Neutral Citation Number: [2023] EWHC 757 (Ch)

Case No: PT-2021-BHM-000012

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

The Birmingham Civil Justice Centre
Priory Courts, 33, Bull Street, Birmingham B4 6DR

Date: 31 March 2023

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between :

(1) Luke Price	**Claimants**
(2) Gillian Anne Goulet	
- and -	
Julian Lewis Price	**Defendant**

- -
- -

John Keddie, Solicitor (of Midwinters Solicitors) for the **Claimants**
The Defendant in person

Hearing date: 6 January 2023

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Approved Judgment

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HHJ WORSTER

This judgment was handed down remotely at 10.30am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ WORSTER:

The application

1. I heard this application on 6 January 2023 at a hearing held by MS Teams. There was insufficient time to give a judgment at the hearing (which ran over significantly), and the preparation of this written judgment was then delayed whilst a copy of the bundle prepared for the trial and of the judgment of HHJ Mithani KC of 14 September 2022 were obtained.

2. The Defendant makes this application by his application notice dated 17 November 2022, filed on 30 November 2022. The Claimants were not served with the notice, but they subsequently became aware of it, and took no point on service at the hearing before me. The application seeks orders setting aside or staying the order made by HHJ Mithani KC on 14 November 2022 which in turn struck out the Defendant's application for an order setting aside the order made by HHJ Mithani KC in the absence of the Defendant at the trial on 14 September 2022.

3. The application is to be determined by reference to the test set out under CPR Part 39.3(5):

> *Where an application is made … by a party who failed to attend the trial, the court may grant the application only if the applicant:*
>
> *(a) acted promptly when he found out that the court had exercised its power to strike out or enter judgment or make an order against him*
> *(b) had a good reason for not attending the trial; and*
> *(c) has a reasonable prospect of success at trial.*

4. The general approach to be adopted in relation to applications under rule 39.3(3) is not in dispute. In *Bank of Scotland Plc v Pereira* [2011] EWCA Civ 241 Lord Neuberger MR said this:

> *24. First, the application to appeal Judge Ellis's refusal under CPR 39.3 to set aside the Order. An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in Regency Rolls Ltd v Carnall [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.*
>
> *25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention for the protection of human rights and fundamental freedoms that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the*

party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order.

26. The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal.

That passage was cited with approval by Sir Terence Etherton MR in *Mohun-Smith v TBO Investments Ltd* [2016] EWCA Civ 403.

5. In this case the Claimants accept that the Defendant's application was made promptly. They do not accept that the Defendant had a good reason for not attending the hearing on 14 November 2022, but in any event submit that the Defendant has no reasonable prospect of success at trial. In the context of CPR Part 39.3(5) that means a defence which carries some degree of conviction. The test is akin to that applied on summary judgment, namely whether there is a "realistic" as opposed to a "fanciful" prospect of success.

6. To succeed, the Defendant's application must also satisfy the test for relief from sanction provided for by CPR Part 3.9; see *Gentry v Miller* [2016] EWCA 141.

The proceedings

7. It is necessary to examine something of the history of the claim. The Claimants are the Executors of the Will of Pamela Mary James who died on 19 November 2019. The first Claimant was her only grandson, and the second Claimant was her next-door neighbour. The Defendant is one of Mrs James' two children, and the first Claimant's uncle. The claim was brought to prove the last Will Mrs James made on 7 October 2019. The net estate was estimated at about £390,000. The first Claimant is the sole residuary beneficiary and takes majority of the estate.

8. Following his mother's death, the Defendant entered a caveat. That was warned off, but the Defendant showed no signs of issuing proceedings to challenge the Will, so the Executors issued this claim on 30 January 2021.

9. At that stage the Defendant was represented by solicitors (Davies and Partners) who served a Defence and Counterclaim on 30 April 2021, alleging that Mrs James lacked testamentary capacity, and that she had been unduly influenced by the first Claimant. By his counterclaim, the Defendant seeks to prove an earlier Will dated 16 August 2018. That Will left the first Claimant a legacy of £10,000 and after some other

bequests, divided the residuary estate between the first Claimant (21.67%) the Defendant (21.67%) Mrs James' other son Christopher (21.67%) and members of her step-daughter's family (35%). Christopher has made an application under the Inheritance (Provision for Family and Dependents) Act 1975, but does not challenge the 2019 Will. His claim is stayed pending the outcome of this claim.

