TRANSCRIPT OF PROCEEDINGS

Ref. CH-2019-000065

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY DIVISION

[2019] EWHC 1843 (Ch)

Rolls Building, Fetter Lane, London

Before THE HONOURABLE MRS JUSTICE FALK

IN THE MATTER OF

VAQAR MALIK, FAKIM MALIK, RAHIM MALIK **(Appellants/Part 20 Defendants)**

-v-

IFTIKHAR AHMAD MALIK **(Respondent/Part 20 Claimant)**

MR T WEEKES QC, instructed by Naylor Solicitors LLP, appeared on behalf of the Appellants

MR T DUTTON QC and MR J KINMAN, instructed by Stephenson Harwood LLP, appeared on behalf of the Respondent

JUDGMENT

21st June 2019, 15.31-16.11

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MRS JUSTICE FALK:

Background

1. This is a rolled-up hearing of an application for permission to appeal and, if permission is granted, appeal against a decision of his HHJ Gerald in the Central London County Court in a very long-running dispute between members of the Malik family about the ownership of a valuable long leasehold flat in Central London.

2. The matter relates to a Part 20 claim for possession of the flat brought by Iftikhar Malik, the registered leaseholder of the flat, against his brother Vaqar Malik and two other members of the Malik family who are sons of Vaqar (Fahim and Rahim Malik). I will refer to first names throughout for convenience, without intending any disrespect.

3. The Part 20 claim arose from proceedings brought by the freehold owner, South Lodge Flats Limited, in November 2017, seeking access to the flat to investigate the source of a leak. The freeholder owner has played no part in the Part 20 claim. The Part 20 claim was issued in June 2018 and it seems was triggered by the defence filed by Vaqar Malik and his sons, which asserted that the flat was held by Iftikhar on trust for Vaqar.

4. In the Part 20 claim Iftikhar, who is the respondent to this appeal, claimed possession on the basis that he is the legal and beneficial owner and the Part 20 defendants, Vaqar and his two sons, are trespassers. Iftikhar also claimed mesne profits and interest. In the alternative, if the land was trust property as the Part 20 defendants contended, Iftikhar sought declarations that he was entitled to be reimbursed sums paid by him under the terms of the lease since 1987, which is the date he says Vaqar wrongly took physical possession.

5. Vaqar and his sons, the appellants in this appeal, filed a defence and also applied to strike out the Part 20 claim as an abuse of process, on the basis that Iftikhar was seeking to re-litigate a dormant dispute. In any event, they said that Iftikhar (1) held

the flat on trust for Vaqar, or (2) was estopped from denying that fact, or alternatively (3) that Vaqar had been in adverse possession for over 12 years before 13 October 2003, the date when relevant provisions of the Land Registration Act 2002 came into force, such that the effect of sections 15 and 17 of the Limitation Act 1980, read with section 75 of the Land Registration Act 1925 and paragraph 18(1) of Schedule 12 to the Land Registration Act 2002, was that Iftikhar held on bare trust for Vaqar and Vaqar was entitled as the adverse possessor to be registered as proprietor. As well as seeking a strike out, Vaqar and his sons sought summary dismissal of the claim to possession on the basis of the adverse possession claim.

6. By way of high level summary, the background to the abuse of process allegation that I have referred to is as follows. Iftikhar had sought possession of the flat in a claim made in 1987. The claim was stayed later that year until Iftikhar paid £25,000 into court as security for costs, which he failed to do. That stay remained until the case became subject to a further automatic stay pursuant to transitional provisions in paragraph 19 of Practice Direction 51A in April 2000. Nothing then happened in the proceedings until early 2011, when the £25,000 was paid into court, some 23 years late, and Iftikhar applied to lift the stay in both that action and in a separate action that Vaqar had commenced in 1987, in which Vaqar had sought a declaration that the flat was purchased on behalf of a family partnership. The application to lift both stays came before Mr John Jarvis QC, sitting as a judge of the Chancery Division, in February 2012, and was refused by him ([2012] EWHC 711 (Ch)).

