Neutral Citation Number: [2022] EWCA Civ 34

Case No: A3/2020/7771

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)
Sarah Worthington QC (Hon) sitting as a Deputy High Court Judge
BL-2019-001726

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2022

Before :

LORD JUSTICE GREEN
LORD JUSTICE BIRSS
and
LADY JUSTICE WHIPPLE

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Between :

HUSEYIN ALI	**Claimant/ Respondent**
- and -	
(1) ISMET DINC **(2) SELAHI DINC**	**Defendants/ Appellants**

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Nigel Woodhouse (instructed by **Simons Rodkin Solicitors LLP**) for the **Appellants**
Nicholas Trompeter QC (instructed by **Ince Gordon Dadds LLP**) for the **Respondent**

Hearing date: 15 December 2021

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Approved Judgment

Lord Justice Birss :

1. This is an appeal from the decision of Sarah Worthington QC (Hon) sitting as a Deputy Judge of the High Court. By her order dated 16th November 2020 the judge declared that the first appellant Mr Ismet Dinc holds two properties on trust for the respondent Mr Huseyin Ali, and that the second appellant Mr Selahi Dinc holds a lease relating to one of the properties on trust for the respondent Mr Ali as well. The order also makes a number of consequential orders requiring transfer of the properties to Mr Ali, surrender of the lease and various financial remedies. The order was made following a trial before the judge in July 2020. The judge's judgment was given on 16 November 2020 ([2020] EWHC 3055 (Ch)).

2. Permission to appeal was given by Nugee LJ at an oral hearing (having been refused on paper). He gave permission on a single ground, and that was with considerable misgivings (judgment of 26 February 2021 at paragraph 1). The single ground is the contention that the judge decided the case on the basis of an arrangement that the claimant had not pleaded and had expressly disavowed in cross-examination. Therefore the appellants submit it was not open to the judge to decide the case that way and in doing so the judge crossed the line which separates adversarial and inquisitorial systems, citing ***Al-Medenni v Mars UK*** [2005] EWCA Civ 1041. The judge's conclusion was said to be impermissible in our adversarial system.

3. The respondent submits to the contrary, supporting the judge's approach. The respondent contends that the proceedings before the judge cannot be characterised as inquisitorial. The judge made findings of fact based on the pleadings and the evidence given at trial, did not misunderstand the legal principles or misapply the law to the facts as she found them and therefore justice was done fairly between the parties. The respondent contends that the appeal should be dismissed.

The facts and allegations

4. Mr Ali is about 70 years old. He was the sole registered proprietor of two properties: 19 Trent Gardens, Southgate, N14 4QA, and 67 Geldeston Road, London, E5 8SB. No.19 was and still is Mr Ali's home. No.67 was and still is a rental property.

5. On 27 April 2016, Mr Ali transferred both properties to Ismet Dinc for nil consideration. Although Ismet Dinc had been described as Mr Ali's nephew, he is not. They are not related.

6. Ismet Dinc was registered as proprietor of No.67 on 6 May 2016 and of No.19 on 17 June 2016. As part of this transaction, Ismet Dinc provided the funds to redeem an existing charge over No.19 in favour of Santander UK plc securing the sum of c.£67,500.

7. In December 2016 Ismet Dinc leased the first floor at No. 67 to his brother Selahi Dinc. Selahi Dinc was then registered as the leasehold proprietor of the first floor.

8. On 2 March 2017 Ismet Dinc granted a charge in favour of Charter Court Financial Services Ltd and in return c.£460,000 was transferred to Ismet Dinc's bank account. None of that money was paid or provided to Mr Ali. Ismet Dinc dissipated it.

9. In 2018 Mr Ali commenced these proceedings. His case was that the properties had been transferred pursuant to an oral sale agreement between himself and Ismet Dinc made the day before the transfer (i.e. 26 April 2016) in a restaurant called Kervan. The agreement was that the properties were to be sold to Ismet Dinc for a price of £1.35 million (£750,000 for No. 19 and £600,000 for No. 67) and that in addition Ismet Dinc would discharge the Santander charge. Although the Santander charge had been discharged, allowing Ismet Dinc to be registered as proprietor of No. 19, no money had been paid to Mr Ali.