10. The Costs and Case Management Conference on 3 August 2021 was attended by the parties' solicitors. District Judge Malek gave directions taking the matter through to trial. The order is prefaced by the following:

> *Warning: you must comply with the terms imposed upon you by this order otherwise your case is liable to be struck out or some other sanction imposed. If you cannot comply you are expected to make formal application to the court before any deadline imposed upon you expires.*

11. Paragraph 10 of the directions order provided for disclosure. The parties had agreed the issues for disclosure as :

    (i) the deceased's Will making history/records/files generated upon her instructions,
    (ii) the deceased's medical records, and
    (iii) undue influence

    No further disclosure was required as to (i). The Claimants' solicitors had some 10,000 pages of the deceased's medical records which were available for inspection. As to (iii) the parties were not aware of any documents in existence. A Disclosure Review Document was to be prepared by 18 August 2021. By paragraph 12.5 of (what was then) the Disclosure Pilot under CPR Part 51U, a party was not entitled to rely upon a document within its control if it had not disclosed it within the time required by Extended Disclosure or within 60 days of the CCMC if there was no Extended Disclosure, without the permission of the court. The same provision is to be found in the current provisions in PD 57AD. That sanction is to be seen in the context of the duty to give disclosure, and the fact that documents come into the possession of parties at various times.

12. Paragraph 11 of the directions order provided that witness statements were to be exchanged by 7 February 2022, and were to comply with the requirements of PD 57AC paras 3-4, PD 32 paras 17-20 and PD 22 para 3A. The relevant sanction here is that provided by CPR Part 32.10:

> *If a witness statement … for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.*

    However the failure to verify a witness statement with a statement of truth does not of itself render the statement inadmissible. CPR Part 22.3 provides that the court may direct that it shall not be admissible.

13. In addition, there was permission for the parties to rely upon the report of a jointly instructed expert in geriatric psychiatry. The parties were to agree the identity of the expert, who was to report by 29 April 2022.

14. The Defendant's solicitor came off the record in September 2021. The Claimants filed and served their witness statements as directed. One of those witness statements was from Mrs Alexis Cassin, the solicitor who had made the deceased's Will for her in 2019. Mrs James and her husband had used her firm for their private affairs since 2001, and Mrs Cassin had been their solicitor since 2013. She made Wills for Mrs James in 2013, 2014, 2015, a codicil in 2017, and the Wills made in 2018 and 2019. None of that is in issue.

15. Mrs Cassin's witness statement confirms that she received instructions for the 2019 Will by telephone from Mrs James on 27 August 2019 [trial bundle D77] and went to see her in her nursing home on 6 September 2019. She prepared an attendance note which she exhibited [trial bundle D82-5]. The attendance was for more than an hour. She prepared a draft Will and a short supporting statement, and sent them to Mrs James. The supporting statement set out the reasons for leaving the residuary estate to the first Claimant [D91]. Mrs James approved the draft and the statement, which were returned to her offices by Mrs James' nephew, Gary Newman.

16. Mrs Cassin had agreed with Mr James that she would write to her GP. She did so, and on 3 October 2019 she received a response to the effect that he had met her on a number of occasions and that in his opinion Mrs James had testamentary capacity [trial bundle D95]. An appointment was then made for Mrs James to execute the Will, and Mrs Cassin and a witness attended Mrs James in her room at the nursing home on 7 October 2019. Mrs Cassin is an experienced and well qualified probate practitioner, and had met Mrs James on a number of occasions over the years. At paragraphs 17 and 18 of her witness statement she expresses the clear view that Mrs James had testamentary capacity.

17. The Defendant served four witness statements in early March 2022. These were from the Defendant, his brother Christopher, Jane Stewart and Shabheen Akter (an employee of the Defendant's). None were verified by a statement of truth. In a letter of 15 March 2022 the Defendant indicated that further witness statements would follow. In his witness statement the Defendant refers to statements from staff at the nursing home where his mother was, and from the NHS, but none were served. On 20 August 2022 the Defendant served two further statements. The first from his wife Sylvia Lewis dated 1 June 2021 but with no statement of truth, and the second from a Vivian Honeyan (a carer), which was unsigned.

18. The Defendant failed to agree the identity of a joint expert, and so the Claimants applied to the court for permission to instruct an expert. That was granted and the Claimants instructed a Consultant Old Age Psychiatrist, Dr Fawzi. His report is dated August 2022. He undertook a review of the medical records available from both before and after the making of the contested Will. He concluded that the deceased had capacity and that the medical and nursing home records did not indicate that she had dementia or any other mental health disorder at the material time in September/October 2019.