7. By the strike out application, Vaqar and his sons claimed that Iftikhar was effectively seeking to revive the proceedings stayed many years earlier, and which Mr Jarvis QC had refused to allow to proceed.Any fresh proceedings to re-litigate the issue should have been brought immediately after the 2012 decision. Key witnesses had now died or would likely have a weak recollection.

8. In his reply, Iftikhar relied on inconsistencies in Vaqar's position. Vaqar's case in the separate action he brought in 1987, supported by affidavit evidence, had been that the flat was owned by the family as business partners and not by him alone. Vaqar had also had a discussion with Mr Jarvis QC during the 2012 hearing, at which Vaqar was a litigant in person, in which he said he had made a mistake in making an adverse possession application to the Land Registry in 2000, because this was family property and he thought he could not make an adverse possession claim in respect of property that he partly owned, a point with which the judge agreed in discussion.

9. Iftikhar also relied on the fact that, in 1988, a court in Pakistan had dismissed the claim by Vaqar that there was a family partnership and that it owned the flat, on the basis that no *prima facie* case had been shown.

10. In relation to the adverse possession claim, while it was accepted that Iftikhar had been out of possession since July 1987, it was denied by him that Vaqar had been in sole possession because Vaqar's own position had been that he was entitled to occupy the flat as a licensee of his father, the family or some family partnership. In any event, it was said that Vaqar was barred from alleging he had rights by way of adverse possession because of his express disavowal of such rights during submissions to Mr Jarvis QC, on which the judge had relied.

11. Before this court Iftikhar made a formal application to strike out the parts of the defence and counterclaim alleging adverse possession on the basis that those allegations were an abuse of process.

HHJ Gerald's decision

12. As already indicated, in the County Court the appellants in this appeal had applied to strike out the whole of the Part 20 claim as an abuse of process. Alternatively, they sought summary dismissal of the claim to possession under CPR 24.2 on the basis that Vaqar had adverse possession. They also sought security for costs.

13. The matter came before his HHJ Gerald. His order, dated 7 March 2019, dismissed the application for strike out and for summary dismissal, required payment of costs on an indemnity basis, made a number of case management directions, including in relation to a proposed cross claim against Iftikhar in respect of the Part 20 claim, and also refused permission to appeal. The only appeal to this court is against the dismissal of the application for summary dismissal.

14. HHJ Gerald dismissed the strike out application on the basis that to do otherwise would not allow the long running dispute as to the true ownership of the flat to be resolved. He remarked that there would be a stalemate.

15. In relation to the application for summary judgment on the basis of adverse possession, the Judge referred to an allegation in paragraph 7 of the Part 20 claim that Vaqar purported to occupy, not on his own behalf, but as licensee of his father and the father of Iftikhar, Bilal Malik, or on behalf of Bilal and his family, or on behalf of a partnership constituted by Bilal and his family (in other words, not on Vaqar's own behalf but as licensee of others), and said that if that was found to be correct at trial, then it would at least be arguable that the adverse possession claim would fail.

16. The judge also referred to a witness statement produced by Vaqar in June 2018 as providing support that he knew that he was in occupation by dint of his father or at least by permission of the family, and commented that it was at least arguable that he was in occupation at least from 1992 as a licensee of his father as the true owner which, if correct, would arguably defeat his claim to adverse possession, and the judge speculated, may have been why Vaqar had told Mr Jarvis QC that he would not be pursuing it.

17. HHJ Gerald commented that, based on Mr Jarvis QC's decision, there would be "much fertile ground" for cross-examining Vaqar as to the basis on which he thought he was in occupation, bearing in mind the different stories given about whether he thought he was the owner or that his father was, or that the family or a family partnership were, all of which the judge said contradicted the claim for adverse possession (see paragraph 36 of the decision). The judge also found that it was unnecessary to deal with Iftikhar's argument that Vaqar was estopped from claiming adverse possession because of what was said during the 2012 hearing, but noted that there was plainly an argument to that effect.

18. It is worth noting that one of the recitals to HHJ Gerald's order states that unless orders had been attached to each substantive order he made, due to the inordinate delay and wholesale breach of court orders in relation to previous proceedings, and

the desirability of all parties observing the order to ensure that the claims were resolved at the 10 day trial listed from 14 October 2019, with a view to bringing finality to the long-running dispute and ensuring efficient use of the court's and parties' resources.