10. Ismet Dinc and Selahi Dinc were the first and second defendants below. They denied there was any such agreement. Their case was that there had been a plan whereby Mr Ali would gift the properties to Ismet Dinc and then he (Ismet Dinc) would use them to raise finance to give back to Mr Ali. This was called "the Claimant's Plan". Part of these allegations involved assertions about the reasons why Mr Ali wished to raised funds (to fund litigation in Cyprus) and an assertion that Mr Ali had assured Ismet Dinc that if anything went wrong with the Claimant's Plan, he, Ismet Dinc, would not be adversely affected because he would be registered as proprietor of No. 19 and No. 67.

11. The third defendant below was Charter Court Financial Services Ltd.

12. The judge heard oral evidence from Mr Ali, Ismet and Selahi Dinc as well as Mr Choudhury, the solicitor who drew up the transfer documents executed on 27th April 2016, and Ms Havva Tacel, Mr Ali's daughter. The only other witness was the mortgage underwriting manager from the third defendant. A notable witness who did not appear was Mr A.S. Mohamed who had been present on many of the occasions mentioned by both Mr Ali and Ismet Dinc.

13. The judge decided that none of the four key witnesses "emerged unscathed from … attacks on credibility" (judgment paragraph 80). She also noted that there were very few contemporaneous documents (judgment paragraph 81).

14. The passage in cross-examination relied on by the appellants is described accurately by the judge at paragraph 90 in the course of the judge's summary of Mr Ali's version of events:

> "90. At end of cross-examination, C was asked by counsel for D1 and D2 whether there was any arrangement between the parties other than one for a sale at £1.35 million. C said there was not. Counsel pressed him: if he was not believed on this, then was he sure there was nothing else, no other discussions other than for a sale. C confirmed that the only arrangement with D1 was for a sale."

15. After a full analysis of all the evidence, the judge rejected key aspects of each party's case. Nevertheless the judge felt able to make certain findings of fact (judgment paragraphs 190-199). They can be summarised as follows:

    i) An arrangement or agreement between Mr Ali and Ismet Dinc did exist, and was not an arrangement intended by either party to be by way of gift or binding in honour only.

ii) However the arrangement, whatever it was, was not a sale agreement for a price of £1.35m, which Mr Ali asserted, nor was it the "Claimant's Plan", which Ismet Dinc asserted.

iii) Nevertheless the arrangement was – on both parties' versions – to involve the transfer of the properties from Mr Ali to Ismet Dinc and the payment of money by Ismet Dinc to Mr Ali. That arrangement, whatever its detail, is not in writing. The judge explained that "*All this is clear from both C's and D1's own pleadings, so I accept it as not in dispute*" (paragraph 191).

iv) Ismet Dinc redeemed the mortgage over No.19, paying c.£67,500.

v) Neither Mr Ali nor Ismet Dinc had presented sufficient evidence to establish the truth of their own version of the arrangement between the parties. After explaining her reasons for that conclusion the judge added:

> "195. In short, while I suspect that the parties may have had some relatively clear endeavour in mind by 26 April 2016, when they discussed the issues at the Kervan restaurant, it is impossible on the evidence presented to say what that might have been."

vi) The judge then added:

> "196. Fourthly, there is, however, one aspect of the parties' arrangement that I am prepared to find proven on the evidence put before me. I find that both C and D1 had in mind as part of their arrangement that the Properties would be used to provide the security for the funds that needed to be raised by D1 to pay to C, as required by their arrangement. In reaching this conclusion, I give special credence to a party's evidence when it goes against his own interests."

vii) In the next two paragraphs the judge gives her reasons for that conclusion, which are that it was an explicit element of Ismet Dinc's version of events and was necessarily implicit in how the properties were to be used in Mr Ali's version, in part because the judge found, contrary to Mr Ali's testimony, that he both understood and expected the properties would necessarily be used as security to facilitate delivery of what, according to Mr Ali, was the purchase price of £1.35 million (judgment paragraphs 197-198).