The trial

19. The trial was fixed for 3 days starting on 13 September 2022. The Defendant had made an application in July 2022 for a short adjournment – to the effect that the trial was not to be listed in August 2022 - because of his medical condition and treatment. It seems that was borne in mind when the trial was listed for September. It was also apparent that the Defendant was aware that the trial had been listed for those dates. He telephoned the court on the morning of 12 September 2022 to say that he was in hospital awaiting a liver transplant. The Court informed the Claimants of that fact; see the email of 12 September 2022 at 11.02. At 16.32 on 12 September 2022 the court received an email from Mrs Lewis saying that she was the Defendant's wife and requesting an adjournment of the trial on medical grounds. The email stated that the Defendant "remains in hospital as his current condition is described by Consultants as very ill to critical"; see the preamble to HHJ Mithani KC's order of 13 September 2022. The email came from "lewisjulian2022@gmail.com"

20. HHJ Mithani KC adjourned the trial to the next day, and made directions. They were to the effect that if the Defendant wanted to pursue his request to adjourn the trial, he should file medical evidence to support his request. The requirements reflect the approach of the court in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch). The order was sent by email to the email address from which the request to adjourn had been made.

21. No further evidence was filed, and no further representations made. The preamble to the order of 14 September 2022 records that HHJ Mithani KC proceeded on the basis that the Defendant had made an application to adjourn the trial. He considered the available evidence, and dismissed the application to adjourn. The Claimant then called the Claimants and Mrs Cassin to give oral evidence. Dr Fawzi's written report was admitted in evidence. The Claimants had included the witness statements filed by the Defendant in the trial bundle. Mr Keddie explained that whilst it was not accepted that they were valid witness statements or that they had been filed in time, the Claimants took the view that there was nothing in them and that they should be available to the court.

22. Having heard evidence and submissions from Counsel for the Claimants, HHJ Mithani KC gave a short judgment. I have the Claimants' solicitor's note. Having set out the nature of the claim and the Defendant's challenges to the Will, HHJ Mithani KC referred to the evidence of Mrs Cassin and Dr Fawzi. He concluded that the deceased had sufficient testamentary capacity, that the tests set out in *Banks v Goodfellow* were satisfied, and that:

> *Therefore the challenge to the Will by Mr Julian Price cannot be sustained. It is clear that the deceased had capacity …*

23. He then came to the allegation of undue influence. He described the Defendant's pleaded case as "tenuous" and said this:

> *The evidence provided by the First and Second Claimants is that the deceased had fallen out with her sons and that she was much closer to Luke Price throughout her life and especially close to him prior to her death. As a consequence she left the bulk of her estate to Luke Price. In my judgment it is*

> *important to note that Mrs Alexis Cassin saw Mrs James personally to make the will dated 7th October 2019. I cannot see any conceivable basis upon which a claim that the deceased was unduly influenced can be made out.*

He went on to find that:

> *… the Defendant's basis for a claim for undue influence is misconceived in law and fact.*

24. The order of 14 September 2022 pronounced for the Will of 7 October 2022 and granted probate to the Claimants. The Defendant was ordered to pay the costs of the proceedings to be assessed if not agreed, with a payment on account of £88,000.

The hearing on 14 November 2022

25. The Defendant made an application to set aside the order of 14 September 2022 by an application notice dated 5 October 2022 which was filed on 10 October 2022. The application also seeks to appeal the order, but if it was an application to appeal, it was made to the wrong court, was in the wrong form, and would have required permission to appeal from either the trial judge or the Court of Appeal.

26. The grounds for setting aside the order of 14 September 2022 were that (I summarise) firstly the Claimants had failed to notify the Defendant by hard copy of the findings of a request for an adjournment dated 8 September 2022, and secondly that the Court had ignored the application the Defendant submitted for an adjournment. The Defendant attached further medical evidence to his application, but required that it not be divulged to the Claimants. The documents attached were (i) a letter the Defendant had sent to the Court dated 10 September 2022; (ii) photographs of him in a hospital bed connected to tubes and the like; (iii) letters from his GP dated 22 August 2022 and 15 September 2022; and (iv) notes from his hospital visit on 6 July 2022.

