Neutral Citation Number: [2019] EWHC 2683 (Admin)

Case Nos: CJA/143/2004 & CJA/165/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 October 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

IN THE MATTER OF THE
CRIMINAL JUSTICE ACT 1988

AND IN THE MATTER OF AFTAAB ARIF KHAN
AND MIKAIL ARIF JADOON KHAN

- -

Peter Caldwell (instructed by **Janes Solicitors LLP**) for the **Applicant**
Michael Newbold (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 25 June 2019

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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 version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE PEPPERALL :

1. Mikail Arif Jadoon Khan and his brother, Aftaab Arif Khan, were both convicted of fraud and made the subject of confiscation orders pursuant to the Criminal Justice Act 1988. Monies were outstanding pursuant to both brothers' confiscation orders and accordingly the Crown Prosecution Service ("the CPS") applied to the High Court for the appointment of an enforcement receiver in respect of a basement flat at 24 Westminster Mansions, Great Smith Street in London. The application came before Julian Knowles J on 7 March 2018 when the parties agreed, upon terms, that a receiver should be appointed.

2. On 27 June 2018, Mikail, then acting as a litigant in person, applied to set aside the order of 7 March. He argued that he had not entered into the consent order willingly and that his agreement had been "extracted" by the undue influence of his then legal representatives. Specifically, he complained that the lawyers had exerted sustained pressure upon him to settle at a time when he was very ill with influenza and a serious eye infection.

3. Mikail's application was listed on 31 January 2019 for preliminary legal argument as to whether it was open to him to seek to set aside the March 2018 order on the grounds of alleged undue influence. By then, Mikail had fresh representation and, by his barrister's skeleton argument, he rightly did not pursue the undue influence argument. He did, however, argue that the order should be set aside because he had "made an irrational decision to settle when overwhelmed by the circumstances" and that the CPS purported to enter into an unlawful agreement not to oppose any application by Aftaab for a certificate of inadequacy.

4. Mikail is represented before me by Peter Caldwell. He had not appeared before but adopted his predecessor's skeleton argument. The application is opposed by Michael Newbold who appears for the CPS.

5. It will be noted that, in order to avoid confusion, I refer to the brothers in this judgment by their given names. No discourtesy is intended in taking that course.

THE CONFISCATION ORDERS

6. By a confiscation order made on 13 October 2006, Aftaab was ordered to pay £86,183.50. With accrued interest, £157,661.50 was payable at the time of the hearing before Julian Knowles J. By a second confiscation order made on 10 July 2009, Mikail was ordered to pay £20,225.21. Following payments by Mikail, he owed £8,175.19 at the time of the March 2018 hearing.

7. The link between the two brothers' confiscation orders arose from the fact that the flat at 24 Westminster Mansions was registered in their joint names. But for the settlement, the central issue before Julian Knowles J would have been the question of the brothers' respective interests in the flat. Mikail's case was that he was the sole beneficial owner of the

flat and that Aftaab's name had only been added to the legal title for mortgage and maintenance reasons. Further, he relied upon irregularities in the transfer of title. If Mikail had succeeded in his arguments, the CPS would only have been able to enforce the smaller balance owed by Mikail, together with any costs awarded against him and the costs of realisation, against the asset. If, however, the court found that Aftaab had a 50% share:

7.1 Mikail's interest in the property would be so reduced; and

7.2 the CPS could also seek to enforce Aftaab's confiscation order, together with any costs awarded against him and the further costs of realisation, against Aftaab's share of the property.

8. The scheme of the March 2018 settlement was careful not to declare any interests in the property. Accordingly, it left the question of Aftaab's beneficial interest open as between the brothers. The scheme of the settlement was as follows:

8.1 The enforcement receiver was appointed over the assets of both brothers and specifically over the flat in order to secure the enforcement of the confiscation orders. The receiver's powers were, however, suspended for five months.

8.2 Mikail agreed to pay £8,175.19 in satisfaction of the confiscation order against him and £86,183.50 in satisfaction of the order against Aftaab by 8 August 2018.

