Neutral Citation Number: [2019] EWHC 2179 (Ch)

Case No: PT-2018-000322

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/8/2019

Before:

MASTER CLARK

- -

Between:

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

- -
- -

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

Hearing dates: 7 January & 12 April 2019

- -

Approved Judgment

This is the judgment of the Court.

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Master Clark:

1. This is my judgment following a directions hearing in this claim, listed in unusual circumstances.

Parties and the background

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

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

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

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

6. On 5 June 2018 Nancy Miller, the director of Dexters, the firm of estate agents responsible for the sale of the property, sent an email ("the Email") to the claimant and his solicitor, Jeremy Bristow in the following terms:

> "I would estimate that if on the market the property for rentals, 17 Marble Hill Close would have achieved £1500 per calendar month, however it was not in a rentable condition, therefore would not have been able to be legally let without considerable remedial works undertaken.
>
> In terms of the condition of the property it was in very poor condition, the property in its entirety had not been looked after or maintained well, the carpets were threadbare, there was damp in various points throughout the house and the electrics weren't safe. Plumbing was leaky and the boiler hadn't been used for 2 years therefore was presumed not working.
> From memory the garage was in a very poor state. It was saleable as it was a project, however the buyer did work to the property immediately upon completion."

7. On 19 July 2018, the claimant instructed a valuation expert, Christopher Magowan ("the expert"), to provide a report as to the rental value of the Property. In his report dated 6 August 2018 ("the Report"), he sets out the material with which he was provided by the claimant's solicitor to prepare it:
   (1) Sales particulars for the property (prepared by Dexters);
   (2) Photographs of the property taken by the purchaser in June 2015 – the copies in evidence were in black and white, and it appears the expert was not provided with colour copies.

8. The expert was not provided with the Email, although it was plainly relevant to his valuation and dealt with matters which would not have been apparent from the material which was provided to him, particularly the fact that the boiler had not worked for 2 years. The claimant relied upon the fact that the Email being a communication passing between his lawyers and a potential witness was privileged, so that he was entitled not to provide it to the expert. However, it would appear from the defendant's evidence that the claimant himself was aware of the factual matters set out in the Email.

9. In the Report, the expert referred to the property being "below average" in its condition. He did not of course refer to or rely upon the Email because he was unaware of it. He expressly sets out his (apparently incorrect) assumption that there was gas-fired central heating. The sum claimed by the claimant on the basis of the expert's rental valuation is about £67,000.

10. A hearing was listed for the directions or disposal of the claim on 21 August 2018. The defendant attended that hearing. This was the first occasion on which he engaged with the claim. He has acted in person throughout the claim, and appeared in person before me. In dealing with the claim, I have in mind, therefore, that I must ensure that the parties are on an equal footing, whilst also ensuring compliance with rules, practice directions and orders: CPR 1.1.

11. At that hearing I made an order removing the defendant as administrator and requiring him to account for his rent free occupation of the Property from 25 April 2009 to 1 July 2015 (the latter date is, it is common ground, an error, and should be 22 June 2015). I also gave permission to the claimant to rely upon the Report. I granted permission to the defendant to file and serve evidence as regards the value of his occupation of the Property, and to send any written questions and accompanying evidence to the expert.

12. On 10 September 2018, the defendant emailed the expert (copying in the claimant's solicitor and Ms Miller) in the following terms:

> "- what description of the condition of the property were you given?
>
> - principally, where you made aware of structural defects to the property present during my mother's occupation? Notably, there had been a flood from the attic water tank, through the roof of the bathroom into the kitchen, thus affecting the roofs of the bathroom and kitchen on to walls of the kitchen, which were left wholly unrepaired there was also possible

substance, with structural damage visible affecting the wall of the upstairs front large bedroom

Similarly, the wood of the garage doors and rear garden fences was were rotten beyond repair.

As a regular visitor to the property, plaintiff was aware of these and other problems.

- were you given contact details for Nancy Miller of Dexters? Ms Dexter is the estate agent who receive the instruction to sell the property and made the original examination of the property… Ms Dexter has good recollection of the condition."

