Neutral Citation Number: [2023] EW Misc 21

Case No: 9CX00182

IN THE COUNTY COURT AT BRISTOL
BUSINESS AND PROPERTY LIST

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 22 November 2023

Before :

HHJ PAUL MATTHEWS

- -

Between :

Michael Marshall	**Claimant**
- and -	
The Official Receiver	**Defendant**

- -
- -

Application dealt with on paper

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

……

HHJ Paul Matthews :

Introduction

1. On 10 December 2021 an extended civil restraint order ("ECRO") was made against the applicant by Mrs Justice Foster, sitting in the High Court, Bristol District Registry, after dismissing an application for permission to appeal out of time against an order made in the Bristol County Court as long ago as 24 September 2009. That order expires on 10 December 2023. On 24 July 2023, the applicant applied (also in the County Court) for permission under CPR Practice Direction 3C, paragraph 3.2(2), to apply for the discharge of the ECRO. I am one of the judges designated in the order for dealing with such applications for permission.

2. The background to this matter is both lengthy and complex. I dealt with much of it in the written reasons given following my order of 25 April 2019, made in appeal no 9BS0019C. Mrs Justice Foster also gave some of the background in the reasons for her order of 10 December 2021, made in appeal 9BS0046C (from case no 9CX00182), which led to the ECRO. In order to make the reasons that follow intelligible, I must repeat some of that. I will do so as shortly as possible.

Background

3. Between 2003 and 2007, litigation was successfully brought by the applicant's stepsisters against the applicant and his mother (who died in 2011) to trace the proceeds of sale of property originally owned by the applicant's stepfather, and one half of which had been given to the stepsisters by his will. Those proceeds of sale had been employed in the purchase by the mother of land in Wales, under title no WA 639701, and known as Nantyronnen (or Nant Yr Ronnen). The applicant's and his mother's claim that the original property had actually been given to his mother by a document dated 15 April 1974 was dismissed at trial, on the basis of the document was a forgery. During the course of the litigation, the applicant failed to pay costs orders made against him, and he was made bankrupt in 2007.

4. The trustee in bankruptcy sought to realise the applicant's assets. He issued proceedings against the applicant for possession of some other land, also in Wales, which (the trustee said) had been bought by the applicant but transferred to a third party in order to defeat the applicant's creditors. The title number to this land (which was at Llaingyfre) was WA759774. The third party in fact agreed to transfer the land back to the applicant. Various challenges were made by the applicant to his bankruptcy, but these were dismissed, and a possession order made, in September 2009 in respect of this further Welsh land. The trustee in bankruptcy subsequently sold this land to pay the applicant's debts and costs.

5. In 2017 the applicant brought proceedings on behalf of his mother's estate for a declaration that the land under title number WA 759774 had not vested in his bankrupt estate at all, because it had been purchased from him by his mother in 2001, and had been held on trust by him for her, and now for her estate. This was an argument not previously raised in the earlier litigation. The claim was

struck out on the basis that the applicant at that stage had no grant of representation to, and therefore had no standing to act on behalf of, his mother's estate. The applicant appears to have taken out a grant of representation to his late mother's estate, on 29 January 2018. But this was too late to save his proceedings, and an application for permission to appeal was dismissed by Mrs Justice Rose (as she then was).

6. Next, the applicant sought to appeal out of time against the decision of District Judge Rowe made on 14 July 2009, in which she had dismissed an application by the applicant's mother to have the land removed from the bankruptcy. I dismissed the application for permission to appeal against the 2009 order on 25 April 2019, under appeal no 9BS0019C. Then, in 2021, the applicant sought permission to appeal out of time against the decision of HHJ McCahill QC dated 24 September 2009. As I have said, this was refused by Mrs Justice Foster, in appeal 9CX001182, on 10 December 2021 when she made the ECRO the subject of the present application.

The 2022 claim

7. In support of the present application for permission to apply to discharge the ECRO, the applicant says that:

> "In 2022 and following legal advice a trial took place under TOLATA 1996 involving the entire family concerning the beneficial interest of the purchase of properties on 1 November 2001, an issue that has never before been determined. Judgment was handed down on 19 December 2022. The claimant respectfully submits that there is no basis in law where the order of possession dated 24 September 2009 can stand where the party had no beneficial interest in the property."