8.3 In return, the CPS agreed not to pursue greater recovery in the case of Aftaab. This was achieved by the following recital in the consent order:

> "AND UPON the Prosecutor confirming that it will not oppose an application by Aftaab Khan for a certificate of inadequacy upon payment of the said sum of £86,183.50"

9. Mikail told me in his evidence that he believed that his flat was worth approximately £800,000. This was not expert evidence but was admitted without objection and was, in any event, reasonably consistent with the prosecution's own valuation. The short point, which was common ground between the parties, is that a 50% share of the property was worth significantly in excess of £86,183.50.

THE POWER TO SET ASIDE THE ORDER

THE LAW

10. This application is made pursuant to rule 3.1(7) of the Civil Procedure Rules 1998, which provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

11. In Lloyds Investment (Scandinavia) Ltd v. Ager-Hanssen [2003] EWHC 1740 (Ch), Patten J (as he then was) observed, at [71]:

> "Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR r.3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in

> some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to reargue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to deploy."

12. In Roult v. North West Strategic Health Authority [2009] EWCA Civ 444, [2010] 1 W.L.R. 487, a claimant sought to reopen a final order made by consent in settling his personal injury. Hughes LJ (as he then was) confirmed that r.3.1(7) could not be used to allow a judge to hear an appeal from himself or another judge sitting at the same level, and added at [15]:

> "It may well be that, in the context of essentially case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And it especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

13. In Kojima v. HSBC Bank plc [2011] 3 All E.R. 359, Briggs J (as he then was) said, at [33], that "a line has to be drawn between orders for which revocation may be sought under CPR r.3.1(7) upon the alternative grounds first identified in Ager-Hanssen … and approved in Collier v. Williams [2006] 1 W.L.R. 1945 on the one hand, and final orders, to which the public interest in finality applies, on the other." Indicating the scale of the difficulty facing applicants seeking to set aside final orders, the judge added, at [34]:

> "It is unnecessary for me to conclude whether exceptional circumstances may none the less justify the revocation of a final order within that second category, still less to prescribe in advance what those circumstances might be …"

14. In Terry v. BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, Hamblen LJ observed, at [75], that the circumstances in which the court might vary or revoke a final order would be "very rare."

15. The leading case in respect of the application of r.3.1(7) to interim orders is Tibbles v. SIG plc [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591. Rix LJ observed, at [39]:

"(i) … The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts of arguments are known or ought to have been known as at the time of original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi) Edwards v Golding [2007] EWCA Civ 416 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

16. Accordingly:

16.1 Criticism of a judge's decision is a matter for an appeal and not an application pursuant to r.3.1(7).

16.2 The public interest in finality and in not undermining the concept of an appeal requires that the court's discretion pursuant to r.3.1(7) should be sparingly exercised.

16.3 The power under r.3.1(7) is a discretion to be exercised in accordance with the overriding objective. While judges should not treat the factors identified by Patten J as either sufficient of themselves or as the only circumstances in which the court can exercise the discretion, relief under the rule will only normally be given where:

a) there has been a material change of circumstances; or

b) the facts on which the original decision was made were misstated.

16.4 The public interest in finality will be particularly significant where the application is to vary or revoke an order finally deciding the case or an issue in the case. Exceptional circumstances would be required to justify varying or revoking such a final order.

16.5 The court should be even more cautious about exercising the power to vary or revoke a consent order. Since such orders are based on an underlying contract of compromise, in my judgment the court should only exercise its power under r.3.1(7) to vary or revoke a consent order where there are vitiating grounds for avoiding the compromise itself.

THIS ORDER

17. The order in this case was not a case management order, but rather an order finally disposing of the CPS's application for the appointment of an enforcement receiver. Further, the order was made by consent. Accordingly, in my judgment, Mikail faces a particularly high hurdle in persuading the court that it should exercise its discretion pursuant to r.3.1(7). For the reasons set out above, I consider that the court should not exercise such discretion unless there is some vitiating factor that allows Mikail to avoid the contract of compromise underlying this consent order.