13. The defendant then set out the 2nd paragraph of the Email and continued:

> "From the above, I would highlight the comment that "the electrics weren't safe".
>
> It seems appropriate to remark that as an "expert" witness from the world of estate agency, Ms Dexter's eyewitness description of the property would be essential to a proper valuation of the property.
>
> Accordingly, I would ask that you contact Ms Dexter - nancymiller@dexters.co.uk - who is expecting to hear from you - so that she can give you a proper account of the condition of the property, which I hope will assist you in revising your valuation."

14. On 11 September 2018, the expert replied by email, confirming what he had set out in his report as the materials provided to him and continuing:

> "This was the only evidence available to me at the time of my report. I was not aware that the property suffered from structural defect or was in the condition you describe.
>
> I did not speak to Nancy Miller but I did attend her office where I spoke with the letting staff and received details of some of the comparable evidence referred to.
>
> In analysing the comparable evidence I adjusted the evidence to reflect the condition of the property. I would say that I deducted in the region of 20% from what I would consider to be the full market rent to reflect the condition."

15. The defendant replied by email on 14 September 2018:

> "I would take issue of your characterisation of the kitchen as "modern but basic" - the kitchen units were about 40 years old; the cooker, washing machine and fridge (the latter 2 were on their last legs) were probably 20 years old, and I would expect all to have been replaced immediately …

> I would simply like you to confirm that in your professional opinion the property as described by Ms Miller in her email to the plaintiff and now supplied yourself (which you have had the opportunity to verify)
> - was in a condition where it could legally be rented "as was"
> and
> - that you confirm your original valuation of the rental property "as was"."

16. My order of 21 August 2018 required the defendant to file and serve his evidence by 4pm on 18 September 2018. The defendant filed a witness statement ("the first statement") on that date (49 minutes late), but did not serve it. His evidence (in a statement dated 15 February 2019) was that having filed the statement late, he waited for confirmation from the court that it had been accepted, which was not forthcoming.

17. On 19 September 2018, the claimant's solicitors wrote to the defendant by email setting out para 3 of my order of 21 August 2018 and continuing:

> "That deadline has now passed and you may not make any further submissions.
> As far as I am aware, you have not filed and served any evidence and your written questions to Mr Magowan are comprised of your previous emails dated 10 and 14 September 2019."

The defendant did not reply to this email. His evidence (in the statement dated 15 February 2019) was that he took the claimant's solicitors' statement at face value.

18. The expert replied to the defendant's email of 14 September 2018 on 24 September 2018:

> "I refer you to my previous replies. I have seen no evidence from Mrs Miller other than your email. It is not my role to interview witnesses or weigh up the strength of evidence.
>
> I have made assumptions based on the evidence available to me at the time of my report as to the condition of the house and I have made these clear, I can add that this included the fact that you resided at the property during this period from which I concluded the house was habitable."

19. On 17 October 2018, in response to an email from the claimant's solicitors, the expert wrote:

> "My report remains as written on 6th August.
>
> I answered Mr Baynton-Williams questions fully, as is my duty as an expert witness. However, I do not consider it my role to consider evidence introduced by Mr Baynton-Williams after my report was written I am not instructed as a joint expert.

In my view it is for Mr Baynton-Williams to present his evidence to the Court and if that differs from mine then the court will determine what weight to give the evidence the parties have presented."

20. On 23 October 2018, Mr Bristow, made a witness statement in which he stated that "As far as I am aware, the Defendant *has not filed* any written evidence with the Court nor has he served any evidence on the Claimant." (emphasis added). The clear implication of the expression "As far as I am aware" was, in my judgment, that the file had been checked by him or someone in his firm.

21. The statement that the defendant had not filed a witness statement was incorrect. Mr Bristow, at my direction, made a witness statement dated 8 February 2019 explaining the circumstances in which he came to make the statement. This sets out that neither he nor anyone else at the claimant's solicitors had checked the file before he made the statement set out above. Mr Bristow describes this as "inadvertently" misleading the court. I accept that he had no conscious intention to misled the court. However, it is clear from his evidence that he knew both that the file could have been checked, and that neither he nor anyone else at his firm had done so. This shows a failure properly to consider both the effect of the statement, and the need to have a sound evidential basis for making it, with the inevitable consequence that the court was in fact misled. For the avoidance of doubt, I do not consider that the defendant's failure to answer Mr Bristow's email of 19 September 2018 constituted such a sound basis: the defendant did not reply because he assumed that his lateness in filing the first statement was an absolute bar to his being able to rely on it.

