question, as well as the logically prior question whether the undertaking is valid and enforceable, can be dealt with as necessary. For the present, I simply say that I am not now deciding anything about the status of these undertakings, one way or the other.

The second question

14. As to the second question, the defendants say that the claimant's submission that he is not bound by the undertakings, even if it is wrong, means that his earlier submission (that he was not able to fund the costs of opposing any appeal by the defendants), upon the basis of which the court decided to attach conditions to the grant of permission to appeal, is fatally undermined. Hence, it is said, the imposition of those conditions should be revisited.

15. It is clear that the court has power to revisit an order before it is sealed: *Re L and B (Children)* [2013] 1 WLR 634, [19], SC. This is sometimes known as the *Barrell* jurisdiction, from *Re Barrell Enterprises Ltd* [1973] 1 WLR 19, CA. More recently, in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223, SC, Lord Briggs and Lord Sales (with whom the other judges agreed) considered this jurisdiction in some detail.

16. Amongst other things yhey said,:

> "32. … on receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from anything like neutrality or evenly-balanced scales. It will often be a useful mental discipline, reflective of the strength of the finality principle, for the judge to ask herself whether the application should even be entertained at all before troubling the other party with it or giving directions for a hearing. It may be a perfectly appropriate judicial response just to refuse the application *in limine* after it has been received and read, if there is no real prospect that the application could succeed …
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> […]
>
> 35. The weight to be given to the finality principle will inevitably vary, depending in particular upon the nature of the order already made, the type of hearing at the end of which it was made and the type of proceedings in which it was made. Leaving aside orders made on appeal … finality is likely to be at its highest importance in relation to orders made at the end of a full trial …
>
> 36. There is unlikely to be any particular magic in the word or phrase chosen to reflect the weight attributable to the finality principle in any decision whether to re-open a judgment and/or order before the order has been sealed, nor (which is the reverse of the coin) to describe the weight of the factor or factors which will be needed to prevail over the desirable adherence to finality …
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> […]
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> 39. In light of the importance of the finality principle in the present context, we consider that such formulae [from the previous paragraph of the judgment, *eg* "a matter 'of real weight' constituting 'a very strong case'"] are appropriate to be used here. It is difficult to improve upon them. The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place."

17. I make two main points. The first point is that it is not obvious to me that the claimant's submission that he is not bound by the undertakings undermines his earlier submission of impecuniosity. The matter is not argued out. But, to my mind, there is no necessary connection between the two. However, even if there were, and the later submission undermined the earlier, not being bound by the undertakings would not mean that the claimant became any better off financially.

18. The second point is that, as appears from paragraph 26 of my supplementary judgment, the condition that a payment be made on account of costs was imposed, *not* because of impecuniosity, but rather as a sanction for non-payment by non-resident defendants without apparent UK assets, against whom enforcement of my order would not be an easy matter.

19. Paragraph 28 of my supplementary judgment imposes a further condition on permission to appeal on ground 8, again not because of impecuniosity, but because ground 8 is put on the basis of public interest, in circumstances where *ex hypothesi* there is no real prospect of success. If the defendants wish to argue this ground on the grounds of public (rather than personal) interest, then I consider that the claimant should not be exposed to the same costs risks.

20. Accordingly, I consider that no sufficient basis has been made out by the defendants for me to exercise the *Barrell* jurisdiction and to revisit the question of the conditions imposed on the grant of permission to appeal. Those conditions accordingly stand.

The third and fourth questions

21. As to the third and fourth questions, I am being asked in effect to make an *ex cathedra* statement or statements now as to what the law is on these points. But these points formed no part of the trial and were not argued before me. Frankly, the law on these points is whatever it is. And, whatever it is, it does not need to be stated in this order.

22. When the accounts which are ordered in this case are actually produced, the relevant parties will claim whatever indemnities they consider they are entitled to, relevant objections will then be made, and the matter will be resolved by the court (almost certainly a chancery master) on taking those accounts, *if* the parties choose to fight it. But *that* in turn will depend on the amounts involved, and the precise facts of the points to be contested. Neither those amounts nor the precise facts are known at this stage. I am no position now to deal with any of that now, and I therefore decline to do so.

