Neutral Citation Number: [2018] EWHC 2519 (Ch)

Case No: HC-2016-003015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 28/09/2018

Before :

MASTER TEVERSON

- -

Between :

NORIKO TACHI	**Claimant**
- and -	
CONCEICAO DOS SANTOS WOODWARD	**Defendant**

- -
- -

AIDAN BRIGGS (instructed by **Veale Wasbrough Vizards LLP**) for the **Claimant**
ANTHONY ALLSTON (instructed by **Palmers**) for the **Defendant**

Hearing dates: 20 and 24 September 2018

- -

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.

.....

MASTER TEVERSON

MASTER TEVERSON:

1. This is an application by the Claimant, Ms Noriko Tachi, by application notice dated 21 June 2018, seeking permission to file and serve amended Particulars of Claim and to serve out of time two further witness statements. The application is made in the context of a probate claim which is scheduled for a 5 day trial listed to start on 5 November 2018.

2. The claim relates to the estate of Hamish Woodward ("the Deceased") who died on 9 July 2012 aged 71.

3. The dispute between the parties is as to which of two wills made by the Deceased should be admitted to probate.

4. The first in time is dated 10 October 2006 ("the 2006") Will. Under the terms of the 2006 Will, the Deceased appointed the Claimant and another friend, Natalja Kryshenyk, as joint executrices. He gave to the Defendant, his wife, Conceicao Dos Santos Woodward, his flat at 23 Hillcrest Court, Shoot-Up Hill, London. He left the contents of his home at 7 Prior's Lodge, Richmond, Surrey to the Claimant. He gave the residue of his estate as to 90% to the Claimant and as to 10% to Nataljia Kryshenyk

5. The later will is dated 12 June 2007 ("the 2007 Will"). It revokes all earlier wills. It appoints the Defendant as sole executrix and leaves her everything.

6. The Claim was issued on 24 October 2016. The Claimant asked the Court to pronounce against the 2007 Will and to pronounce in favour of the 2006 on the grounds that the 2007 Will was executed when the Deceased did not have the necessary capacity to execute a will alternatively did not know and approve its contents.

7. A Defence and Counterclaim was filed on 6 June 2017.

8. Agreed case management directions were given by Deputy Master Henderson on 18 December 2017. Following that hearing the claim was listed for trial.

9. The matter came back before the Court on 11 April 2018 as a result of applications made by both parties. It was agreed that the date for exchange of witness statements be extended to 4pm on 28 March 2018 and that the date for experts' reports to be filed be extended to 4pm on 23 May 2018 with joint statements extended to 4pm on 20 June 2018.

10. The orders made on 11 April 2018 included an order that by 4pm on 13 April 2018 the Defendant should serve on the Claimant's solicitors a signed form of authority agreeing to the release of all files held by Ms Beverley Thompson-Haughton of Dixon Ward Solicitors 16 The Green, Richmond, Surrey TW9 1QD relating to the Deceased.

11. The documents from Dixon Ward were received by DX on Friday 8 June 2018.

12. On 13 June 2018 Veale Wasbrough Vizards LLP ("VWW"), the solicitors acting for the Claimant, wrote to Palmers, the solicitors acting for the Defendant, referring to the receipt of this additional material and saying that they had not considered it cost

effective to instruct their client's expert until those documents and medical records translated into English from Portuguese had been received. They proposed that the date for exchange of experts' reports be extended until 11 July 2018 and the date for the joint statement to be filed be extended to by 8 August 2018. In the final paragraph of the letter, VWW said that following disclosure of the Dixon Ward papers, they put the Defendant on notice that they were considering with counsel applying to the court for permission to amend their client's claim to include a claim of undue influence.

13. The application now before me was issued on 21 June 2018 seeking permission to amend in the form of draft Amended Particulars of Claim dated 20 June 2018. The draft amended Particulars of Claim seek to introduce into the proceedings a claim that the 2007 Will was procured by the Defendant's undue influence. The draft amended Particulars of Claim also contain a significant number of additional particulars of alleged lack of testamentary capacity some but not all of which are based on the Dixon Ward file of documents.

14. On behalf of the Claimant it was submitted that the contents of the file received from Dixon Ward raised matters of the greatest concern.