8. The "trial" and "judgment … handed down on 19 December 2022" mentioned by the applicant appear to refer to an order made on 19 December 2022 by Deputy District Judge Peter Evans, sitting in the County Court at Swansea, in claim number J00LI088. I obtained the file for this claim from Swansea, and considered its contents. The claim form is shown as having been issued (under CPR Part 8) in the County Court at Llanelli on 7 June 2022. It states that the claimant is "Estate of Margarita Conde-Marshall (represented by Michael Marshall by Grant of representation 29/1/2018)", and the defendant is shown as "Michael Marshall (Trustee)". In other words, the applicant appears on both sides of the record, and no one else is a party.

9. It is well established that no one can be both claimant and defendant at the same time in the proceedings: *Neale v Turton* (1827) 4 Bing 149. A person cannot sue him- or herself: *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch), [49]. Indeed, a party should not appear on the record in *two* capacities, even on the same side: *Hardie & Lane Ltd v Chiltern* [1928] 1 KB 663. What should have happened here is that the defendant should have been struck out and another person with a beneficial interest substituted: *Re Phillips* [1931] WN 271, 101 LJCh 338; *Allnutt v Wilding* [2006] EWHC 1905 (Ch), [4]; *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch), [11]-[12].

10. In this claim, the applicant "seeks an order under section 14(2)(b) of the Trusts of Land and Appointment of Trustees Act 1996, declaring the beneficial interest in the purchase of trust property Title WA759774". It goes on to say that "Michael Marshall was appointed a trustee to the proceeds of sale in May 1998", and refers to a document in the bundle annexed which appears to be a deed of appointment of a new trustee (the applicant) in relation to a property in Gloucester, 47 Tuffley Avenue. But the land in title WA 759774 is in Wales, and moreover was purchased on 1 November 2001. Probably the applicant means to refer to the proceeds of sale of the *Gloucester* property, which were later traced into the Welsh property called Nantyronnen under title number WA 639701.

11. At all events, the final paragraph of the Details of Claim says this:

> "The Defendant is fully aware that the beneficial interest of the property WA 759774 was never determined prior to Margarita Marshall's death, and to prevent any conflict of interest in dealing with matters concerning the estate and in the interest of justice, the Claimant seeks an order under section 14(2)(b) of the Trusts of Land and Appointment of Trustees Act 1996, for a declaration of the beneficial interest of the Claimant in the purchase of the trust property WA 759774 on 1 November 2001".

12. The applicant filed an acknowledgment of service, as defendant to his own claim as personal representative, on 10 June 2022 indicating that he did not intend to contest the claim, and asking the court to make the following order:

> "1. The Defendant is an appointed trustee, holds no beneficial interest in the purchase of land 'South of Llaingyfre' registered at HMLR under title WA 759774 on 1 November 2001.
>
> 2. The beneficial interest in the purchase of title WA 7597774 [sic] on 1 November 2001 is held by the Claimant (the estate of Margarita Conde-Marshall)".

The applicant's witness statement

13. On 27 August 2022, Deputy District Judge Evans made an order that the claimant should

> "by 4 PM on 10 August 2022 send to the court a witness statement endorsed with a signed statement of truth setting out all the relevant facts and witnesses relied upon in support of the declaration sought, why it is sought, and what the beneficial interest in the land, the subject of the claim, are so far as he is aware."

The deputy judge also made an order transferring the claim to Swansea.

14. On 8 August 2022 the applicant filed a witness statement made by him with the Swansea court, in apparent compliance with the deputy judge's order. This witness statement contained a signed statement of truth. The applicant stated that he was "Acting by Grant of Representation 29 January 2018". This means

that he was making and filing the witness statement in his capacity as the claimant, the personal representative of the estate of his mother, rather than in his capacity as defendant in this claim.

15. In substance, this witness statement said that both the land in title number WA 639701 and the land with title number WA 759774 were bought using the proceeds of sale of a previous property called Oakfields in Gloucester, which had itself been bought with the proceeds of sale of another, earlier property in Gloucester called 47 Tuffley Avenue. The applicant asked the court "to determine the beneficial interest in the purchase of the land property WA 759774 on 1 November 2001". He also asked the court not to make any order as to costs. He did not however answer the deputy judge's question as to *why* the declaration was sought. This is particularly important given that, as already stated, the land had long been sold by the applicant's trustee in bankruptcy.

16. By this witness statement, the applicant was asking the court to infer that the land with title number WA 759774 belonged beneficially to whoever beneficially owned 47 Tuffley Avenue and later Oakfields. He gave evidence that the funding of the purchase of that land came entirely from his late mother, and that he had been appointed trustee of the proceeds of sale of 47 Tuffley Avenue together with his mother, who (he asked the court to infer) was the beneficial owner of that property.