22. The hearing for determination of the amount due from the defendant in respect of his occupation of the Property was listed on 7 January 2019. On 19 December 2018 the defendant sent to the court (although for reasons which are unclear it did not reach the file), and the claimant's solicitors a revised version of his statement ("the revised statement").

23. This set out his contentions as to the condition of the Property and again the second paragraph of the Email, and continued:

> "It is important to note that this description of the property was not shown to the surveyor who supplied the valuation.
>
> Plaintiff was also in a position to supply contact details to the expert witness to ensure his valuation was accurate; this was not done.
>
> Defendant represents that the surveyor was materially misdirected by the plaintiff (and representatives) to overvalue the description of the property, and that plaintiff was aware the report submitted to the to court relied on concealing pertinent eye witness description to justify his claim.
>
> Expert witness has subsequently refused to contact estate agent, even though defendant has been able to contradict his assumptions, in order to more accurately value the property."

24. On 20 December 2018, the claimant's solicitors sent the hearing bundle to the defendant. They did not include the revised statement in it. Their covering letter to him referred to the fact that the defendant had not asked the court's permission to rely upon it.

25. The practical effect of the claimant's solicitors' conduct was that neither the first statement or the revised statement were in the bundle; and were not pre-read by me before the hearing.

26. At the hearing on 7 January 2019, the defendant again appeared in person. He sought permission to rely upon the first statement. I refused permission on the assumption that the claimant was unaware (and had no reason to be aware) of the first statement; although I permitted the defendant to rely upon it insofar as it consisted of argument.

27. Although the defendant had quoted from the Email in his statements, a copy was not available at court. The claimant's counsel confirmed however, that the claimant had received the Email.

28. Having reserved judgment, in the course of preparing it, I became aware of the passage in Mr Bristow's witness statement set out at para 21 above. I sent a Note dated 21 January 2019 to the parties, stating that I proposed to make further directions admitting the first statement, providing for the claimant to respond to it and for disclosure in respect of the issue of the condition of the Property, directing the expert to produce a supplemental report, and providing for the parties to make further written submissions, alternatively listing a further hearing.

29. The claimant objected to these proposals and, at my direction, a hearing was listed.

Claimant's submissions

30. The claimant submitted that the defendant's statements should not be admitted.

31. He submitted that there was a general rule that evidence may not be relied upon unless it has been served on time (referring to, for example, CPR rules 8.5, 8.6 and 32.10). This meant, he said, that if a party wished to disapply this sanction he must apply for relief from sanctions. He referred me to *Barton v Wright Hassall* [2018] UKSC 12 as authority for the proposition that in relief from sanctions applications, litigants in person should not usually be given special treatment.

32. As to relief from sanctions he made the following submissions. The defendant had made no application for relief from sanctions. Even if such an application were made, it should not succeed. The failure to duly serve his evidence was a very serious and significant breach which had caused substantial disruption to the proceedings, significant additional costs to the Claimant, and extensive judicial involvement. The defendant had not put forward any good reason for the breach. In considering "all the circumstances of the case" there was no reason to grant relief. If the defendant wished to rely upon evidence, it was up to him to draw it to the attention of the claimant and the expert by sending it to them. He failed to do this. It is not the role of the claimant (still less the expert) to search the court e-file for evidence of which they were unaware because no attempt had been made to serve it.

33. The claimant does not "formally" accept that the condition of the Property is as set out in the Email. He also submitted that the Email was not admissible evidence, as it was not in the form of a witness statement containing a statement of truth.