15. The following matters were relied upon by Mr Aidan Briggs, counsel for the Claimant as giving grounds for concern and suspicion:-

(1) An attendance note dated 9 November 2016 when the Deceased and the Claimant met with Beverley Thompson-Haughton ("BT-H") with instructions to prepare an EPA appointing *"his long term girlfriend"*, the Claimant, as his attorney. The Deceased is recorded as expressing concern that *"his estranged wife"* does not have control over his affairs;

(2) On 6 December 2006, the Deceased was referred by his GP urgently to the duty psychiatrist in the accident and emergency department of Kingston Hospital. He was seen by a consultant psychiatrist, Dr Lawrence, on 8 December 2006 who made a diagnosis of a depressive episode with psychotic features;

(3) On 11 January 2018 the Claimant contacted BT-H expressing concern about her not having had any contact with the Deceased since 22 December and needing to get access to his documents in order to settle bills and other urgent matters;

(4) On 13 February 2007 the Deceased and the Defendant attended BT-H with instructions to change his EPA in favour of the Defendant; BTH decided that a medical opinion was needed;

(5) On 19 February 2007 the Deceased attended together with the Defendant with a view to changing his will in favour of the Defendant;

(6) On 22 February 2007 BT-H was telephoned by the Claimant saying she has received a call from the Deceased the day before from Norway informing her the Deceased was very distressed and very anxious that he would be abandoned;

(7) On 28 February 2007 the Deceased rang BT-H asking the reason why a medical appointment had been arranged for him to be assessed;

(8) On 5 March 2007 the Deceased on the telephone asked BT-H if he could give instructions over the telephone to change his will;

(9) On 16 March 2007 the Deceased was assessed by Dr Lawrence. The Deceased was recorded as telling Dr Lawrence that his beneficiaries would be *"his two children (Archie and Natalie), as well as his wife Conceicao."*

(10) On 23 March 2007 having received Dr Lawrence's report records BT-H was concerned this was the first time she has heard mention of the Deceased having children;

(11) At BT-H's request the Deceased came to her office later that day with the Defendant. She recorded the Deceased as being insistent that the Defendant remain in the office until his return. He told BT-H that the Defendant kept threatening to leave him. When shown Dr Lawrence's report, and the paragraph referring to him having children, the Deceased said the doctor had made an error.

(12) After discussing what to do with her colleagues, BT-H recorded in her attendance note that an allegation of undue influence [being made] was also a concern. She recorded in her attendance note:

"On the issue of undue influence, this would appear to be a classic situation of a carer threatening a vulnerable person i.e. I will leave you and not take care for you unless you do as I say and so on and so forth. The fact that he wishes to make a new Will the effect of which would be to disinherit totally the current beneficiaries under his current Will might be perceived as a result of undue influence is not considered [sic] leaving them a small legacy".

(13) On 16 April 2007 Dr Lawrence wrote to BT-H assuring her that the account in his original report was verbatim [of] what was said to him on the specific occasion of the assessment. He said:

"In the light of these discrepancies, however, I will definitely need to revise this case and this gentleman's mental state and level of capacity, as well as to consider the possibility of coercion."

(14) On 5 June 2007 Mrs Lucy Watson of Calvert Smith & Sutcliffe, wrote to Dr Lawrence saying she had been contacted by the Deceased with a view to altering his Will and reconsidering his power of attorney in favour of the Claimant. She asked if a follow up report had been prepared.

(15) A week later the 2007 Will was prepared and executed by O'Malley Holmes & Sexton, solicitors in Limerick, Ireland.

16. The relevant principles to be applied to the Claimant's application for permission to amend were not in dispute before me although there was disagreement as to whether the application when issued was a "very late" application. The relevant principles were summarised by Carr J. in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment as follows:-

"36 An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.

37 Beyond that the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities:…

38 Drawing these authorities together, the relevant principles can be stated simply as follows:-

a) whether to allow the amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute concept, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

17. On behalf of the Claimant it was submitted that there was a good explanation for the lateness of the application. The Dixon Ward files were received on 8 June 2018. On 13 June 2018 the Claimant's solicitors put the Defendant's solicitors on notice that an application for permission to amend to include a claim of undue influence was being considered. The application was made on 21 June and served on 26 June 2018.

18. It was further submitted that the lateness of the application was in part at least the fault of the Defendant. On 6 March 2018 VWW wrote to Palmers inviting them to return a form of consent to enable the documents being held by Dixon Ward being released. In reply on 14 March 2018 replied:-

"Regarding your request that records be released by Messrs Dixon Ward, solicitors, both firms (namely yourselves and us) have long been aware of the deceased's previous instruction to Messrs Dixon Ward and any request for release of said records could have been made before the High Court appointment held on 18 December 2017 and order of even date. We do not consider said records to be central to the issues at hand and therefore do not agree that further correspondence with Dixon Ward is required."

