

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

IN THE MATTER OF MRS. JOYTARA BIBI (DECEASED)

Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date of hearing: 14th December 2021

Before:

DEPUTY MASTER SCHER

Between:

ALFU MIAH

Claimant

- and -

MONTAJ ULLAH

Defendant

MS. N. WANNAGAT (C) (instructed by **Capital Solicitors LLP**) for the **Claimant**
MR. KAMAR UDDIN (C) (instructed by **Taj Solicitors Ltd.**) for the **Defendant**

JUDGMENT

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DEPUTY MASTER SCHER :

1. This is a transcript of my *ex tempore* judgment in the matter of PT-2020-000855, Miah v Ullah, a Part 8 Claim brought by Alfu Miah against his half-brother, Montaj Ullah.
2. The parties' mother, Mrs. Joytara Bibi, died intestate on 11th December 2018. Mr. Ullah, the Defendant, was granted letters of administration on 15th September 2019.
3. The main asset of the estate is No. 3 Brinsley House, Tarlings Street, London E1 2PD. I will refer to this as "The Property". It is said by the Claimant to be worth somewhere between £380,000 and £400,000. The rental value is estimated by the Claimant at £1,500 per month.
4. Under the intestacy, the estate is to be shared between the five children of the deceased.
5. Mr. Miah, the Claimant, applied by way of Part 8 Claim Form on 2nd November 2020 for relief under section 50 Administration of Justice Act 1985, to remove Mr. Ullah as administrator and to be appointed substitute administrator in his place. His main reason was that despite having been administrator for about a year, Mr. Ullah had failed to sell the Property and therefore failed to distribute the proceeds of sale to the beneficiaries in the intestacy.
6. On 18th January 2021, Chief Master Marsh made an unless order in the usual way, based on Form CH44, giving Mr. Ullah 14 days from service of the order to file and serve any evidence on which he wished to rely to contest the claim. Mr. Ullah did not do so. In the same order, Chief Master Marsh listed a disposal hearing.
7. At that disposal hearing, which was via MS Teams on 4th March 2021, the Chief Master removed Mr. Ullah as administrator and appointed Mr. Miah as substitute administrator in his stead. This was recorded on the letters of administration on 6th April 2021.
8. On 17th March 2021, Mr. Ullah applied to set aside the Chief Master's order on grounds that the Claimant had obtained the order by providing incorrect information to the court. The alleged fraud was developed somewhat in the various witness statements filed by Mr. Ullah. However, they have quite properly not been pursued by Mr. Uddin today.
9. At a hearing before Deputy Master Raeburn on 24th September 2021, the Defendant was granted relief from sanctions in respect of failing to file his substantive written evidence. Deputy Master Raeburn directed that the Defendant's evidence be filed and served by 4 p.m. on 14th October 2021. The Defendant was also ordered to identify expressly in that evidence the legal basis of his application to set aside the judgment dated 4th March 2021. The order of 4th March 2021 made by Chief Master Marsh was not, at that stage, set aside.

10. At today's hearing, the Defendant seeks to set aside the order of 4th March 2021. If I am persuaded that it should be set aside, I would then need to either dispose of the Part 8 Claim or to give directions.

The legal basis for setting aside the order of 4th March 2021

11. The Defendant had not set out the legal basis for his application to set aside the order in his evidence dated 5th August 2021. Deputy Master Raeburn therefore made his order very explicit: the witness evidence due to be served by 14th October 2021 needed to set out the legal basis of the application.
12. Unfortunately, the witness statement dated 15th October 2021 also failed to identify the basis of the application to set aside. Rather, it set out a number of reasons why the Part 8 Claim was contested.
13. It is important for me to identify the basis on which I am asked to set aside the order, as there are only certain circumstances in which I can set aside such orders and I have got to apply the correct test. If a party does not identify the legal basis for setting aside an order and persuade the Court that the relevant conditions are satisfied, or the relevant test is met, the order must stand, and only an appeal court would be able to overturn it.
14. At today's hearing I heard from the Defendant's counsel, Mr. Uddin, and from the Claimant's counsel, Ms. Wannagat. Ms. Wannagat has helpfully framed the Defendant's application in terms of CPR rule 39.3. Mr. Uddin agreed that this was the rule under which he sought relief. Therefore, it is agreed that the test that I need to apply is set out in rule 39.3(5):

...the court may grant the application only if the applicant

- a) *acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;*
- b) *had a good reason for not attending the trial; and*
- c) *has a reasonable prospect of success at the trial.*

15. In this application, the parties agree that Mr. Ullah acted promptly. I therefore need to be satisfied that Mr. Ullah had a good reason for not attending the hearing of the Part 8 Claim on 4th March 2021, and also that he had a reasonable prospect of success at such a hearing. I would then be able to exercise the residual discretion derived from the words "*the court may grant the application only if...*".
16. I will deal first with the question of whether he had a good reason.
17. The timeline is important:

- i) On 23rd September 2020, during pre-action correspondence, Mr. Ullah's former solicitors wrote to say that they were no longer acting for him. I note Mr. Ullah's evidence, and Mr. Uddin's submission, that Mr Ullah still sought their advice from time to time after that. Nevertheless, I accept that he had no solicitors on record for these proceedings.
 - ii) On 2nd November 2020, the Part 8 Claim Form was issued. It was served by first class post on 2nd or 3rd December 2020.
 - iii) After the time for acknowledgement of service expired, Chief Master Marsh made the unless order approximately in Form CH44, dated 19th January 2021. That order listed a hearing on 4th March 2021 via Microsoft Teams.
 - iv) The order was served on 22nd January 2021. As I understand paragraph 3 of Mr. Ullah's witness statement dated 21st July 2021, he received that order but did not fully understand it. Paragraph 5 of his witness statement dated 29th March 2021 says that he was under Kalam solicitors' "care" at the relevant time. That is the paragraph which deals with this court order. However, I also understand from the witness statement dated 27th July 2021 that Mr. Ullah could not pay the fees sought by Kalam solicitors. I am prepared to assume that he did not receive legal advice when he received that order.
 - v) Mr. Ullah also received a letter dated 1st March 2021. I understand it to be the letter enclosing the bundle for the hearing on 4th March. That letter asked for his email address if he wanted to be at the hearing, which was to be heard via Microsoft Teams. (To put that into context, the Claimant was obliged to provide the court with the email address of all attendees in the usual way.) Paragraph 3 of Mr. Ullah's witness statement dated 29th March 2021 says that he received that letter at such short notice that he was not able to understand everything. He could not find a solicitor to represent him. Later, in his witness statement dated 27th July 2021, he says that he only found out about the hearing after it had occurred.
18. Mr. Uddin says that more effort should have been made by the Claimant's solicitors, and in particular that they should have tried to contact him by telephone as well. However, Mr. Ullah's former solicitors gave only a postal address, and the relevant order was sent to and received at that address. In my judgment no further efforts needed to have been made by the Claimant's solicitors: they were entitled to write to him at the address given by his former solicitors.
19. Now, there is some inconsistency and lack of clarity in Mr. Ullah's evidence, as the above summary may show. I do not need to resolve it all to determine the application today. For present purposes, I am prepared to take Mr. Ullah's case at its highest, with the most generous interpretation of his evidence, in that he received the order of 19th January 2021 but did not understand it; that he could not afford legal advice at the time and did not receive legal advice at the time;

and that he only became actively aware of the hearing on 4th March, after it occurred.

20. I have considered the commentary in the White Book 2021 in paragraph 39.3.7.2, derived from the authorities cited there. When considering whether there was good reason for not attending the hearing, I must “*consider each case in light of all the relevant factors for non-attendance and, looking at the matter in the round, determine whether the reason is sufficient for the court to exercise its discretion in favour of the defaulting party*”. I also note the guidance, again derived from the authorities, that “*Once a party is aware that proceedings have been served, they have to be taken to expect to receive communications personally from the opposing party and/or the court*”.
21. In my judgment, Mr. Ullah has not demonstrated that he had good reason not to attend. He was aware of the proceedings. He had sought but failed to obtain legal advice. He received but failed to act on the order giving him notice of the hearing on 4th March 2021. I have taken into account the language barrier when coming to my decision, but that is not of itself a “good reason” not to attend the hearing. For the court to deal with cases such as this justly and at proportionate cost, and to give effect to the overriding objective, litigants who are aware of proceedings served on them must engage with those proceedings. The rules apply to them, as they do to all litigants, and the court may consider giving extensions of time, or relief from sanctions, in accordance with the relevant tests.
22. In my judgment, for those reasons the limb in sub-paragraph 5(b) of rule 39.3 is not met. There was no good reason not to attend the hearing. This application must therefore fail.
23. I make no findings in respect of whether Mr Ullah had a reasonable prospect of success at the trial. That is a low bar to reach for an applicant (just as it would have been a high bar for an applicant seeking summary judgment), but I make no determination on that point, nor do I need to exercise my residual discretion. I have found that there was no good reason for not attending the hearing, and so I cannot grant this application.

For proceedings, see separate transcript

DEPUTY MASTER SCHER:

24. The Claimant is seeking his costs on the indemnity basis of an application made by the Defendant to set aside an order of 4th March 2021. The basis on which the Defendant had applied to set aside that order was only made clear today. Since the application was made in March 2021, the application had been on the basis that the Claimant had obtained the order by providing incorrect information to the court.
25. In the Defendant’s evidence, a running theme was that the Claimant was applying fraudulently to the court for an order to become substitute administrator, the fraud being that Alfu Miah was not his true name. The Defendant has repeatedly included evidence to suggest that the Claimant was

guilty of such fraud. The Defendant's evidence suggests that this was possibly the main substantive reason why the Claimant's application to become substitute administrator should be refused.

26. I make no findings on whether the Defendant would have had a reasonable prospect of success if this matter had reached a full Part 8 hearing, not so much because the Defendant's fraud allegations have any merit, but more because of the broader question of whether or not the Defendant was properly administering the estate. There are a number of reasons on which the Defendant relies to contest the Part 8 claim: the alleged fraud is just one of them, albeit an important one.
27. However, fraud was (until today) the primary reason for making the application to set aside the judgment. It has resulted in no doubt very significant costs incurred by the Claimant, certainly in excess of what would have been incurred had the fraud allegation not been made. Moreover, it was an allegation which was not pursued, quite properly, by Mr. Uddin, who is under professional obligations in respect of serious allegations such as fraud.
28. As the fraud allegation was the basis of the application, and as that basis was abandoned today, in my judgment the circumstances are "out of the norm" and the Claimant is therefore justified in seeking costs on an indemnity basis. When a serious allegation such as fraud is maintained all the way through to the most recent witness statement and then abandoned at the hearing, this is, in my judgment, so far out of the norm as to justify costs being awarded on the indemnity basis, and I do make such an order.

For proceedings, see separate transcript