The arguments in this appeal

19. Turning to issues before this court, they essentially fall into three parts, the first being whether the judge made an error of law in relation to adverse possession, the second being whether Vaqar had lost any right to rely on an adverse possession defence for abuse of process reasons, and the third, although I did not hear specific oral submissions on this, being whether there is in any event a compelling reason for the matter to go to trial.

20. Dealing first with whether there was an error of law in relation to adverse possession, the appellants say that the judge was wrong in law to rely on the factual allegation at paragraph 7 of the Part 20 claim because, even if that allegation was correct, there was adverse possession as against Iftikhar as a matter of law and the judge had misunderstood the effect of *JA Pye Oxford v Graham* [2003] 1 AC 419 and had failed to take account of *Ofulue v Bossert* [2009] 1 AC 900, upholding the Court of Appeal at [2009] Ch 1, and also the High Court decision in *Alston and Sons v BOCM Pauls Limited* [2008] EWHC 3310 (Ch) ("*Alston*"). They say that Vaqar had been in exclusive possession for at least 12 years from 1987. It was no part of Iftikhar's case that Vaqar was in fact in possession as a licensee of anyone after that time, and Vaqar was not himself contending that he was occupying as a licensee. On that basis a trial judge would have no basis to conclude that there was any such licence.

21. The appellants say that whatever Vaqar believed about his basis of occupation at the time made no difference to his claim to adverse possession as against the paper owner, who had not consented to that occupation. The *Pye* case made it clear that the key question was whether, in addition to actual physical possession, the adverse possessor had an intention to *possess*, as opposed to an intention to *own*. *Alston* made it clear that any belief Vaqar had about the basis of his occupation was irrelevant, and that settled the matter at High Court level and below.

22. Iftikhar disagrees and argues that there is an arguable defence to an adverse possession claim by reference to the fact that occupation was apparently considered to be by permission of a third party, and there was insufficient evidence to justify summary determination. If Iftikhar made good the allegation in paragraph 7, then his brother would not have the necessary *animus possidendi*. Whether or not any licence was valid was not determinative, and some examination of Vaqar's mental state was necessary to determine whether he intended to possess the land to the exclusion of all the world, including the true owner. Furthermore, if a third party had actually given Vaqar permission to occupy then he was not in adverse possession and insofar as anyone was, it would be the third party. The courts could simply not take a view on this pending trial.

23. As regards abuse of process, Iftikhar claims that the adverse possession contention was not open to Vaqar following the hearing before Mr Jarvis QC, because an important factor which weighed with the judge in refusing to lift the stay was that there was no hardship, on the basis that fresh possession proceedings would not be

met with a defence of adverse possession, Vaqar having disclaimed any such right. Iftikhar says there would be an abuse of process for Vaqar to be permitted to resile from the basis on which he had resisted the application to lift the stay. Vaqar had chosen for tactical reasons to deny he had rights to adverse possession in 2012 and it would be manifestly unfair to Iftikhar if he was allowed to adopt a contrary position now.

24. The appellants say there is no abuse. Vaqar simply expressed a mistaken belief or opinion about the legal position to the judge in 2012. Determining whether Vaqar was prevented from defending the claim on the grounds of adverse possession depended on a broad merits-based evaluation focused on all the facts. There was nothing inherently objectionable in a party adopting inconsistent stances unless to do so would be an abuse. What Iftikhar was relying on was a discussion between a judge and a litigant in person. Vaqar had not been expressly asked to confirm whether he would or would not rely on an adverse possession defence in fresh proceedings, and the discussion was also in the context of a reference to an application to the Land Registry and Vaqar's (incorrect) belief that it was not possible to advance a claim to adverse possession in those circumstances. The appellants say it was just one factor that Mr Jarvis QC took into account and it had no impact on the outcome of what was a hopeless application to reopen a stale case.