19. The Defendant maintained its opposition to being required to provide a signed consent form until consenting to an order on 9 April 2018.

20. On behalf of the Defendant it was submitted that steps could have been taken on the part of the Claimant to recover the Dixon Ward files at a much earlier stage. It was pointed out that the instruction of Dixon Ward by the Deceased concerning the making of a new will had been referred to by the Claimant in paragraph 7.11 of the existing Particulars of Claim under Particulars of lack of knowledge and approval.

21. In their letter of 14 March 2018, Palmers say that both firms of solicitors had long been aware of the Deceased's previous instruction to Dixon Ward. It appears from VWW's letter to Palmers of 6 March 2018 they were alerted to the existence of potentially relevant documents being held by Dixon Ward from the GP records disclosed to the Claimant.

22. Even if there is force in the point that steps could have been taken earlier, the position remains that the content of the Dixon Ward file was not known to the parties until 8 June 2018.

23. In *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 1699 at paragraph 72 it was contemplated that a good explanation for a very late amendment might be late disclosure or new evidence. This was contrasted with the position where a very late amendment was the result of a re-appraisal by newly instructed Counsel of the merits of the case.

24. On behalf of the Defendant, it was submitted that the fact the application was made in consequence of new disclosure was not of itself a "passport" to the application being allowed. I accept that submission. The court still has to take account of the overriding objective and balance the injustice to the party seeking to amend if refused permission, against the need for finality in litigation and the injustice to the other party and other litigants if the amendment is permitted. The court also has to be satisfied that the proposed amended case has a realistic prospect of success.

25. The applicable principles regarding testamentary undue influence were set out by Lewison J. (as he then was) in *Edwards v Edwards* [2007] EWHC 1119 (Ch) at paragraph 47 as follows:-

"The approach I should adopt may be summarised as follows:-

i)In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii)Whether undue influence has procured the execution of a will is therefore a question of fact;

iii)The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

iv)In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;

v)Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

vi)The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

ix)The question is not whether the court considers that the testator's testamentary disposition is fair, because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

26. On behalf of the Defendant it was submitted that many of the matters relied on to support undue influence were of a general nature and could all have been pleaded back in October 2016 when the proceedings were commenced.

27. It was submitted that so far as the undue influence claim rested on concerns expressed by BT-H in her attendance note of 23 March 2007 this was an insufficient basis to advance a claim of undue influence. It was argued that there was nowhere recorded in the Dixon Ward files any express articulation of a threat to abandon the Deceased if he did not make a will in favour of the Defendant. It was also argued that the possibility of undue influence was a conclusion to which BT-H had jumped and that her prior contact with the Claimant meant that she lacked objectivity toward the Defendant.

28. In reply it was submitted on behalf of the Claimant that there had when the claim was pleaded been suspicions and concerns as reflected in the particulars of want of knowledge and approval but that the contents of the Dixon Ward file had tipped the balance in favour of making a claim of undue influence.

29. It is not my role on this application to conduct any form of mini-trial. I have to decide whether the proposed claim as pleaded and particularised in the amended Particulars of Claim has a real prospect of success. I do not think this is the type of case where the court can be confident from reviewing the documents alone that the claim is inherently implausible or not supported by the contemporaneous material. The fact that undue influence was raised as a concern by BT-H in her attendance note of 23 March 2007 is not of itself any evidence of undue influence but it is evidence that the hypothesis of undue influence was raised as a concern at the time by a probate solicitor.

30. It may very well be that when all the evidence has been heard at trial, the undue influence claim will fail and be found to be without foundation. This does not mean that I can or should conclude on the documents alone that it has no real prospect of success. On balance, taking into account the explanation for the timing of the application, I have concluded that I should give permission to amend to include the undue influence claim.

31. In relation to testamentary capacity, this claim was already in the claim. Objection was I think taken mainly to the scale of the amendments. Submissions were made to me on the substance of the claim. It was said that too much weight was being attached to the fact that Dr Lawrence's report stated:-

"in the event of his demise his beneficiaries would be his two children (Archie and Natalie) as well as his wife Conceicao."

It was said this was a simple mistake or misunderstanding and that the Deceased was referring to Ms Tachi as "Archie" and Natalje Kryshenyk as "Natalie", the residuary beneficiaries under the 2006 Will.

32. Reliance too was placed on the fact that Dr Lawrence when he assessed the Deceased on 16 March 2007 had given a positive psychiatric assessment of the Deceased's testamentary capacity. In my view, these are really all matters for the trial judge.

