IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS LIST (ChD)
[2021] EWHC 2814 (Ch)

No. CH-2020-000198

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 27 July 2021

Before:

MR JUSTICE MILES

B E T W E E N :

GHOLIZADEH — Appellant/Defendant

- and -

SARFRAZ — Respondent/Claimant

MR M. STEPHENS (instructed by Malcolm and Co Solicitors LLP) appeared on behalf of the Appellant/Defendant.

MR M. YOUNG (direct access) appeared on behalf of the Respondent/Claimant.

A P P R O V E D J U D G M E N T

(v i a M i c r o s o f t T e a m s)

MR JUSTICE MILES:

1 This is an appeal against the order of HHJ Raeside QC dated 8 July 2020. I shall refer to the appellant as the defendant and the respondent as the claimant to reflect their positions in the court below. The defendant is represented on this appeal by Mr Stephens. In the court below, he was represented by Mr O'Sullivan. The claimant was represented before me and below by Mr Young. Both counsel made clear and helpful submissions.

2 By his order, the Judge gave judgment for the claimant in the sum of £200,000 plus interest. The appeal is brought under CPR 52.21(3)(b) on the grounds that the decision of the Judge was unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

Background

3 I can take the background from the judgment. The claim was for a sum due under a contract said to have been entered into on 1 November 2018 by which the defendant agreed to pay a fee of £200,000 in the event that the defendant completed the purchase from a third party of the Admiral Mann public house in North London ("the Pub"). The contract was evidenced in a manuscript document produced by a solicitor, Ms White, on 2 November 2018. It described the sum payable as a finder's fee. The claimant said that the reason for the finder's fee was that he had managed to negotiate a good price with the sellers of the Pub. The defendant accepted that he had eventually completed the purchase of the Pub. However, he denied that he was liable under the 1 November 2018 agreement.

4 The Judge recorded the pleaded issues and said that the defendant was relying on three principal defences. The first was that the contract had been procured by misrepresentation. In essence, the defendant alleged that the claimant had represented that there were no further costs associated with the development of the property in order to put it into a lettable condition. The second defence was that that there had been accord and satisfaction by which the contract had been rescinded. The third, closely-related, point was that the parties had agreed to a fundamental alteration of the contract so that it was no longer effective by the time the Pub was purchased. As to the argument based on accord and satisfaction, the defendant contended that he had agreed that a company associated with the claimant should be allowed to take over the benefit of the contract to acquire the Pub and that that amounted to good consideration for the rescission of the contract. As to the third argument, the defendant relied on the fact that on 19 November 2018, at a meeting at Ms White's offices attended by the defendant and a representative of the claimant, Ms White wrote on the manuscript version of the agreement the words "no longer applicable".

5 The Judge found that there had been no material misrepresentations. He held that the claimant had been aware that there were additional charges and liabilities concerning the Pub before he paid the deposit for it and that he went ahead knowing the true position. The Judge also held that the defendant had failed to offer counter restitution for any benefits he had received. The Judge rejected the defence of accord and satisfaction and concluded that the contract had continued and that there had been no agreement with consideration for it to be brought to an end. He also concluded that

the agreement had not been varied or altered. He accepted the evidence of Ms White that the she had written the words "no longer applicable" because the defendant had indicated that he did not intend at that date to complete the purchase, so that the condition needed for the obligation to pay the finder's fee would never arise. The addition of those words reflected the factual assumption that he was not going to buy the Pub. The Judge noted that the defendant's counsel did not cross-examine Ms White about that evidence.

6 In the event, as I have said the defendant did complete the purchase and the Judge therefore concluded that the defendant was liable to pay the finder's fee. The Judge refused permission to appeal. An application for permission to appeal to this court included a number of grounds, including in relation to the Judge's decisions on points of substance. I gave permission to appeal limited to one ground, namely that the Judge wrongly refused to allow the use of an interpreter for one of the defendant's witnesses who requested an interpreter and, more generally, did not allow the interpreter to assist the defendant and his other witnesses for all of whom English was their second language.