25. In relation to compelling reasons, Iftikhar also says that in any event there are compelling reasons for the possession claim to go to trial, because even if this appeal succeeded it would not avoid the need for a trial nor would it have a significant effect on the questions to be determined, and the trial date should not be imperilled.

Tests for summary judgment and PTA

26. I shall refer briefly to the tests for summary judgment. Under CPR 24.2 the court may give summary judgment on the whole of a claim or a particular issue if the claimant has no real prospect of succeeding, or the defendant has no real prospect of successfully defending, the claim or issue, and there is no other compelling reason why the case or issue should go to trial. The burden of proof is on the applicant.

27. The principles to apply were summarised by Lewison J, as he then was, in *Easyair Ltd v Opel Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. "Real" prospect means realistic as opposed to fanciful. The case must be better than merely arguable (though I would add that it can still be somewhat improbable). The court must not conduct a mini-trial. Part 24 is designed for cases that are not fit for trial at all – *Swayne v Hillman* [2001] 1 All ER 91. It is not an appropriate process to resolve complex questions of fact or law.

28. As regards permission to appeal, the test under CPR 52.6 is whether the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. So that is the same test, again with a relatively low bar, and essentially that the prospects of success are more than fanciful. Furthermore, applications for permission to appeal in respect of case management decisions must cross a high threshold and an appellate court will not lightly interfere.

Discussion

29. In the light of the low hurdle I am prepared to grant permission to appeal, but I have decided to dismiss the appeal. In summary, I do not think that the judge's refusal to grant summary dismissal was wrong, although my reasoning would not be exactly the same. The most material points are the nature of the test to be applied at summary judgment stage – in essence, the absence of reality of Iftikhar's chances of success on the adverse possession issue – which I do not consider to be met and, importantly, the point that in my view a full determination of the facts at trial will not only assist in correctly determining the adverse possession claim as a matter of law, but is also important in determining whether there has been an abuse of process, such that it is not open to Vaqar to claim adverse possession.

Adverse possession – legal position

30. Dealing first with the legal position on adverse possession, I agree with Counsel for Iftikhar that some examination of Vaqar's mental state at relevant stages is needed. Authority for that can be found in *Pye v Graham*, particularly at [40] and [43]. Paragraph [40] refers to the twin tests for adverse possession, that is so-called factual possession, in the form of a sufficient degree of physical custody and control, and secondly, intention to possess, being an intention to exercise such custody and control on one's own behalf and for one's own benefit. At paragraph [43], the second part of the test, intention to possess, is explained further and reformulated as follows: "…intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title… so far as is reasonably practicable and so far as the processes of the law will allow".

31. The question is not what Vaqar's current intention or belief is, but his intention during the period that forms the basis of the adverse possession claim; that is, a period of at least 12 years between 1987 and 2003. Whilst he is not now saying that he was a licensee, what he intended or believed during that period would in principle be relevant.

32. It is apparent from the papers that the factual position is unclear. In particular, the basis on which Vaqar has claimed he occupies has altered, varying between part owner, ownership or at least control by his father, and now that he is the sole beneficial owner. The adverse possession claim is made in the alternative, and as with the ownership claim, initially at least as a defence only rather than as a positive claim. I also note that at some stage Vaqar has been bankrupt, and it was clearly not in his interest to assert beneficial ownership in circumstances where the asset could vest in his trustee in bankruptcy. The discussion with Mr Jarvis QC included a statement that he had told the trustee that he was not entitled to the property because he had given up his rights in favour of his father.

33. On Iftikhar's side, he now claims that he financed the purchase of the flat, but evidence of that is lacking and is contradicted by Vaqar. Both brothers have also been extremely dilatory for reasons which are not entirely clear.

34. An important point, however, is that Vaqar's evidence in a witness statement made in June 2018, for these proceedings, is that a written agreement was entered into in 1992 between all family members, including him and his brother, which he (Vaqar)

says covers the flat and under which it was agreed that the properties held by his father and on his behalf by any of the parties to the agreement were to be distributed by the father, whose decision was to be final. It is at least arguable that if that was the case, as Vaqar says it is, then Vaqar was occupying the property during the relevant period at the will of his father pending allocation of the property by a decision of his father. This is a matter which would naturally be investigated further at trial, where there would be an opportunity to consider the precise interpretation and effect of the agreement, which might, for example, in turn require evidence of Pakistani law.