27. On 26 October 2022 the Court listed the application for hearing before HHJ Mithani KC at 2pm on 14 November 2022. The notice of hearing was sent to the Defendant at his Cotswold House address (the address given on his application form). The Claimant produced copies of the letter and emails by which they sent the notice of hearing for 14 November 2022 to the Defendant. These were included in the bundle prepared for the hearing before me. The letter of 2 November 2022 sent to the Defendant with the Notice of Hearing is at page 55, an email sent to the lewisjulian2022@gmail.com address is at page 57, and a further email to cotswoldfireservices1@gmail.com is at page 58. Mr Keddie's evidence was that this second email address was "the email address [the Defendant] confirmed to be used to the mediator's co-ordinator"; see paragraph 5 of his witness statement of 11 November 2022. Mr Keddie's secretary (Ms Selby) copied the letter to the Defendant and has noted on the copy at page 54:

> *2.11.22 I confirm that this letter and Court Order was posted on Wednesday 2nd November.*

The letter is correctly addressed to the Defendant and the postage paid.

28. Mr Keddie made a witness statement in reply to the application on 11 November 2022. A copy of that was sent to the same postal address and email addresses by the Claimants on 11 November 2022. Again Ms Selby has copied and annotated the envelope with the hard copy to that effect (page 61). Mr Keddie told me that the emails did not bounce-back, and these letters were not returned in the post. He also noted that a previous letter of 30 September 2022 to the Defendant at the same address which enclosed the Court's order of 14 September 2022 had been returned with a note "Not at this address – please re direct". He questioned how that could be, given that the Defendant was at that address.

30. When the Defendant's application came before HHJ Mithani KC on 14 November 2022, the Claimants attended by Counsel. The Defendant made no appearance. The court was referred to an email to the Court that morning at 10.26 from chrisprice56@outlook.com saying that the Defendant had undergone a liver transplant and was unable to attend the hearing. HHJ Mithani KC struck out the application and ordered the Defendant to pay the Claimants' costs. He ordered a payment on account of £2,400. There is a copy of the order at page 10A of the bundle for the hearing before me. Mr Keddie's note of the hearing (page 69) includes the Judge noting that he would have been willing to give summary judgment at the trial had that been requested. I do not have a full note of his reasons, but it is apparent from that remark, that he regarded the Defendant's case on the merits as having no real prospect of success.

This application

31. A copy of the order was sent to the Defendant. He must have received that order, because on 17 November 2022 he completed the application notice which was listed before me on 6 January 2023. The application gives the following reasons for setting aside the order made on 14 November 2022:

    1. *The Defendant was not informed by the Courts of the hearing on the 14 November 2022*

    2. *The Courts were made aware that the Defendant requested to correspond in hard copy as was not in the position to supply an email address. Any emails the Courts may have submitted were not received by the Defendant [and] in any event [he] would not have been in a position to receive as being hospitalised. The Defendant has NO email address or access to computers especially in hospital (please see previous correspondence with very personal photographs*

    3. *The precious hearing was heard in the Defendants absence despite the appeal to adjourn on the Ground (1) and the fact that the Defendant had only come out of the Queens Medical Hospital Birmingham 3 days prior following a Liver Transplant.*

    4. *The Defendant would not have been in a sensible state of mind in any event due to the medication and morphine that was being taken.*

    5. *The Courts were aware the Claimants had not conformed to previous Courts directions and withheld vital evidence the Defendant would have used. The*

Defendant did ask the Courts to order the same from the Claimants but failed to respond to the requests.

6. By the Courts failing to communicate through the channels highlighted by the Defendant in previous correspondence (hard copy) to date, there actions has deprived the Defendant from a proper and strong defence which with the evidence supplied with witness statement, the defence would have been overwhelming.

The Defendant asks the Courts for this order to be set aside/stay pending a further fair hearing.

32. The Court listed the application for a hearing by MS Teams with a time estimate of 45 minutes, and a notice of hearing was sent to the parties dated 19 December 2022. The notice of hearing was posted to the Claimant at his address at Cotswold House, Cold Pool Lane, Badgeworth, Cheltenham GL51 4UP. The Claimant prepared a short bundle of documents. The notice of application is at page 27A-D.

33. The Defendant's application is supported by his witness statement dated 17 November 2022. In that witness statement the Defendant says that he had been discharged from hospital on 11 November 2022 "after being hospitalised for a number of weeks following a Liver Transplant at the Queen's Medical Birmingham …". He goes on to say that he had not received notice of the hearing on 14 November 2022, but that in any event he was in no state to take part in a hearing. He refers to a telephone call with the court on the morning of the 14th of November 2022, and to his brother sending an email to the Court. This appears to be the email from Chris Price which was referred to the Judge.