17. One thing that the witness statement to the Swansea court did not mention was the litigation brought by the applicant's stepsisters to trace the proceeds of sale of property originally owned by the applicant's stepfather, and his half of which had been given to the stepsisters by his will. The stepsisters successfully showed in that litigation that their entitlement under the will of their father could be traced into the Welsh land in title WA 639701. If the land in title WA 759774 was also bought with the same money, then the stepsisters would be entitled to at 50% of that too. But, although the applicant was the only party before the court, he did not mention this in asking the court to make a declaration of beneficial interest.

18. Moreover, the applicant exhibited to this witness statement a copy of the form TR1 dated 12 November 2001, showing that the land in title WA 759774 was bought from vendors David and Julia Birchall, and transferred on that day to the applicant. The applicant contended that on that transfer he was a trustee for his mother. So (in his submission) it could not form part of his bankrupt estate. Yet, in the application made in 2017 to the Cardiff County Court (no 34 of 2007), he unsuccessfully sought an order that the land in title WA 759774 did not vest in his bankrupt estate, on the grounds that it had been purchased beneficially *from him* by his mother in 2001. So, his story appears now to have changed.

19. He also failed to mention any of his earlier, unsuccessful attempts to persuade the court that the land in title WA 639701 was not part of his bankrupt estate (see [5]-[7] above). Indeed, he did not mention his bankruptcy at all. He also did not mention the witness statement of his trustee in bankruptcy dated 18 November 2007, which gave evidence that the applicant bought the land out of his own resources. Nor did he mention (as stated earlier) that he transferred the land to a third party on 18 October 2002 for no consideration, and that the latter

had submitted to an order on 25 November 2008 in proceedings brought against him by the trustee to retransfer the land to the applicant. Nor did he mention (as also stated) that the trustee sued for possession of the land, succeeded, evicted the applicant and sold it.

20. Indeed, the witness statement managed to give the impression that the land was still in the estate's possession. It asked the court to determine the beneficial ownership of the land, and then continued:

> "28. Once the Court has given judgment, solicitors will be instructed to deal with all matters relating to the Estate of Margarita Marshall."

The fact that the land had actually long been sold as part of the applicant's bankruptcy was ignored.

Further procedure

21. On 26 August 2022, the deputy judge reviewed the file and asked for two questions to be put to the applicant: Who the beneficiary was, and what were the beneficial interests in the land. On 1 September 2022, the applicant answered both questions. The answer to the first question was as follows:

> "It is believed that, and with no material evidence to the contrary, the beneficial ownership of the purchase of land property WA 759774 on 1 November 2001 was held by Margarita Conde-Marshall."

The answer to the second question was that "the beneficiaries to the estate of Margarita Conde-Marshall are her four children listed below", followed by a list of their names and ages, including the applicant himself.

22. On 5 September 2022, the deputy judge made a further order requiring the claimant forthwith to send to the other three beneficiaries of the estate the particulars of claim and the claimant's witness statement. They were invited to notify the claimant and the court of any objection or views they had in respect of the claim or otherwise of any representation they wished to make, within 14 days.

23. On 17 October 2022, the applicant wrote to the court saying that he had received no correspondence from his two elder sisters, although he said that his brother had told him that he did not want to be a beneficiary of their mother's estate. He reached the following conclusion:

> "Acting as administrator of the estate of Margarita Marshall … I am satisfied and with no evidence to the contrary, on the 5th September 2022, all three of my siblings made the decision not to be listed as beneficiaries".

24. On 24 November 2022, an administrative officer at the County Court emailed the applicant asking him to "confirm if you have received the claim form, particulars of claim and witness statement. Have you notified the claimant and the court of any objections or views?" It is clear that this court officer considered

that she was asking these questions of the applicant in his capacity as *defendant*, apparently not realising that the claimant was in effect the same person.

25. On the same day the applicant responded to the court officer confirming that various documents had been received by him, including the claim form, particulars of claim and witness statement. Later on the same day the officer thanked the applicant for his response and said "I have looked on the file and note that we do not have any responses from you. Please could you resend to this address." The applicant duly re-sent the same message to the same address. I do not understand this. But I do not think that anything turns on it.

