Case No: B5/2014/1305

Neutral Citation Number: [2015] EWCA Civ 261
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
BRENTFORD COUNTY COURT
(HIS HONOUR JUDGE POWLES QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 19 February 2015

Before:

LORD JUSTICE BRIGGS

- -

Between:

SWAMPILLAI

Applicant

- and -

JOSEPH

Respondent

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Henry Hendron (instructed by Direct Access) appeared on behalf of the **Applicant**

Miss Miriam Shalom (instructed by Warnapala & Company) appeared on behalf of the **Respondent**

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Judgment

LORD JUSTICE BRIGGS:

1. This is Mr Joseph's oral application by way of renewed application for permission to appeal the order of His Honour Judge Powles QC, given at the Brentford County Court on 3 April 2014, whereby he declared that Mr Joseph held a property known as 10 Middleton Avenue, Greenford for himself and Miss Swampillai as tenants in common in equal shares; and that Mr Joseph had no beneficial interest in another property known as 25 Middleton Avenue, which was registered in her name.

2. The bare facts are that Mr Joseph bought number 10 in 2002 for £272,500 with the assistance of a deposit payment of £50,000 the money for which came from a sale by Miss Swampillai of a property of hers in Stockton. Number 10 was bought as a home for Mr Joseph and Mr Swampillai, her brother and her grandson, Andrew. Mr Joseph was at the time the sole owner of number 25 where Miss Swampillai, Andrew and Miss Swampillai's mother had been living under a tenancy granted by Mr Joseph to her mother. In June 2003, Miss Swampillai contracted to buy number 25 from Mr Joseph for £150,000. Following completion of the refurbishment by Mr Joseph, the family moved into number 25 in August 2004 and Miss Swampillai's purchase from Mr Joseph was only completed after mortgage facilities had been put in place in May 2005.

3. The issues at the trial, so far as relevant to this application, are as follows: In relation to number 10, Miss Swampillai said that the £50,000 was her contribution to the purchase under an express oral agreement and therefore common intention that it should be beneficially owned 50/50 between them. I interpose that the evidence suggested that both sides contributed to the mortgage payments. Mr Joseph said that the £50,000 was just a loan to him at 6 per cent repayable on demand so that he was the sole contributor to the purchase price. He said that the £50,000 loan was, in

effect, paid off together with another loan by him giving a discount to Miss Swampillai on the purchase price of number 25, which was (he said) worth about £222,000. In relation to number 25, Mr Joseph said he had a beneficial interest attributable to his refurbishment works following the agreement to sell it to Miss Swampillai either on the basis of common intention or proprietary estoppel.

4. In an extempore judgment the judge found:

a. That the £50,000 was indeed a contribution by Miss Swampillai to the purchase of number 10 rather than a loan, on the basis of a common intention that the beneficial ownership would be shared equally between them. He considered the promissory note by Mr Joseph recording his liability to pay £50,000 to Miss Swampillai signed by him but not by her, but rejected it on the basis that although it supported Mr Joseph's case it did not cause him to prefer his case to the case and evidence of Miss Swampillai. He simply preferred Miss Swampillai's oral evidence about there being an express agreement or arrangement about shared beneficial ownership;

b. He rejected Mr Joseph's case that any such loan was repaid by a discount off the purchase price at number 25. He acknowledged evidence that it might have been worth about £222,000 if fully refurbished but found that £150,000 was the agreed price rather than a discounted payment against an agreed higher price;

c. He rejected Mr Joseph's case for a beneficial interest in number 25 first because the contract prepared by solicitors made no reference to a retained interest and because there was no evidence that Miss Swampillai assured him that refurbishment works would give him proprietary interest and nor was there any detrimental reliance.

5. The appellant's notice and skeleton, of which Mr Hendron has pursued orally this morning with brevity, economy and good effect, raises four grounds of appeal, and I will deal with each separately. The first is that the judge wrongly applied the burden of proof. In paragraph 12 of the judgment, the judge said, and Mr Hendron does not criticise him for saying this, that:

> "... it is for the person seeking a beneficial interest different from that set out in the documents to prove it and so the burden of proof is on the claimant ..."