34. There is (still) no evidence from the hospital that the Defendant had a liver transplant, as to when he had it, or as to when he was discharged. In this witness statement the Defendant says that it was the same day as the trial (4th paragraph from the bottom of the second page). The evidence I have does not comply with the requirements set out in the order of HHJ Mithani KC of 13 September 2022. What I do have is:

(i) The three undated copy photographs of a man in a hospital bed attached to a multitude of tubes and wires;
(ii) The letters from the Defendant's GP in August and September 2022 confirming that the Defendant is on the waiting list for a transplant and (in the letter of 15 September 2022) that he is not fit to attend court in person or via a video link;
(iii) The note of the Consultant's examination on 6 July 2022 recording that a transplant would be appropriate.

35. The Defendant offered to show me the operation scar from his transplant at the hearing on 6 January 2023. I declined, partly because the evidential value of that course is open to question, but principally because I had formed the view from the other evidence that the Defendant had recently had a liver transplant. That is a serious operation. The probability is that someone who is about to undergo such an operation, or who is in the immediate aftermath of such an operation, will be in no fit state to conduct a court hearing. That accords with the view of the GP in the letter of 15 September 2022. The requirements of *Levy v Ellis Carr* are no doubt appropriate in the context of an

application to adjourn a trial, but the guidance from the Court of Appeal on an application such as this is "not to be very rigorous". The issue is "fact sensitive", and if there is a doubt about this aspect of the matter, I am inclined to give it to the Defendant.

36. The Defendant's case on the issue of whether he knew of the hearing on 14 November 2022 is far less persuasive. Firstly, a hard copy of the hearing notice was sent to his address and not returned. Secondly, a copy was send to the email address used to contact the court on 13 September 2022. The Defendant denies any knowledge of the email address or his use of it, but it bears his name, and appears to have been used by his wife to inform the court of his medical condition. Thirdly, the history of service generally supports the conclusion that the Defendant has been playing games with service – acknowledging the documents which it suits him to acknowledge, and denying those which he would rather ignore.

37. The Defendant also purported to know nothing of the hearing on 6 January 2023, despite the fact that the Court had posted the hearing notice to him in December 2022, and the Claimants had sent emails to the two email addresses I refer to above with copy documents. The Defendant's position is that he contacted the court on 5 January 2023 "by shear chance". Having then been told of the hearing, the Defendant joined the hearing on 6 January 2023 by Teams, albeit a little late. In the event, he took a full part in the hearing. He appeared perfectly lucid, and presented his case with some skill. He understood the arguments, and seemed to have a good grasp of the history and the issues. In particular I note that he was able not only to present his arguments, but to respond meaningfully to the points being put against him. At the close of the hearing I confirmed that the email address he had given the court (julianlewis560@gmail.com) was one that he was using.

The Part 39.3 test

38. Whilst I do not accept that the Defendant was unaware of the hearing on 14 November 2022, I am persuaded that he had a good reason not to attend. If he is right that he was discharged from hospital on 11 November 2022, and was taking a variety of drugs to manage his condition, then the probability is that he would not have been in a proper state to represent himself at a court hearing a few days later. He should have provided the court with the required medical evidence to that effect, if not for the hearing on 14 November 2022, then for the application which came before me. As Mr Keddie submitted, there must be a discharge letter and some other medical evidence in the Defendant's possession which would demonstrate when he had his operation, when he was discharged, and what drugs he was having to take. Given the Defendant's approach to this litigation, the Claimants were entitled to question what he said.

39. Even now there are some significant question marks about the account he gives. In the course of the hearing the Defendant suggested that he had been in hospital for 2-3 weeks after his operation, which would place his return home in late September/early October (rather than November), and I am also conscious that on receipt of the order of 14 November 2022 the Defendant was well enough to make the application to set aside and to compose the four page witness statement of 17 November 2022. Nevertheless, adopting the "less rigorous approach", I am prepared to accept that the Defendant had a good reason for not attending the hearing on 14 November 2022.

40. The key issue on this application is whether the Defendant had a reasonable prospect of success. In this case that means whether he has a reasonable prospect of successfully defending the claim. Whilst this application is an application to set aside the striking out of the previous application, it is the merits at trial which determine the point. That is so both as a matter of form and substance. As to form, had the Defendant attended to hearing on 14 November 2022, and the court had been presented with the GP's letter of 15 September 2022, it would have probably concluded that there was a good reason for not attending the trial, and that the issue on the application was whether there was a reasonable prospect of success at trial. As to substance, there is an unreality to asking whether there was a reasonable prospect of obtaining an order setting aside the order made on the trial, and then setting aside the strike out order and then (presumably) having another hearing to determine whether the order at trial should be set aside. The parties dealt with the merits of the claim at trial at the hearing before me on the basis that it was this which was the real issue, and I agree with that approach.