35. I also note that in the 2012 decision Mr Jarvis QC formed a provisional view that this agreement did include the flat, and the position at that stage appeared to be that no decision had been made about allocation (see [80] and [87] of the decision). I understand that the father has since died.

36. I agree with counsel for Iftikhar's submission that the law is not entirely settled about the precise relevance of a belief by the would-be adverse possessor that he is there with the permission of the true owner, and this is reflected in diverging views in Ruoff and Roper: Registered Conveyancing (2018) at 33.014 and Jourdan on Adverse Possession (2017) at 9-48 to 9-51. The latter doubts a statement by Hart J in *Clowes Developments (UK) Ltd v Walters* [2005] EWHC 669 at [40] that a person intending to remain in occupation so long as permitted by the true owner does not have the necessary intention and prefers *Alston* where the contrary view was reached (see especially paragraph [100] in that case).

37. I agree that in principle *Alston* should be preferred as the later authority and that it is binding on the County Court, but in my view that case is not determinative. As recorded there, the key question is whether the would-be adverse possessor intended to occupy on his own behalf: see [59], where the *Pye* case is referred to, and [62] and [63], where the judge refers, among other things, to the example of a friend taking care of a house while the owner is absent as being a case where the occupier is plainly not intending to assert occupation of the house on his own account and for his own benefit but instead for his friend, such, the judge says, that it is easy to see that his occupation represents the friend's possession.

38. Here Vaqar was not in the flat with the consent of the paper owner, and there was no misunderstanding between the two brothers on that point, but it is possible, based on Vaqar's own evidence, that he was there on behalf of a third party to whom he would have given up occupation. In that case his possession could be described as vicarious, so that if anyone was entitled to adverse possession it would be the person on whose behalf he occupied. If that was the case, then the apparent contradiction between the authorities is not determinative. The question would be whether Vaqar in fact had the necessary intention to exclude others, or whether he did not because he was not intending to exclude his father, being the relevant third party. In other words, he was occupying on his father's behalf.

39. Difficult points of law are better decided on the basis of actual rather than assumed facts and this militates against summary judgment, which of course must not involve a mini- trial. At the trial the question of the effect of the 1992 agreement could be properly investigated. I do not agree with the appellants' submission that this is not

relevant on a summary judgment application because the issue is not pleaded, and all that is pleaded is a "purported" licence. I do not consider that the stress placed by the appellants on the word "purported" is justified. As Mr Dutton said, that word is not necessarily limited in meaning to something which does not in fact exist. The trial judge will in reality look at all the evidence and make his decision based on that evidence.

40. In my view, a decision on adverse possession ought to be reached after a proper investigation into the facts at trial. As noted below, some at least of those facts will be investigated at the trial in any event, and that full investigation could have an impact on the proper conclusion on the adverse possession issue. In my view it would be premature to determine it now. The effect of the 1992 agreement and, more broadly, the basis of Vaqar's intention to occupy, are in my view triable issues.

Abuse of process

41. Turning to abuse of process, whilst it will frequently be an abuse of process for a person to adopt a position that is opposed to a position adopted in other proceedings, particularly proceedings between the same parties, it will not always be the case that there is an abuse. Clearly, it is not generally possible for the same person to put forward two inconsistent cases, but the mere fact of inconsistent allegations is not enough – *Bradford & Bingley v Seddon* [1999] 1 WLR 1482 at 1498. It all depends on the circumstances. What is required is a broad, merits-based judgement taking account of all the facts to determine whether the process of the court is being abused.

42. I was referred to the summary of the principles in *Michael Wilson & Partners v Sinclair* [2017] EWCA 3, in particular at [46] and [47], where earlier cases are cited and where it is said that the court must, by an intense focus on the facts, determine whether in broad terms the proceedings fall under one or other, or both, of the broad rubrics of unfairness or bringing the administration of justice into disrepute.