The fifth question

23. As to the fifth question, CPR rule 52.3(3) relevantly provides:

> " … where the lower court refuses an application for permission to appeal—
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> (a) a further application for permission may be made to the appeal court; and
>
> (b) the order refusing permission must specify—
>
> (i) the court to which any further application for permission should be made; and
>
> (ii) the level of judge who should hear the application."

24. In my supplementary judgment I granted permission on grounds 2-5 and 8 of the 9 grounds sought and refused it on the others. I also attached a condition to all the grounds on which I gave permission (payment of a sum on account of costs) and a separate condition (liability for 50% of the claimant's costs on appeal) to permission on ground 8.

25. In *R (Medical Justice) v Home Secretary* [2011] 1 WLR 2852, Lord Neuberger MR (with whom Hooper and Rimer LJ agreed) held that

> "17. … where, as here, permission to appeal is given on terms by the judge, the prospective appellant cannot appeal against those terms, as he would, at least almost always, have been 'present at the hearing where permission was given'. The prospective appellant in such a case is put to his election: either he accepts those terms, in which case he has permission to appeal, albeit on those terms, or he treats the conditional permission as a refusal, and pursues a fresh application to appeal to the appropriate appeal court …"

26. The defendants have not indicated what approach they would adopt here. In other circumstances, were there time, I might have put them to their election. But in the present case, where time is short and the procedural tail seems to be in grave danger of wagging the substantive dog, rather than have another round of written submissions I will simply say that the order should provide for the statements contemplated by rule 52.3(3).

Time for payment on account and lodging appellants' notice

27. In my judgment of 1 August 2024, I decided that the defendants should make a payment on account of costs within 14 days of that day (see at [57]). In that judgment, I also refused the defendants permission to appeal, or made it subject to conditions. So, the defendants had 21 days from that day to lodge their notice of appeal with the Court of Appeal: CPR rule 53.12(2).

28. In an email from him to me dated 9 August 2024, Mr Curry for the defendants asked that, in light of further time being given to Mr Singh KC to reply to Mr Curry's submissions, both these time limits be extended to run from the date the order was "finally decided". In my email in reply dated the same day, I indicated that I would extend both time limits by three days, which was the extra time given to Mr Singh KC. I confirmed this also in a subsequent email to the parties dated 21 August 2024. My order will reflect these extensions of time.

The form of the order

29. My first two attempts at asking the parties to agree an order on the basis of my two judgments regrettably did not produce an agreed form of order. Rather than ask counsel to make a further attempt, I have sought to produce my own draft, which I think does now accord with what I have decided. This is based on the version of Mr Singh KC, the claimant's counsel, dated 21 August, though with some amendments to eliminate duplications and unnecessary complication. I have passed this version to Chancery Listing with the request that they seal it and send it out forthwith.

The need for the sealed order

30. Finally, I will say something briefly about the suggestion by the defendants that they would be unable to lodge their notice of appeal without the sealed order. This appears to be based on certain statements set out in the decision of Sweeting J in *Elbanna v Clark* [2024] EWHC 1471 (KB). In that case, judgment

on the merits of the claim had been delivered, in the claimant's favour, on 20 March 2024 (after earlier circulation to counsel of a draft in the usual way).

31. At the hand-down hearing the defendant did not seek permission to appeal, or seek an extension of time in which to do so. Later the same day, the claimant's counsel sent a draft order to the defendant's counsel for consideration. This had not been agreed, and nor had the order been sealed, by 10 April 2024, when, without any intimation being given to the lower court, the defendant filed an appellant's notice with the Court of Appeal. (This was at the end of the usual 21-day period.) Obviously, the notice was not accompanied by a copy of a sealed order.

32. On 15 April 2024 the claimant's counsel chased his opponent to see if the draft order sent on 20 March could be agreed. On 24 April the defendant's counsel responded by sending back a different form of draft order. Between 15 and 25 April the defendant's solicitors corresponded with the Court of Appeal, but did not copy the claimant's solicitors into any of it, despite the mandatory terms of CPR rule 39.8.