41. The Defendant's primary case is that his mother was mentally disturbed and suffered from paranoia and dementia. I come to that below, but in his witness statement of 17 November 2022 he relies on a number "further grounds". Some deal with the issues as to his attendance, which I have already determined. As to the others (the numbers refer to the numbered points in the Defendant's witness statement):

    4. He objects to the Claimants efforts to discredit him. This, I assume, refers to the evidence of his conviction for fraud in 2012, for which he received a suspended prison sentence. The matter was not relevant to the decision at trial, and is not relevant to the determination of the issues before me.

    5. There was no meaningful mediation. The Defendant says that he heard 58 seconds of the mediator's conversation with the Claimants, and that their solicitor was advising them as to what to say. Again this is not a matter which is relevant to the determination of the issue at trial or the issue before me.

    6. His brother Christopher has been offered £30,000 to settle his claim. Again that has no bearing on the outcome of he probate claim, or the issue before me.

42. The Defendant also makes reference to the first Claimant's character, his "deceitful" behaviour, and to his mother's mental health problems. He says this:

    > *The Claim by the Defendants with substantial correspondence and witness Statements which shall be produced, will show beyond doubt, the Defendant claim has every chance of success in these proceedings, once offered a fair and proper hearing by the Courts.*

43. In the course of his oral submissions, the Defendant referred to having 7 witnesses, and that hospital doctors would provide evidence of his mother's mental state in hospital as would the nursing home staff after her discharge from hospital. He suggested that the GP who had provided the opinion as to testamentary capacity was not his mother's GP, that he had only seen her three times, and that her old GP would confirm the medical difficulties. He referred to there being recordings of 999 calls he said his mother made to the Police from hospital making allegations that someone had tried to rape her, and

that he had the incident numbers. He also said that the report from an expert who had never met or examined his mother was (I summarise) of limited value.

44. Mr Keddie set out his submissions in a written outline. He accepted that once the issue of testamentary capacity was raised, it was for the Claimants to satisfy the Court that the deceased had testamentary capacity. However, the onus of proving undue influence was on the Defendant. In essence, there are two points. Firstly that since September 2021 the Defendant had failed to comply with the directions as to documents, witness statements and expert evidence, despite some prompting from Mr Keddie. These defaults pre date his serious medical issues. There was no application for relief from sanction. The consequence is that there was no admissible evidence from the Defendant at trial, whether from witnesses of fact or from doctors giving their opinion. The Claimants had included the statements the Defendant had served late in the trial bundle, but they were not admissible. The further evidence the Defendant was now relying upon was not before the Court in any form.

45. Secondly, the evidence called by the Claimant was overwhelming. Mrs Cassin's evidence dealt with the making of the Will. It was apparent that she had undertaken her duties cautiously and conscientiously. There was a letter from Mrs James' current GP which confirmed testamentary capacity, and a review of the medical records from a Consultant Old Age Psychiatrist. Had there been the sorts of issues the Defendant was now raising, they would have been reflected by the medical records. The expert found no evidence of dementia, and that supported the evidence given by Mrs Cassin of the deceased's state of mind when she made her Will. Nor did the allegations of undue influence amount to anything of substance. Mrs Cassin was conscious of that issue too. Mrs James had told her in 2019 that her two sons could not be bothered to see her, and the notes of earlier meetings reveal similar sentiments.

46. I conclude that the Defendant's case had no "real" or "reasonable" prospect of success at trial. The evidence before HHJ Mithani KC led him to conclude as he did in the judgment he gave at the trial. His indication that he would have given summary judgment had he been asked to do so is further confirmation of his view that the Defendant's case had no real prospect of success. It is not open to the court now to set aside that judgment on the basis that the Defendant says that there is other evidence, when the Defendant has had the opportunity to put that evidence forward but has failed to do so in accordance with directions given by the Court in August 2021.

47. The Defendant would also have to satisfy the 3 stage test for relief from sanction set out in *Denton v White* [2014] EWCA Civ 906, but it adds little in the circumstances of this case. Had I concluded that the claim had a real prospect of success, I would have given relief from sanction.

48. The application is dismissed.