AN IRRATIONAL DECISION

THE EVIDENCE

18. Mikail briefly gave oral evidence in support of his application. He confirmed the following account, which is taken from his witness statement:

> "5. On the evening of Wednesday 28 February, I started to feel unwell with chills, sore throat and headache. I did not sleep well and by the morning of Thursday 1 March I felt much worse with runny nose, fatigue, nausea, muscle aches and sneezing. From the types and severity of the symptoms and my experience of colds and flu, it seemed that I was starting to come down with the signs of an intense flu.
>
> 6. I would have preferred to have rested more that day, but had a busy schedule including a meeting with my solicitor and barrister at the chambers of my barrister and a key follow-up eye specialist appointment at Moorfields Eye Hospital that afternoon.
>
> 7. After meeting with my lawyer only … my friend, Dr Margaret Jeffers and I went straight to Moorfields Hospital … I was seen that day by the Corneal Fellow … and later by the Head Consultant & Clinic Director …

8. During the past year or so I have undergone a corneal transplant in the left eye and up to that point all of [the] sutures/stitches remained in my cornea to keep it stable as it undergoes a gradual, complicated recovery. Upon being examined on 1 March, it was evident to the doctors that my transplanted left eye was red and irritated with likely infection around one of the stitches. The suture had to be removed right away in the consulting room and was sent for culture. Needless to say, this caused considerable pain, pressure and discomfort. My systemic illness was confirmed as flu by Dr Mandal.

9. This corneal infection was a genuine concern for me and my ophthalmologists at Moorfields Eye Hospital; since there was a risk the infection could spread causing possible rejection and graft failure. This could in turn result in permanent blindness in that eye, as I have been advised that each successive corneal transplant has diminishing rates of success.

10. From 2 to 6 March, my flu progressed with dry cough, chest and sinus congestion, joint pain and by 4/5 March, I felt a fever had set in. My left eye was having difficulty, with pain and fluctuating pressure. I cannot remember everything during this 5-day period other than considerable fatigue, with the need to sleep extended times; not eating or drinking that much and feeling dehydrated.

11. The time frame 5 March, when my fever began, to about 11 March, the flu was especially intense and it was during this time that I lost about 5kg in body weight.

12. On the morning of 7 March 2018 I attended the hearing at courtroom 35 despite my acute flu and concerning eye infection.

13. Before the trial began that day I completed a witness form to testify before the Court. Although, given my ill health, my wish was to ask the Court, via Counsel, to testify the next day, Thursday 8 March."

19. Mikail's account of his illness gains some support from Dr Jeffers. Against that, Mikail's former solicitor says that he did not mention either the 'flu or his eye problems when they met on 1 March 2018 or when they subsequently discussed matters by phone in the days before the hearing. He recalls that Mikail mentioned that he was suffering from the 'flu on arriving at court on 7 March, but he did not request an adjournment. Mikail's former barrister adds:

"30. Mr Khan appeared to be displaying the symptoms of a cold (runny nose, sniffing, coughing) but … I did not think that he presented as being under any greater strain than any party to litigation is when they attend a hearing. Mr Khan appeared to follow what was being said to him. If I suspected he had not been following the discussion, I would have asked him to recap a discrete issue to check his understanding …

49 (c) I was not aware of his visit to Moorfield's on 1 March 2018, and do not believe Mr Khan told me that he had a corneal infection when he attended court on 7 March. As noted above, I could see that he had a cold / runny nose and was coughing. If Mr Khan had told me that he was so unwell that [he] wanted to give his evidence the following day, I would have told him this would be difficult to accommodate given the issues to be litigated and the order in which matters would need to be dealt with, but I would have nonetheless raised it with the judge."

ANALYSIS

20. I am far from satisfied that Mikail acted irrationally. Settlement:

    20.1 avoided a finding that Aftaab had a 50% interest in the flat;

    20.2 capped the sum that could be enforced against the flat in respect of Aftaab's order at £86,183.50;

    20.3 avoided the risk of adverse costs orders against the brothers;

    20.4 gave Mikail five months in which to raise funds;

    20.5 avoided the costs of realisation; and

    20.6 thereby capped Mikail's liabilities and reduced the risk that he would lose his home.

21. Even if I am wrong in that assessment, I do not accept that Mikail was so unwell that he could not properly take advice or give instructions:

    21.1 I accept that Mikail was suffering from at least a heavy cold and an eye infection in March 2018. The eye infection was potentially significant since he had undergone a corneal transplant and his eyesight was already poor.