16. The judge then went on to find that it was the clear intention of Mr Ali and Ismet Dinc, understood by both, that the properties would be transferred by Mr Ali to Ismet Dinc for Ismet Dinc to use exclusively for raising funds which were to be transferred to Mr Ali. On that basis the judge held that the legal consequence of this was to find a *Quistclose* trust.

17. On finding a *Quistclose* trust to exist the judge decided that Mr Ali's rights took priority over the lease granted to Selahi Dinc but not over the mortgage granted to Charter Court. The orders made by the judge all follow from that conclusion.

18. There is no dispute that if the judge's findings were open to the court, then the conditions necessary for a *Quistclose* trust to exist were made out. As explained above, the appellants' argument is that in taking the course I have summarised, the judge adopted an inappropriate inquisitorial approach.

The law

19. ***Al-Medenni v Mars*** was a claim for personal injuries suffered at work. At trial, the judge raised his own theory as to the cause of the accident. This "third man" theory was not part of the claimant's pleaded case, did not form the basis for the witness evidence, and was not explored with the witnesses in cross-examination. Nevertheless, in the judgment the judge adopted this theory and found the defendant employer liable. The Court of Appeal held that the judge was not entitled to find for the claimant on the basis of the unpleaded theory and allowed the appeal. Dyson LJ explained what had gone wrong in terms of the contrast between an adversarial and inquisitorial approach. He said:

> "[21] In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

20. Dyson LJ went on in paragraphs 22 and 23 to emphasise the importance of the pleadings in identifying the issues and the extent of the dispute between the parties, and made the point that if the claimant had wished to advance the third man theory as an alternative to her primary case, then she had to seek permission to amend her pleadings.

21. In ***Sainsbury's Supermarkets Ltd v MasterCard Inc*** [2020] UKSC 24 at paragraph 242 of the judgment of the court, the Supreme Court cited with approval the first part of paragraph 21 of Dyson LJ's judgment in ***Al-Medenni*** (above), and also a related passage from Lord Wilberforce in ***Air Canada v Secretary of State for Trade*** [1983] 2 AC 394, at 438F-G. Aside from the reference to these authorities, at paragraph 242, the Supreme Court said:

> "[242] In the adversarial system of litigation in this country, the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth."

22. The most recent case to address these issues is ***Satyam Enterprises Ltd v Burton*** [2021] EWCA Civ 287, another case about disputed property transactions. On appeal Nugee LJ explained what had happened at the trial at paragraph 7:

> "[7] Apart from certain basic facts, almost everything else was disputed. Documents were alleged to have been forged and fabricated, and witnesses to have given false evidence, and the Judge indeed found much of the oral evidence (on both sides) unreliable. In those circumstances there were few secure footholds for him as he picked his way through the allegations. Such a case poses particular difficulties for a trial judge, and requires careful findings of fact, firmly set in the context of what each party alleges, and which of the allegations have either been admitted or proved to the requisite standard. Regrettably, as will appear, this is not what happened here."

23. In ***Satyam*** the trial judge decided that the properties in issue were held on trust for a Mr Sharma at all times, and the conclusions he reached followed from that. However the idea that the properties were held on trust for that person was the judge's own, and not part of either party's case. The Court of Appeal decided that the judgment could not stand and remitted the matter to be tried again. Nugee LJ first addressed the importance of the pleadings at paragraph 35:

> "[35] This is not therefore a case, as sometimes happens, where one or other of the parties seeks to run a different case at trial from that pleaded. That itself is unsatisfactory and can cause difficulties, as has been said recently by this Court more than once: see *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 at [47] per David Richards LJ where he said that statements of case play a critical role in civil litigation which should not be diminished, and *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619 at [19] per Coulson LJ where he said that it was too often the case that the pleadings become forgotten as time goes on and the trial becomes something of a free-for-all. As both judges say, the reason why it is important for a party who wants to run a particular case to plead it is so that the parties can know the issues which need to be addressed in evidence and submissions, and the Court can know what issues it is being asked to decide. That is not to encourage the taking of purely technical pleading points, and a trial judge can always permit a departure from a pleaded case where it is just to do so (although even in such a case it is good practice for the pleading to be amended); in practice the other party often, sensibly, does not take the point, but in any case where such a departure might cause prejudice he is entitled to insist on a formal application to amend being made: *Loveridge v Healey* [2004] EWCA Civ 173 at [23] per Lord Phillips MR."

24. Next, referring to ***Al-Medenni***, Nugee LJ explained:

> "[36] The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him. The relevant principles were stated by this Court in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041. There the trial judge had rejected the claimant's pleaded allegation of how she had sustained an accident but nevertheless found the defendant liable on the basis of his own theory of what had happened (referred to as the "third man theory"), which had never formed any part of either party's pleaded case. [*The paragraph then quotes para 21 of* Al-Medenni]
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> [37] In that case the Judge had in fact raised the third man theory with counsel in the course of closing submissions, and there was a "rather faint-hearted" espousal of it by the claimant's counsel, but that was far too late for the claimant to take the point as it had not been explored with any of the witnesses: see at [23]-[24]. Dyson LJ said that the judge, having rejected the claimant's pleaded case, should have dismissed the claim, and by making findings for which the claimant was not contending, had crossed the line which separates adversarial and inquisitorial systems; what he did might have been legitimate in an inquisitorial system but was impermissible in our system: see at [25].
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> [38] In the present case, the possibility that the Croydon Properties were held on trust for Mr V Sharma does not appear to have been even canvassed by the Judge during the hearing, but, as far as we know, first emerged fully-formed in the Judgment. That, for the reasons given by Dyson LJ in *Al-Medenni*, was not a course that was open to him. Judges may sometimes think – and may even sometimes be right – that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound sense of unfairness."

25. To these statements of principle I wish only to add the following. These problems are all concerned with the interests of justice and, in particular, with circumstances which cause prejudice to the losing party. The common sort of prejudice which is to be avoided is that a new point has arisen in such a way that the losing party was not given a proper chance to call evidence or ask questions which could have addressed it. That is why the function performed by pleadings, lists of issues and so on, which is to give notice of and define the issues, is an important one; but is also why a judge can always permit a departure from a formally defined case where it is just to do so. It is also why

the judge's function is to try the issues the parties have raised before them, rather than to reach a conclusion on the basis of a theory which never formed part of either party's case. By placing the emphasis on prejudice, the point I am making is that the modern approach to the definition of the issues requires judges to adopt a pragmatic approach in line with the overriding objective and not seek to be governed by unnecessary formality, provided always that it is just not to do so.

26. To decide this appeal the task will be first to identify what case or cases the parties were advancing, second to compare that with the decision the judge made, and third, if need be, to identify what prejudice, if any, may have been caused to the defendants.

Assessment

27. Before addressing the cross-examination, it is helpful to start with the pleadings. Albeit as a result of amendments which were made shortly beforehand, by the time of the trial, while Mr Ali's primary case was based on the alleged sale agreement as it always had been, he also advanced an alternative case if the defendants' version was accepted. One of Mr Ali's pleaded allegations on his primary case was that the properties were now held on resulting or constructive trust by the first defendant absolutely for him (Re-Amended Particulars of Claim paragraph 23.1). The same allegation, that the properties were now held on trust, was advanced as part of the alternative case if, which was denied, the defendants' version was accepted (Re-Amended Particulars of Claim paragraph 38). The relief sought included a declaration that Ismet Dinc held the properties on trust and an order for re-transfer of them back to Mr Ali. The Re-Amended Defence denied the primary case on the facts and advanced the Claimant's Plan as a positive case in response. The trust claims were denied, both on Mr Ali's primary case and on his alternative case.