That was Miss Swampillai in respect of number 10 and Mr Joseph in respect of number 25. He then added:

> "It is rare that I would decide a case on burden of proof. It seems to me that my task is to see which of two different accounts is the most probable and it could be that I would prefer some of each ..." [*by which he means parts of the account at different stages of the narrative*].

6. Pausing there; that seems to me a perfectly conventional and commonplace expression by the judge of the obviously correct proposition that, where possible, courts decide factual disputes by balancing the evidence (oral and documentary) on both sides rather than deciding cases on the burden of proof. In my view, there is nothing of any substance in this ground of appeal which could give rise to a real prospect of success.

7. The second ground is that the judge wrongly excluded late documentary evidence proffered by Mr Joseph shortly before the trial. The skeleton argument only says that the judge should not have refused to admit it and that it contained important documents going to the merits of the case. I have not been shown the documents. I

have no basis on which to conclude that they were of importance to the case, but more importantly, I have no materials at all before me to suggest that there is any real prospect of success for an argument that the judge mis-exercised his obvious case management powers in relation to late-arriving documents. To be fair to Mr Hendon, he did not spend a lot of time in seeking to pursue that ground of appeal.

8. The third ground which Mr Hendron unhesitatingly put in the forefront of his submissions, and rightly in my view, is that the judge failed to take account of the promissory note, to which I have referred. But the judge, it seems to me, clearly did not fail to take it into account. Mr Hendron's real point is that he failed to take sufficient account of it as material gainsaying the supposed common intention between Miss Swampillai and him as to basis upon which number 10 was to be acquired.

9. At paragraph 9 of the judgment, the judge refers in terms and in detail to the promissory note and he continues that although Mr Joseph had not put a place in the document as an appropriate place for Miss Swampillai to sign, she said that it was presented to her to sign and that she declined to do so and there the matter rested until it raised its head again in these proceedings. Later, at paragraph 13, the judge refers to the fact that it was Mr Joseph's case that the handwritten promissory note was intended to reflect the reality. Then at paragraph 21 he says this:

> "I do not find the note that he wrote helpful either way. It seems to me entirely neural. It is consistent with his case that he wrote it. It is consistent with her case that she refused to sign it as she did, so it does not help me."

10. The main point taken by Mr Hendron is that even if the judge believed Miss Swampillai's evidence as to what her intention was for the purpose of the use of the

£50,000, which undoubtedly came from the sale of previous property of hers, that did not justify the judge concluding that the intention to that effect was shared by Mr Joseph, and since the judge did not treat the note as a forgery or some concoction or anything other than a genuine note, the judge should have been compelled to conclude that Mr Joseph did not share Mr Swampillai's intention with regard to the purchase.

11. This is an attractive submission, but in the end I have not been persuaded that it gives rise to a real prospect of success. My reasons are as follows:

    a. The judge had on the one hand the benefit of hearing Miss Swampillai giving oral evidence about an express agreement at the time of purchase that the property should be beneficially shared. The note was undated. The judge was quite unable to say that the note reflected an intention at the very time of purchase because it was undated and the judge also had, of course, Mr Joseph's evidence denying any such intention, but a great deal more evidence about whether there ever was a genuine £50,000 loan because the judge also rejected the evidence that it was repaid by means of a discount off the purchase price of number 25.

    b. The judge may perhaps be criticised for saying, if he did say, in paragraph 21: "I do not find the note that he found helpful either way." If one looks at the note on its own it is, as the judge then went on to say, consistent with Mr Joseph's case. I think what the judge meant was that he did not find the episode about the note which included the evidence that Miss Swampillai had refused to sign it ultimately helpful either way.

    c. In my judgment, the judge sufficiently took the note into account. It is not generally a good basis for an appeal, that a judge has placed insufficient weight when weighing up the evidence rather than no weight at all. This is a case in which he plainly took the note into

account and it would be quite impossible (it seems to me) for the Court of Appeal, without hearing the evidence of any of these witnesses, to second guess the judge's conclusion that although, on the face of it, helpful to Mr Joseph's case it was not conclusive in Mr Joseph's favour, and that taking the evidence as a whole, the judge was, I think, entitled, plainly entitled, to come to the conclusion that Miss Swampillai's evidence was to be preferred.