7 The witness who said that he wished to give evidence through an interpreter was Mr Khameni. He signed a witness statement on 9 March 2020. There was nothing in the statement to suggest that it had been made in anything other than English and there was no certificate that it had been translated from any other language. He gave evidence in the witness statement about the original circumstances that had led to the agreement of 1 November 2018. He also described how the claimant claimed to have learned that there were additional expenses involved in the development of the Pub, the meeting of 19 November 2018 which led to the words "no longer applicable" being written on the manuscript version of the contract, the claimant's abortive attempts to raise money to take over the benefit of the contract, and discussions that took place after the meeting on 19 November 2018.

8 In relation to the 19 November meeting, his evidence in his statement was that he attended at Ms White's offices and heard from the defendant that the claimant was going to take over the contract and repay the deposit, and that he would complete the deal. He then said that Ms White spoke to the claimant by phone and then wrote the words "no longer applicable" on the manuscript agreement. He said that the meeting was attended by the defendant. He did not give any evidence of having witnessed any direct conversation between the defendant and the claimant. As to the events after 19 November, he gave evidence that he understood that the defendant had agreed with the claimant that the claimant would take over the purchase of the Pub.

Events in the run up to trial and the course of the trial

9 The witness statements of all the witnesses were made in English and did not record that they had been translated from any other language. Neither party made any application at the CMC on 23 January 2020 for the assistance of an interpreter. The trial date of 6 July 2020 was notified to the parties on 7 April 2020. On 16 June 2020, counsel for the defendant objected to the hearing being remote. He referred to the parties having English as their second language and pointed out the particular need for the court when assessing the demeanour of witnesses who did not speak English as their first language to be able to see them in person. In the same email, however, counsel stated that there were no translators required.

10 On 19 June 2020 an administrative officer of the County Court informed the parties that their emails had been referred to a judge and asked for the parties to give their views on the practicality of an attended hearing with interpreters given the social distancing requirements under the COVID-19 pandemic.

11 On 22 June 2020 the defendant and his counsel again stated a preference for a socially-distanced, attended trial. He stated that it was not envisaged that any witness would need an interpreter but said that the court would be assisted in seeing the witnesses because of the nonverbal factors in communication where witnesses use a second language. The claimant's solicitors responded the same day saying no interpreters were required.

12 On 26 June, counsel for the defendant informed the court that one of the defendant's witnesses, Mr Ardekani, had become concerned that he might require the assistance of an interpreter. After receipt of these communications the court decided to proceed fully remotely and there was no appeal from that decision. The trial commenced on 6 July. It was conducted remotely using the Skype for Business platform. As the Judge recorded, it was conducted pursuant to the Civil Justice Protocol Regarding Remote Hearings: [2020] 1 WLR 1334.

13 July 2020 was still fairly early in the courts' experience with various remote platforms for providing remote justice during the pandemic. Skype for Business was widely used but there were some teething problems with it and, indeed, it has now largely been superseded by other platforms, including Teams.

14 The trial was listed for three days. At the outset of the trial, the Judge explained to the parties that experience showed that the Skype for Business platform was unstable and prone to crashing and that, for that reason, the Judge wished, if possible, to get through as much of the business as he could on the first day of the trial. He said that cross-examination should be restricted to the essential information.

15 Counsel for the claimant then suggested that he understood that there might be need for an interpreter for one of the defendant's witnesses. An interpreter was available and, indeed, all of the defendant's witnesses gave evidence from the same room, where the interpreter was also present. The Judge said that the use of an interpreter was not a process by which Skype for Business trials worked and it would not be possible to use an interpreter. He said it had not been possible to use interpreters on Skype for Business in the County Court's Business and Property work for some time. He said there were two options. The relevant witness statement could be treated as hearsay evidence or the witness in question should give evidence as best he could and the Judge would form a view as to whether he was fairly answering questions and would deal with it in that way.

16 Counsel for the defendant then said he would wish to take instructions but appears to have been minded to deal with the trial in the second way. The Judge then repeated his wish to get through all the evidence in one day if possible. The witnesses for the claimant were then examined and cross-examined. The defendant was called and cross-examined. Mr Ardekani was then called and cross-examination (his evidence covering about three pages of the transcript). There was no request for an interpreter in respect of his evidence.