    21.2 Against that, the attendance notes taken by Mikail's former solicitor clearly show that he gave detailed instructions in the days running up to the hearing and that he took a full part in the conference with his lawyers on 7 March 2018.

    21.3 There is nothing in the attendance note of 7 March to suggest that Mikail was not fit either to attend court that day or to receive advice and give instructions. He does not appear to have made a complaint about being unfit and neither his former barrister nor his former solicitor recalls his asking for an adjournment or that his own evidence be stood over until the next day.

    21.4 Despite Mikail's claim to have lost considerable weight, attendance notes record that on 2 March the solicitor called while he was eating a chicken Madras pie; he attended a family re-union over the weekend of 3-4 March that, in evidence, he said was to mark a family birthday; and on 6 March (the day before the hearing) the solicitor again called him mid-meal.

22. Many people enter into contracts imprudently or even irrationally, but they are not without more to be excused from their bargain. Whatever his physical condition on 7 March 2018, there is no suggestion that Mikail lacked capacity and no argument is put before the court to make good any other vitiating factor arising from either his ill-health or the pressure of being at court and having to make quick decisions as to his case. There is, for example, no suggestion that the CPS procured Mikail's agreement by misrepresentation, fraud, undue influence or actionable mistake.

23. The assertion that Mikail made an irrational decision when overwhelmed by the circumstances does not, in my judgment, come anywhere close to providing a basis in law for seeking to avoid the contract of compromise or, therefore, for revoking this consent order pursuant to r.3.1(7).

THE LAWFULNESS OF THE SETTLEMENT

24. Section 83 of the Criminal Justice Act 1988 provides:

> "(1) If, on an application by the defendant in respect of a confiscation order, the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order the court shall issue a certificate to that effect, giving the court's reasons …
>
> (3) Where a certificate has been issued under subsection (1) above, the defendant may apply– (a) where the confiscation order was made by the Crown Court, to that court … for the amount to be recovered under the order to be reduced …"

25. Mr Caldwell argues that while settlement was no doubt expedient, it was wrong for the court to have made an order that tied the CPS's hands as to its position upon any application that Aftaab might make for a certificate of inadequacy. He points out that £86,183.50, being the sum to be paid in respect of Aftaab's order, is significantly less than the true value of a 50% share in the flat.

26. It is a principle of contractual construction that the court should, where possible, prefer a construction that allows the contract to be lawfully performed over one that is unlawful: see, for example, Lewison on The Interpretation of Contracts (6th Ed), para. 7.11. In my judgment, the court should apply this principle when construing the underlying contract of compromise embodied by the consent order in this case.

27. Unless there was evidence that Aftaab had other assets, and there is no such evidence before me, the position was that:

    27.1 the CPS would only be able to enforce the confiscation order against Aftaab in the event that it succeeded in its argument that he had a share in the property; and

    27.2 Aftaab would be able to apply for a certificate of inadequacy in so far as his liability under his confiscation order was not met from any such interest.

28. Accordingly, the settlement was effectively on the basis that Aftaab would be able to establish an interest to the extent of £86,183.50 but not in any greater sum. By agreeing not to oppose an application for a certificate of inadequacy, the CPS was implicitly accepting that Aftaab's interest in the flat was limited to such sum. Construed in that way, I see nothing unlawful in the CPS's agreeing not to oppose Aftaab's application pursuant to s.83 upon receipt of that sum.

29. Of course, it might subsequently transpire that Aftaab has hidden assets. If so, then the CPS might well be able to argue that it is not bound by its agreement not to oppose any application for a certificate of inadequacy on the basis that such agreement was procured by Aftaab's misrepresentation as to his assets. Such possibility does not, however, mean that the settlement was itself unlawful or that Mikail is himself entitled to obtain an order pursuant to r.3.1(7). Further, even in the event that additional assets were discovered, it would be open to Mikail to argue that the CPS could not now seek to enforce Aftaab's confiscation order (save in respect of the £86,183.50, any interest thereon and the costs of enforcement) against the flat.

30. In my judgment, Mikail has failed to establish proper grounds upon which he would be entitled to set aside the contract of compromise in this case. For the reasons explained above, it follows and I find that there are no proper grounds for the court exercising its limited jurisdiction pursuant to r.3.1(7).

CONCLUSION

31. Accordingly, this application is dismissed.