12. The final ground of appeal, which I can take briefly, as indeed did Mr Hendron, may be summarised in this way: that the judge ignored specific evidence about the existence and repayment of the loan and about proprietary estoppel. Addressing that in the order in which Mr Hendron raises it in his skeleton; he says that the judge failed to take sufficient account of four documents in relation to the loan.

    a. The loan agreement was the first one (this was not in the appeal bundle but handed up during the course of the hearing) and one can well see why the judge made no reference to it because although it is indeed signed (apparently) by both Mr Joseph and Miss Swampillai, it is silent as to date, amount and interest rate and it was apparently common ground that there was a quite separate loan between the parties which was not in dispute. Accordingly, it seems to me there was no reason why the judge should have referred to that document in his judgment.

    b. I have already referred to the promissory note.

    c. It does not seem to me that the mortgage offer takes the matter any further.

    d. The final reference to a document that the judge should have considered is what is called a mediator's note. I am bound to say that without going any further, and it is not possible, it seems to me, to find

out in any detail about this, an attempt to rely upon a judge's failure to refer to a note made by a mediator is not going to get past first base because of the general principle that any form of mediation, however informal, takes place on a basis that nothing said at the mediation will be referred to at the trial.

13. Apart from those documents, and there is reference to the special terms of the sale agreement, which I am afraid goes nowhere because of the dispute about whether the solicitors accidentally transposed buyer and seller where those word frequently appear in the contract, it seems to me that the judge did indeed take into account all the other matters which are complained of as having been insufficiently taken into account by him. Mr Hendron acknowledged that in his very realistic oral submissions and accepted that his real complaint was that those matters were not sufficiently or properly weighed by the judge. Again, it seems to me this is a factual case. The judge made no discernable error of law and it was for him to decide what weight to give to the various matters to which he referred in his judgment. It was an extempore judgment and the judge is not to be criticised for therefore having dealt with matters so as to give the parties an immediate decision which may not have been as full, complete and precise as a reserved judgment, but that is not of course a matter of criticism in a case of this kind.

14. Accordingly, the test for me being whether a real prospect of success is shown or whether some other compelling reason is disclosed why there should be an appeal, my conclusion on both those tests is in the negative and I must therefore refuse permission to appeal.

Later:

15. Miss Shalom, who has attended, although without the court directing her side to do so on this application and who has, if I may say so, been of assistance, seeks costs of her

attendance. It is of course the case that where the court has not directed attendance then the normal rule is that a respondent to an application for permission to appeal attends at their own risk as to costs and some good reason has to be shown for departing from that ordinary rule. Quite apart from anything else, the regular attendance of respondents on an application of this kind is likely to increase, probably to a disproportionate extent, the costs of litigation in this court. She makes two points which are in relation to one document that appeared in the appeal bundle which she says was not before the judge, (it is a form of amended defence), and to a submission in Mr Hendron's skeleton argument under his, I think, second ground of appeal about the judge having wrongly excluded evidence at a late stage where there had been an unless order.

16. I am not persuaded that either of those two items justified the full-blown attendance of counsel and, for all I know, solicitor to assist Miss Swampillai on this occasion. Those two matters could have been drawn to the court's attention by a simple email or other communication without anything like the expense of attendance which may have been occasioned by Miss Shalom's attendance. I am afraid it does not cross the necessarily substantial threshold of an order for costs in her favour, helpful though her attendance has been.

Order: Application refused.