17 The defendant then called Mr Khameni. Counsel for the defendant did not at that point make any further submissions about the need for an interpreter and or suggest

that the matter needed to be adjourned. He introduced the witness and identified the witness statement. The witness then gave the formal parts of his evidence confirming the statement. The Judge then said to counsel for the claimant that he was only to cross-examine on essential matters and said that there was clearly a language barrier. There was then a very short cross-examination, covering about two pages of the transcript. The witness accepted that the original discussions in early November 2018 had been in English. The transcript shows that the witness was able to understand the questions he was being asked. There was no re-examination.

Submission on appeal

18 The defendant submits, in outline, as follows. The general principle is that any trial must be fair. This applies as much to remote trials as trials in person. This is reflected in the Protocol which says, in terms, that the court must act judicially. Allowances must be made to ensure that remote trials are fair. A witness whose first language is not English should generally be allowed the opportunity of being assisted by an interpreter. An interpreter was available on the day of the trial and the Judge should have allowed Mr Kamanahi to give his evidence through the interpreter. Though that may have been a bit more convoluted, given the remote platform, than simply requiring the witness to give his evidence in English, the Judge ought to have taken that course. The Judge appears to have been more concerned with getting through the process as quickly as possible. The Judge made decisions about the credibility of defendant's evidence and Mr Khameni's evidence was capable of corroborating the defendant's version of events. His evidence was particularly material in relation to the events of 19 November 2018 and the meeting that he referred to that took place shortly afterwards with Ms White. The refusal of the Judge to allow the interpreter was a serious procedural injustice and was unjust. The court should therefore set aside the Judge's order and remit the matter for a re-trial.

19 The claimant submits in summary as follows. In the run up to the trial, the defendant accepted that no interpreters were required. The defendant's position was that there should be an in-person trial because of the difficulties of the court in assessing non-verbal features of communication with witnesses who do not speak English as their first language. The court did not take that route and there was no appeal from that decision. Though counsel for the defendant had indicated earlier that a different witness might require the use of an interpreter, this was not raised in the case of Mr Khameni until the day of the trial. The Judge had a discretion whether to allow evidence to be given via an interpreter and he guided himself by the principle that a fair trial was needed. Counsel for the defendant did not suggest to the Judge that he was acting against principle when he had said that he would either treat the evidence as hearsay or take it in English and do the best he could. In any event, if there was a procedural irregularity, it was not serious and it did not lead to the decision of the lower court being unjust.

Assessment and decision

20 The appeal is brought under CPR 51.21(3)(b). The cases noted in the White Book, including *Dunbar Assets PLC v Dorcas Holdings Ltd & Ors* [2013] EWCA Civ 864, show that in order to fall within the rule, the appellant must show both a serious irregularity and that the decision was thereby rendered unjust. Each case clearly turns on its own facts and in assessing whether there was a procedural irregularity, the

court will consider all the circumstances, including the positions taken by the parties at the hearing.

21 It is clear from the terms of the Protocol that courts are required to conduct trials in accordance with the principles set out in the CPR and elsewhere. I was also referred to the Equal Treatment Bench Book which includes various passages concerning witnesses for whom English is not their first language. In broad terms, that guidance shows that a witness for whom English is not the first language should, where possible, be allowed the assistance of an interpreter.

22 I consider that the position taken by the parties before the trial is of some relevance. Both parties accepted in their communications with the court in advance that an interpreter was not required for the trial and, partly for this reason, it appears the court decided to hear the case remotely. Counsel for the defendant did inform the court about a week before the hearing that Mr Ardekani might require an interpreter (but did not make that point at the trial). However, he did not mention Mr Khameni requiring an interpreter at that stage.

23 At the trial itself it was counsel for the claimant who first raised the point about the possibility of the need for an interpreter for the defendant's witness (no doubt having Mr Ardekani in mind). The Judge indicated, as I have said, that he did not allow interpreters on Skype for Business trials because of the instability of the platform and the need to complete the business sufficiently. He set out the two options which I have outlined earlier, namely either to treat the evidence is hearsay or to hear the witness as best he could. There was no application by counsel for the defendant at that stage to adjourn the trial, or any submission that the courses suggested by the Judge would be seriously unfair or unjust. Nor, when it came to tendering the evidence of Mr Khameni did counsel raise the issue again. He had said in the morning that he would take instructions but he did not, at that stage, apply either for an adjournment or submit to the court that the giving of evidence without an interpreter would constitute a serious irregularity or be unfair. When it came to the examination of Mr Khameni, the Judge recognised that there was a language barrier but allowed the cross-examination to carry on without the use of an interpreter.