34. However, the claimant offered to make the following concession, "in order to draw the matter to a close":

> "a. The court orders [the expert] to produce a revised valuation on the assumed basis that:
>
> i. prior to the Defendant's occupation of the Property there had been a flood from the attic water tank through the roof of the bathroom into the kitchen, affecting the ceiling of the bathroom and kitchen and two walls of the kitchen. This was not repaired;
>
> ii. prior to the Defendant's occupation of the Property there was possible subsidence, with cracking visible to the wall of the upstairs front large bedroom. This was also not repaired;
>
> iii. by the end of the Defendant's occupation the Property was in a very poor condition. It had not been maintained well, the carpets were threadbare, there was damp in various points throughout the house and the electrics were not safe. Plumbing was leaky and the boiler had not been used for two years and was presumed not working.
>
> b. Following the production of [the expert]'s revised valuation the parties have the opportunity to put short written submissions to the court on the assessment of the sum owing by the Defendant. The parties have liberty to apply for an oral hearing if thought necessary."

Discussion

35. The first point to note is that, as the claimant impliedly accepted, this is not a case in which there was an express sanction consequent upon a breach of my order of 21 August 2018. There was no sanction on the face of the order; and none of the rules referred to by the claimant applies in this case. CPR 3.9 does not therefore apply. However, I accept that I have a discretion to refuse to admit the evidence; and that permitting the defendant to rely upon it is equivalent to acceding to an out of time application to extend the time for its service, to which the principles applicable to relief from sanctions apply: see para 3.9.15 of the 2019 White Book.

36. Turning to those principles, I accept that they usually apply equally to a litigant in person as to a represented party: *Barton*. I also accept that the failure to serve his evidence was a serious and significant breach by the defendant. The defendant was unable to give any explanation as to why he had not served the claimant. I also accept therefore that there was no good reason for the breach.

37. Turning to "all the circumstances of the case", I consider the following to be relevant factors. First, although the defendant did not serve his evidence, by filing it he made it available to the claimant, who could readily have obtained a copy of it from the court file. Mr Bristow's witness statement dated 23 October 2018 expressly acknowledges the claimant's ability to access the file. This could have been done quickly and easily and was a sensible step to take when the opposing party was acting in person. This factor is, in my judgment, sufficient to justify permitting the defendant to rely upon his evidence.

38. Secondly, since neither the order on its face, nor any rule or practice direction provides for a sanction for failure to serve the evidence in time, it was not unreasonable for the defendant to be unaware of the "implied sanction" for such failure, or the need to apply for an extension of time in order to be able to rely upon the evidence.

39. Thirdly, the claimant's solicitors, having taken it upon themselves to assert in their email of 19 September 2018 the legal position following the non-service of the defendant's statement, did not state the position fully. They asserted an absolute bar to the defendant adducing the evidence, whereas the true position is that at that stage the defendant could have sought, and would have obtained, a short extension of time to serve his evidence. To that extent, they misled the defendant by omission.

40. Fourthly, in my judgment, the defendant's email of 10 September 2018 to the expert complied with my order of 21 August 2019, in that it asked questions and set out the material part of the Email. The claimant submitted that neither this nor the Email itself was properly admissible evidence. I disagree. It is undoubtedly hearsay evidence; but this is also true of the evidence relied upon by the expert as to the condition of the Property: none of it was within his or the claimant's direct knowledge. The defendant's email also set out the substance of his evidence as to the condition of the Property, albeit it was not formally verified with a statement of truth.

41. Thus, on the face of the evidence, even without admitting the defendant's statements, an issue plainly arises as to the condition of the Property during the material time. As noted, the claimant did not accept that the Email was admissible evidence. He also argued that its contents were inconsistent with another email dated 28 June 2009 from the defendant to Stone Rowe Brewer, the solicitors dealing with the deputyship application. However, he has not put forward his own direct evidence as to its condition (of which, in the circumstances of this case, he must have his own knowledge).

42. Even if, therefore, the defendant's evidence were excluded, the court is unable to resolve the factual issue as to the condition of the Property without oral evidence from persons with direct knowledge of its condition, and disclosure of relevant documents. Furthermore, the court had no evidence from the expert as to the rental valuation if the Property were in the condition alleged by the defendant. In the absence of an admission by the claimant that the Property was in that condition, directions providing for this are in my judgment inevitable. The effect of admitting the defendant's evidence would not therefore be to necessitate an adjournment,

because an adjournment is in any event necessary to enable the court properly to resolve the issues in the claim.