33. On 25 April 2024, a "Court of Appeal manager" wrote to the defendant's solicitors, informing them that the Master of the Court of Appeal considered that the appellant's notice had "been filed prematurely in these circumstances", even though filed right at the end of the 21-day period. In his view, their proper course was to "apply at the consequentials hearing in the lower court for an extension of time to file the appellant's notice in this Court." The email referred to the well-known decision of the Court of Appeal in *McDonald v Rose* [2019] EWCA Civ 4.

34. There was then correspondence between the parties' counsel, and a subsequent application by the defendant to Sweeting J for an order extending time in which to refile the appellant's notice with the Court of Appeal. That judge, however, held that he had no power to extend time, because the hand-down hearing had not been adjourned. In any event, he said that he would have refused permission to appeal. It was of course no part of the dispute before him to determine whether the Master of the Court of Appeal had been right to say that the appellant's notice filed in that case had been filed "prematurely".

35. CPR rule 52.12(2) (in its original form numbered 52.4(2), and which was introduced by the Civil Procedure (Amendment) Rules 2000, rule 19 and Sch 5, as from 2 May 2000) now relevantly provides that:

> "The appellant must file the appellant's notice at the appeal court within—
>
> > (a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing … or
> >
> > (b) where the court makes no such direction … 21 days after the date of the decision of the lower court which the appellant wishes to appeal."

36. It is to be noted that rule 52.12(2)(b) refers to "the date of the *decision* of the lower court" (emphasis supplied). There is no mention of any *order*, sealed or otherwise. It must therefore be conceivable that a decision is made on day 1 but the sealed order is not available on day 22, without fault on anyone's part. In such a case, in the absence of any extension by the court, the time for lodging the appellant's notice expires even though no sealed order has then been made or is otherwise available for lodging.

37. On the other hand, Practice Direction 52C currently provides at paragraph 3(4)(a) that:

> "At the same time as filing an appellant's notice, the appellant must provide for the use of the court one copy of each of the following –
>
> (a) the sealed order or other determination being appealed … "

There is thus an obvious potential disconnection between the rule and the practice direction. Under the rule, it is the *decision* that is appealed. Under the practice direction it is stated to be the "*sealed order* or other determination". This misstatement however has practical implications.

38. In passing I note that, under the old procedure, RSC Order 59 rule 4(1) (carried over at first into the CPR until May 2000) relevantly provided that:

> " … every notice of appeal must be served under rule 3(5) not later than 4 weeks after the date on which the judgment or order of the court below was sealed or otherwise perfected."

39. In other words, under the old rules, this problem did not arise. You did not need to put in your notice of appeal until after the order had been sealed. On the other hand, of course, if the court officers were busy, the parties might have to wait some time, perhaps several weeks, for the sealed order to be produced by the court. No doubt this might suit the putative appellant, but not normally the putative respondent, successful below and eager to conclude matters. So, eventually the rule was changed under the CPR, so as to depend upon the date of the *decision*, and not the order

40. Here the practice direction creates the inconsistency with the rule. The rule is a statutory instrument made pursuant to primary legislation, *ie* delegated legislation. The power to make practice directions (which are not statutory instruments) is conferred by the Civil Procedure Act 1997, as amended by the Constitutional Reform Act 2005: see *eg CPRE Kent v Secretary of State for Communities and Local Government* [2021] 1 WLR 4168, SC, [14]. They are binding on the courts to which they are addressed: *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] 1 WLR 2274, [28], CA. However, in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, SC, Lord Sumption (with whom the other judges agreed) said (at [12]) that Practice Direction 7A of the CPR "has no statutory force, and it cannot alter the general law".

41. It *may* be (though I am obviously not deciding) that the provision for the supply with the appellant's notice of "the sealed order or other determination being appealed" is satisfied by the supply of the *judgment* handed down, because that is the "determination" being appealed. But, if that is not so, and it is mandatory to supply a sealed order that may not yet exist, then the potential for injustice is obvious. Of course, it will usually be possible for the appellant to apply for an extension of time in which to lodge the notice. At first sight, however, it seems hard that, at least where the appellant is not at fault, the appellant must both make an application and rely on the exercise of the court's discretion to save the day.

42. In fact, in the present case, the time for lodging the appellant's notice (as extended by me) expires on 27 August 2024. I expect that the sealed order will be provided to the parties later today. Accordingly, the matter does not arise for decision here and, having raised the point, I need say nothing more about it.