The order of 19 December 2022

26. On 7 December 2022 the court wrote to the applicant telling him that "the judge has requested a draft of the order that you wish to make. They [sic] will then make a final order." The deputy judge made the order on 19 December 2022. It reads as follows:

> "UPON reading the application dated 7 June 2022 under section 14(2)(b) of the Trusts of Land and Appointment of Trustees Act 1996 for a declaration of the beneficial interest in the purchase of land property registered at Her Majesty's Land Registry under title number WA 759774 on 1 November 2001
>
> AND UPON reading the HMLR office copy that the Defendant Michael Marshall was appointed a trustee to the proceeds of sale on 22 June 1998
>
> AND UPON reading the Court Order 26 August 2022 giving the Claimant permission to rely on office copies of documents supplied by HMLR
>
> AND UPON reading the Court Order 9 September 2022 instructing the Claim be sent to all the Claimant's children and the file any responses received
>
> AND UPON the Court noting that the Defendant made no financial contribution to the purchase of the property on 1 November 2001
>
> **IT IS DECLARED THAT**
>
> 1. The Claimant, the Estate of Margarita Marshall, holds 100% of the beneficial interest in the purchase of land property WA 759774 on 1 November 2001.
>
> **AND IT IS FURTHER ORDERED:**
>
> 2. The Defendant Michael Marshall holds no beneficial interest in the purchase of land property WA 759774 on 1 November 2001
>
> 3. No order as to costs."

27. Paragraph 1 of the order is explicitly a declaration. Paragraph 2, though framed as an order, is also in substance a declaration. In *Bank of New York Mellon,*

London Branch v Essar Steel India Ltd [2018] EWHC 3177 (Ch), Marcus Smith J said (footnotes omitted):

> "21. The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration. More specifically:
>
> (1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. …
>
> (2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.
>
> (4) The court will be prepared to give declaratory relief in respect of a 'friendly action' or where there is an 'academic question', if all parties so wish, even on 'private law' issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.
>
> (5) The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial. …
>
> (6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue."

I was unable to find in the file any judgment or other statement of reasons for making the order which the deputy judge made, so I do not know if his attention was drawn to this or any similar statement of the relevant principles, and, if so, how he dealt with them.

Discussion

28. As I have said, this application is for permission to apply for an order to discharge the ECRO. Yet the evidence in box 10 of the application notice seems to be directed at the possession order made in September 2009:

> "there is no basis in law where the order of possession dated 24 September 2009 can stand where the party had no beneficial interest in the property".

29. The question of the possession order of September 2009 has however already been dealt with. It was made by HHJ McCahill QC on the application of the trustee in bankruptcy. Mrs Justice Foster dismissed the applicant's application, long out of time, for permission to appeal against that order, in her order of 10 December 2021, in which she also made the ECRO. This application therefore appears to me to amount to a collateral attack on the decision of Mrs Justice Foster. It must therefore fail, for that reason alone: see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 541B-C, 541H-542D.

30. But, in any event, the order of Deputy District Judge Evans cannot possibly be taken to be an effective decision as to the beneficial ownership of the land under title number WA 759774. It was made in proceedings brought by the applicant, against himself, on the basis of entirely self-serving evidence, where there was (contrary to the applicant's evidence on this application) *no* trial.

31. The present application says that the "trial" was one "involving the whole family". It was not. It involved the applicant alone, albeit in two capacities. The deputy judge asked the applicant to communicate with his siblings, but we have only his word that he actually did so. This decision (if it could really be called a decision, without adversarial argument) binds no-one except the parties, namely the applicant and himself as personal representative of his late mother's estate: *Vandervell Trustees Ltd v White* [1971] AC 912, 928C-D, 931A-B, 932F-G, 937F-G, 942C-D.

32. Indeed, not only was there no trial before the deputy judge, there was no live evidence either. The only evidence before the court was *written* evidence provided by the applicant himself. Further, this evidence was seriously misleading. It omitted important matters which bore on the question of beneficial ownership of the land, such as (i) the claim by the stepsisters, (ii) the applicant's bankruptcy, (iii) the third party involvement in the land, and (iv) the various attempts by the applicant to reverse the decision that the land fell into the bankrupt estate. It did not even make clear that the land had long been sold. Even if it were lawfully possible to mount a collateral attack on the decision of Mrs Justice Foster, on the facts here it would fail by a mile.

Conclusion

33. The application is accordingly dismissed. I will record that it was totally without merit. Indeed, in my opinion it was an impudent attempt to obtain an unjustified order which might be used hereafter to cause mischief.