43. In these circumstances, I will admit the defendant's statements of 18 September 2018 and 19 December 2018, provided that he formally verifies each of them with a statement of truth.

44. Before turning to the directions consequent upon the admission of the defendant's evidence, I consider the position of the expert in this claim.

Expert evidence

45. CPR 35.3 provides

> "(1) It is the duty of experts to help the court on matters within their expertise.
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

46. The case law as to the duties and responsibilities of experts, in relation to the court and the party is summarised at paragraph 35.3.3 of the 2019 White Book:

> "It is of paramount importance that an expert is familiar with the duties and responsibilities imposed on them at common law and under the applicable procedural rules; see *R v Pabon* [2018] EWCA Crim 420; [2018] Lloyd's Rep. F.C. 258 (CACD), where it was noted, in criminal proceedings and hence in respect of the comparable duty in Criminal Procedure Rules r.19.2 to that in CPR r.35.1, that a failure to do so can undermine the integrity of the judicial process and render the expert liable to sanctions. The case law as to the duties and responsibilities of experts, in relation to the court and to the party was considered by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")*[1993] 2 Lloyd's Rep. 68 (Comm Ct). His Lordship said (at 81–82) that they included the following:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1W.L.R. 246, HL, at 256, per Lord Wilberforce).
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (see *Pollivitte Ltd v Commercial Union Assurance Company Plc* [1987] 1 Lloyd's Rep. 379 at 386, per Garland J, and *Re J* [1991] F.C.R.193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumptions on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion (*Re J*, above).

4. An expert witness should make it clear when a particular question or issue falls outside their expertise.

5. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one (Re J, above). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report (*Derby & Co Ltd v Weldon (No.9)*,The Times, 9 November 1990, CA, per Staughton LJ.

6. If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

Particularly relevant to this case are paras 1 to 3, 5 and 6.

47. To this should be added principles identified (in *Anglo Group plc v Winther Browne & Co* (2000) 72 Con LR 118 (TCC)) as necessary extensions to the *Ikarian Reefer* principles:

"7. Where an expert is of the opinion that his conclusions are based on inadequate factual information, he should say so explicitly.

8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert . He should do so at the earliest opportunity."

48. In my judgment, the expert did not understand and adhere to the requirement of his role. First, he drew an unjustified distinction between the documents provided to him by the claimant's solicitors, and the information provided to him in the defendant's email of 10 September 2018. Neither was formal evidence; but the expert's role was not to determine the factual issue of the condition of the Property. It was to express an opinion as the rental valuation on the assumption of a particular condition or conditions. The expert's email of 17 October was based on a misapprehension of his role.

49. Secondly, the defendant's email of 10 September 2018 provided him with new information, which he should have taken into account, but he did not do so. He should at that point have expressed an opinion as to the rental valuation on the basis that the matters set out in the defendant's email and the Email were correct.

50. In these circumstances, I have considered whether it is appropriate to admit his evidence, or whether I should direct a new expert to be instructed. With some hesitation, but bearing in mind the amount in issue in this claim, I have concluded that the cost of doing so would be disproportionate.

Further directions

51. Once the defendant's evidence is admitted, it is necessary to provide for the resolution of the factual issues between the parties. The course suggested by the claimant does not enable this to be done, and I reject it for that reason.

52. I will therefore provide the claimant with an opportunity to file evidence in response to the defendant's evidence, in which he may, of course, either accept that the Property was in the condition alleged by the defendant, or put forward his own case as to its condition at the material times.

53. In either instance, I will direct that the defendant's statements are sent to the expert, and that he produce a report as to the rental valuation on the basis of the condition of the Property as alleged by the defendant. The parties should seek to agree a summary of that condition along the lines of that produced by the claimant.

54. If the claimant disputes the defendant's evidence as to the condition of the Property, it will be necessary to give further directions as to disclosure and oral evidence to enable that issue to be resolved. Otherwise, I will provide the parties with an opportunity to make further written submissions, and consider whether to determine the claim on the papers or to list a further hearing.