28. At the start of the trial, the appellants were on proper notice that they did not only have to meet Mr Ali's primary case, but they also had to address the alternative case if Mr Ali's primary case was not accepted. The trust pleadings in the Particulars of Claim were terse but no objection on that score was pressed.

29. Focussing still on the pleadings, the judge reached a conclusion which was open to the court. The most important findings by the judge were that whatever the arrangement was (a) it was unwritten, (b) it was not a gift or binding in honour only, (c) it involved the transfer of the properties from Mr Ali to Ismet Dinc and the payment of money the other way and (d) it involved using the properties as security to raise the funds that needed to be raised by Ismet Dinc to pay Mr Ali. These were all matters which were either undisputed or were part of one or other party's pleaded case (or both). In reaching these conclusions the judge was also rejecting distinct parts of each party's case, as she was entitled to do. The judge was rejecting Mr Ali's case that the arrangement was contract of sale for £1.35 million and was rejecting the appellants' case that the arrangement was one in which, if anything went wrong, Ismet Dinc would retain the properties.

30. In other words the judge's conclusions are composed entirely of the acceptance or rejection of factual assertions which were pleaded. Although the Re-Amended Particulars of Claim did not explicitly spell out the point the arrangement was not a gift or binding in honour only, that was necessarily implicit in Mr Ali's case. Therefore

this case is a long way from cases like ***Al-Medenni*** or ***Satyam***, in which the judge found facts which were outside the ambit of either party's pleaded case.

31. Turning to the cross-examination, the appellants' point is simple enough. Whatever may or may not have been pleaded, the claimant Mr Ali himself abandoned his alternative case in cross-examination and so, after that, the only courses open to the court were to accept Mr Ali's case wholesale or reject the claim and find for the appellants. However, despite its simplicity, I do not accept the submission, for a number of reasons.

32. First, looking at the matter purely in terms of evidence, the judge's conclusions set against the body of all the evidence at trial, were all open to her. It is no part of this appeal to assert otherwise. It hardly needs to be said that the fact that a witness genuinely and unshakeably believes that what he did was enter into a sale agreement for a price of £1.35 million, and does not countenance any alternative, does not mean that the only logical possibility for a judge is to accept all that wholesale or reject it all. Mr Ali's testimony was not the whole of the evidence before the judge, and as I say, the findings were all open on the evidence taken as a whole.

33. Second, the fact that a witness sticks to their case in the witness box is unsurprising. The real point in this case is that Mr Ali was not only a witness, he was the claimant. However just because a witness is a party, and just because an alternative case on the facts is advanced on their behalf, this does not mean that that alternative is to be taken as being formally abandoned just because the witness/party sticks to their guns. The point of an alternative case like the one advanced on behalf of Mr Ali is to countenance the possibility that the judge may not accept the party's case and testimony as a whole.

34. Third, nevertheless, standing back it is fair to note that the judge's conclusion does amount to a particular intermediate combination of the various factual assertions making up both parties' cases, and the combination itself is one that neither party had expressly pleaded. However that is a commonplace in civil litigation. The circumstances in which that occurs will be infinitely variable and in many cases, like this one, it presents no problems of any sort. In the closings at trial, the case was argued out fully by counsel before the judge. In no sense could it be said that the appellants were ambushed or precluded from advancing submissions or evidence which they might otherwise have done. The appellants have not identified any step they might have taken, but were deprived of the opportunity to take, because of the way the case was decided. No evidence has been identified which the appellants might have called but did not, nor any questions which might have been asked in cross-examination, nor any authority which might have been cited. No prejudice to the appellants of any sort has been identified.

35. This is not a case in which the judge adopted an inquisitorial approach or made any other error. I would dismiss the appeal.

Lady Justice Whipple:

36. I agree.

Lord Justice Green:

37. I also agree