33. It is accepted by the Claimant that if the amendment is permitted, the trial date will have to be vacated. It was argued that had the Defendant not opposed the application following its service on 26 June 2018 it would not have been necessary to vacate the trial date.

34. I accept that there would have still been three months to prepare for trial excluding August. It was however necessary for the application to be determined. It is regrettable that steps were not taken to bring the application on earlier in view of the trial date.

35. I proceed on the basis that this is a very late application in the sense that if granted now it will be necessary to vacate the trial date. I have reached the conclusion that the disclosure to the parties on 8 June 2018 of the Dixon Ward file does provide a proper explanation for the timing of this application and that the proposed amendments ought to be allowed notwithstanding that the trial date will have to be vacated.

36. The effect of allowing the amendments will be to introduce a new claim of undue influence. The Defendant must be given the opportunity to amend her Defence and to serve a supplemental witness statement if so advised.

37. In relation to capacity, the documents on the Dixon Ward file were included as one of the sources of information provided to the Defendant's expert Dr W Fawzi as listed at paragraph 3.23 of his report dated 10 July 2018. They have therefore already been taken into account in preparing his report on the allegation of lack of testamentary capacity. I accept Dr Fawzi may be asked to comment on the allegation of undue influence in the context of the medical history although whether undue influence occurred is a question of fact for the trial judge.

38. I have reached the conclusion that in this case the balance between injustice to the applicant if the amendment is refused and injustice to the Defendant and other litigants in general if the amendment is permitted comes down in favour of allowing the amendments. As stated in the authorities, lateness is a relative concept. The timing of the application is directly referable to the disclosure of the Dixon Ward file. It may be that more could have been done on both sides to investigate what documents were held by Dixon Ward at an earlier date. In any event, I accept that the Claimant was alerted to the possibility of documentation being held by Dixon Ward from the GP records.

39. It is accepted that if the amendments are allowed, that there will be a need for further evidence.

40. The Claimant seeks permission to rely on the witness statement of BT-H dated 26 June 2018. That statement sets out her recollection based on the documents on her file. In view of the conclusion I have reached on the amendment application, and the fact that the documents on the Dixon Ward file will be before the trial judge, I am satisfied that in all the circumstances it is right to give permission for this witness statement to be relied upon. It was not argued that the statement should be disallowed on *Mitchell/Denton* grounds.

41. The Claimant also seeks permission to rely on the statement dated 26 July 2018. of Dr Robert Lawrence, the Consultant in Old Age Psychiatry who saw the Deceased on 6 December 2006, 19 February 2007 and on 16 March 2007. This was not opposed on the ground of lateness. Objection is however taken to parts of the statement on the ground that Dr Lawrence is not giving evidence of fact but his own medical opinion.

42. On behalf of the Claimant it was submitted that the distinction between factual and opinion evidence is a difficult one to draw in the context of a Medical Practitioner who assessed the Deceased on a number of occasions. It was submitted that Dr Lawrence's statement could be read as stating as a matter of fact his medical opinion at the time.

43. As a Consultant who met and appraised the Deceased on three occasions, the evidence of Dr Lawrence may be of value to the trial judge even though Dr Lawrence did not meet the Deceased after 16 March 2007. It seems likely that both sides will want to rely on his report dated 16 March 2007.

44. I think the right course is for me to give permission for the witness statement of Dr Lawrence to be relied on including such parts of it as contain statements of opinion. It will be a matter for the trial judge to decide what weight to be given to the evidence of

Dr Lawrence. It will be for the trial judge to decide to what extent the evidence of Dr Lawrence lacks the objectivity of an independent expert. That will go to the weight rather than the admissibility of his evidence. I have taken into account the perception that the Claimant may have more experts than the Defendant. Against that I think needs to be balanced the possible benefit to the Defendant of being able to explore with Dr Lawrence in cross-examination his evidence.

45. Dr Fawzi, in the addendum to his report, has already commented on the capacity assessments carried out by Dr Lawrence on the Deceased in February and March 2007.

46. I note that Dr Fawzi in his report expresses the opinion that the Deceased lacked capacity at the time when he executed the 2006 Will. In my view, that contention ought to be set out specifically in the Defence and Counterclaim and particulars given of the facts and matters relied upon in accordance with CPR 57.7(4)

47. Finally, I wish to make it quite clear that in determining this application I am not to be taken as expressing any view on the merits of this probate claim or how it will be decided at trial.

48. I will hear counsel on consequential matters.