24 I consider that the Judge should have allowed the witnesses who wanted to do so to have the assistance of an interpreter. There was an interpreter present with the witnesses. As a general principle, it is important that witnesses should be able to give evidence through an interpreter if English is not their first language. It is not a complete answer to the need for procedural fairness say that the witness is able to cope reasonably well in English. It may be different if the witness is truly bilingual but it is not suggested that this was such a case. In this regard, I have taken into account the guidance I have already mentioned in the Equal Treatment Bench Book. I accept that proper allowance must be made for the technical difficulties of interpreters being involved in remote hearings and for the possibility of technological failure but, in the end, it is more important that trials are conducted fairly and that they are seen to be conducted fairly.

25 I do also note that the trial was in the comparatively early days of the Covid-19 pandemic and was conducted over Skype for Business, which was not always a stable platform. However, experience shows that it is possible to use interpreters in remote hearings and I think the Judge erred in suggesting that in the County Court in Business and Property matters had a blanket policy of refusing to allow interpreters

to assist. The interpreter was actually present with the witness and it should have been possible to arrange things so that the interpreter could participate while remaining socially distanced from the witness.

26 In my judgment, therefore, the Judge was wrong not to allow the witness the benefit of an interpreter and this was a procedural irregularity.

27 However, I am not persuaded on the facts of this case that the irregularity was a serious one so as to render the decision of the court below unjust. I say this for several reasons.

28 First, there was no application by counsel for the defendant to adjourn the trial on the grounds that it would be unfair, nor did he make a specific application for the evidence of Mr Khameni to be given through the interpreter when he was called, or suggest to the Judge that fairness required that. It appears to me that the Judge may have had the impression that there was a preference for an interpreter but it was not indicated with any clarity that it was essential to the fairness of the trial process. This conclusion is reinforced by the fact that the witness statement had been written in English and there was no indication in it that it was a translation (as required by the rules where that takes place).

29 Second, though the Judge identified that there was a language issue, Mr Khameni was in fact able, in the event, to give his evidence in English without any apparent difficulties. The cross-examination was short. The defendant's counsel did not suggest either during the evidence or afterwards that the witness had been seriously hampered in giving his evidence. (As already explained the ability of the witness to give evidence is not a complete answer to the appellant's complaint, but it is relevant to the question whether the irregularity was serious and has led to injustice.)

30 Third, the evidence of Mr Khameni confirmed that of the defendant himself. Mr Khameni did not give independent evidence. Counsel for the claimant chose not to challenge much of Mr Khameni's evidence or indeed that of the defendant himself. He left some of the main passages of the evidence of both of them entirely unchallenged. For example, he did not challenge the evidence of either the defendant or Mr Khameni about the meeting of 19 November 2018 or the subsequent meeting in Ms White's offices, or about the defendant's understanding of where things had got to with the claimant by that stage. The Judge did not base his decisions on a preference for the evidence of the claimant over that of the defendant or rest his decision on the relative credibility of their accounts of the various meetings. Rather, the Judge reached his conclusions on the basis of uncontested facts and their legal consequences.

31 In relation to the three main pleaded defences, which I have already identified above, the Judge decided first that there had been no misrepresentation because on the crucial points, the defendant was aware from documents provided to him at the auctioneer's office of the matters now complained of before he entered into a contract to purchase the Pub. As to the later events, the claimant did not cross-examine the defendant about the 19 November meeting or the subsequent meeting or agreement. Rather, the claimant argued that, in law, none of those events affected the original finder's fee agreement and that it remained binding. The claimant succeeded on that basis. It follows from the decision of the claimant not to cross-examine the defendant on these points that the defendant's own evidence must have been accepted.