43. I agree that, based on a review of the 2012 decision, it is not apparent that the judge determined any issue in relation to adverse possession, and that the comments he made seem to have been based on a discussion with a litigant in person involving an expression of opinion. The decision appears to have been made essentially on the basis that the proceedings were so stale that they should not be permitted to be resuscitated. In those circumstances it is by no means obvious that Vaqar should be prevented from claiming adverse possession now, particularly when his brother took no prompt action after the 2012 decision to bring fresh proceedings.

44. However, in my view, a full investigation of the facts at trial is the proper way to determine whether there has in fact been an abuse such that Vaqar cannot now claim adverse possession. Without that investigation the judge is not in a position to take account of all the facts, as is required to determine whether there has been an abuse.

45. Mr Weekes submits that only a very narrow set of facts is relevant, namely the transcript of the discussion with the judge in 2012 and the judge's decision. Nothing in the wider background could make any difference. He says that the statements to the judge were far too equivocal, that Vaqar got no benefit because those

statements were not a deciding factor in the case and, furthermore, that the judge did not actually decide whether an adverse possession defence would have been a good reason to lift the stay. To do so would also have undermined the policy of limitation periods.

46. Whilst I agree that these points are arguable, I do not think that Mr Weekes achieves the high hurdle required for a summary judgment decision. It is clear from the transcript and the decision that the judge did want to understand whether an adverse possession defence would be run if there were to be a fresh claim. It cannot be said that his understanding that such a defence would not be advanced was no part of his reasoning. He was reaching a decision involving an exercise of discretion, which required him to take account of all relevant factors. These included the overall merits, and that included whether there would be prejudice to Iftikhar if the stay was not lifted (see in particular [116], [120] and [130] of his decision). The underlying basis of his decision was that it would be appropriate to start again with fresh proceedings in which he assumed that the defence of adverse possession would not be advanced, because the person opposing the lifting of the stay was effectively saying that there was no prejudice if the stay remained.

47. The key point, however, is that it all depends on the facts. My view is that it would not be safe to form a view now on what the relevant facts are to determine whether there was an abuse of process. The trial judge will be much better placed to do so, in particular, having heard evidence from both brothers. I do not agree that the relevant facts are necessarily as narrow as Mr Weekes suggests or, at least, I think it would be wrong to imagine that that point can be concluded with confidence at this stage.

48. Mr Dutton also reminded me of the statement by Lord Scarman in *Tilling v Whiteman* [1980] AC 1 at 25 about preliminary points of law being too often treacherous shortcuts. In essence, the same principle applies here.

<u>Other compelling reasons</u>

49. Even if the normal test for summary judgment was met under CPR 24.2 it would also need to be considered whether there is another compelling reason for the case or issue to go to trial. Here, summary determination of the possession claim would only dispose of the appellants' tertiary case, the primary case being that the flat has at all times been held on trust for Vaqar and the secondary case being based on proprietary estoppel.

50. Even if they abandoned their primary and secondary cases, then a number of issues would still need to be determined because Iftikhar's position is that, if Vaqar is entitled to the flat, then he is entitled to reimbursement of the sums he has expended on it. Vaqar's response to that, that the money used belonged to a family business, would require the court to resolve whether there was such a business and whether funds from that business were used for the flat and, if so, on what basis.

51. Essentially, these are at least materially overlapping issues to those the court would need to resolve to determine whether the flat was held on trust for Vaqar. There must be a risk that the facts as found could throw a different light on the position as it might now be thought to be, and that can be in principle be a compelling reason –

compare *Iliffe v Feltham Construction* [2015] EWCA (Civ) 715, referred to in the White Book at 24.2.4.

52. Furthermore, the trial is presently listed for October 2019. The judge below was clearly very concerned about steps being taken to imperil the trial date as might occur, for example, if there were an attempt to appeal from this decision. In my view, some respect must be accorded to the judge's views about the importance of ensuring that the trial proceeds without delay.

Disposition

53. Accordingly, the application is dismissed. It follows that the application made by Iftikhar to strike out parts of the pleadings relating to adverse possession as an abuse of process is adjourned to the trial judge.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.