32 It also follows that the unchallenged evidence of Mr Khameni, which confirmed the evidence of the defendant himself, did not affect the conclusions of the Judge. More specifically, the Judge concluded that there had, indeed, been further discussions between the claimant and the defendant about an alternative agreement for the purchase of the Pub but that those discussions did not lead to any legally relevant variation or termination of the original agreement. The Judge, as I have said, did not base his findings or conclusions on an assessment of the respective credibility of the defendant and his witnesses and the claimant and his witnesses.

33 Mr Stephens focused in his submissions on the appeal on a particular event, namely an agreement entered into on 21 November 2018 involving an SPV taking over the purchase of the property. He said that the agreement was capable of acting as a novation and that the Judge had failed to deal with this. He said that it was telling that the Judge had not addressed it and may have done so because he had not given proper weight to the evidence of Mr Khameni. However, that submission ignores the defendant's own defence, which was recorded by the Judge in paragraph 23 of the judgment that the agreement on 21 November 2018 was not enforceable as a contract. Moreover, the defendant gave evidence that there had been no novation. Nothing that Mr Khameni may have said about any such agreement could have affected the outcome in favour of the defendant.

34 For these various reasons, I have concluded that the evidence of Mr Khameni could not, on the Judge's approach, have affected the outcome in any way. It added nothing of substance to the unchallenged evidence of the defendant himself concerning the key points. The Judge recorded where the evidence of the defendant had not been challenged and clearly understood that the claimant was not contesting that evidence.

35 I do not therefore, after analysis, think there is any realistic basis for suggesting that had Mr Khameni been able to avail himself of the use of an interpreter it would have made any conceivable difference to the outcome of the trial. He was a minor witness. The points now said by Mr Stephens to be of significance were covered by the defendant in his evidence and were unchallenged and were therefore not in issue. The Judge recorded this.

36 For these reasons, I also reject the submission of Mr Stephens that the Judge simply ignored Mr Khameni's evidence. In his judgment, he recorded that the evidence of Mr Khameni and that of Mr Adakani supported the defendant's version of events. This shows that he did take into account that evidence. The fact that Mr Khameni did not have the assistance of an interpreter had not influence on the outcome, given the way that the trial went and what was not contested. Counsel for the claimant made a decision to leave large amounts of the evidence unchallenged and took his stance on the legal consequences of that acceptance of the evidence. That approach was successful. I therefore come to the conclusion that the decision was not rendered unjust because of a serious procedural irregularity.

37 Mr Stephens sought to argue that the Judge also went wrong by curtailing the cross-examination of the witnesses and insisted that the case should be heard as quickly as possible because of the instability of the Skype for Business platform. He said that the parties had come to court ready for a three-day trial and that it was ultimately completed in half that time. This point is not within the grounds of appeal but, in any event, there is no indication that counsel who appeared at trial, both experienced barristers, were hampered in conducting the necessary examination of witnesses or

making submissions. They did not, as far as I am aware, seek at any time to suggest to the Judge that further time was needed than was allowed.

38 There was also a complaint that the Judge indicated at the outset that he did not think that any issues arose and that this showed he already had a predisposition against the defendant. That was, to my mind, based on a simple misreading of the transcript. The Judge was, as I read the relevant passage, saying that he would conduct the case on the pleadings and that there was no need to use the list of issues which the parties had agreed. That was appropriate and within his case management powers in a case where he considered the issues were sufficiently clearly spelt out in the pleadings.

39 I therefore reject these wider challenges, both because they are not included within the grounds of appeal and on their merits.

40 For all these reasons the appeal is dismissed.

41 There is an application for summary assessment of the costs of the appeal. There is a statement of costs the great bulk of which are counsel's fees of £3,750 plus VAT. I am told by counsel that the draft bill of costs does not include £875 plus VAT, making a total of £1,050 for advice and a provision of the respondent's notice. I referred to the respondent's notice at some length in my judgment. Counsel for the appellant did not suggest that those costs should simply be ignored. The grand total including VAT is £5,923. It seems to me that that is a reasonable and proportionate sum, taking into also the amounts at stake and the costs that were incurred in the court below. I will make a summary order for those costs in the amount claimed.