Kotak v Kotak

[2014] EWHC 3121 (Ch)

Chancery Division

2 October 2014

Edward Bartley Jones QC (sitting as a Deputy High Court Judge)

APPROVED JUDGMENT

I DIRECT THAT NO OFFICIAL SHORTHAND NOTE SHOULD BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS SIGNED BY ME MAY BE TREATED AS AUTHENTIC.

MR EDWARD BARTLEY JONES QC (sitting as a Deputy High Court Judge):

**Introduction**

1. Dinesh Kotak and Jagdish Kotak are brothers. On his own evidence Dinesh Kotak is often known as “Don”. On his own evidence Jagdish Kotak is often known as “Jack”. For ease of writing (and reading) this judgment I shall refer to them as “Don” and “Jack” respectively. I intend no disrespect to either by use of these names and I hope that neither Don nor Jack will take offence at such use.

2. Don and Jack have fallen out in a major way with the level of acrimony that, perhaps, can only exist in a dispute between siblings. The one point which is undoubtedly common ground between them is what Don says in paragraph 4 of his second witness statement dated 6 April 2014:-

* + “There is no trust as between myself and [Jack] and we are unable to work together.”

3. By Part 8 Claim Form issued on 6 February 2014 Don commenced proceedings against Jack seeking an order for sale of two freehold properties in Leicester. The proceedings were said to have been brought under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 but is now appears to be another (rare) piece of common ground that both properties were assets of an informal partnership which subsisted between Don and Jack. That such partnership is at an end, alternatively that such partnership should be brought to an end by the court under section 35 of the Partnership Act 1890, is undoubted. Accordingly, the partnership subsists only for the purposes of its winding up (and neither Don nor Jack has sought to argue to the contrary). Thus there can be no doubt but that the two properties must be sold in due course in order to effect the winding-up of the partnership.

4. Also on 6 February 2014 Don issued an Application Notice, returnable on 13 February 2014, seeking an Order for the immediate sale of the two properties. That Application Notice came on for hearing before Barling J who, on 13 February 2014, adjourned the same to come on as an application by order. As I understand it, the primary reason why Barling J so acted was so as to give Jack the opportunity to produce valuation evidence as to the true value of the properties. Granted the terms of the order for sale which Don was seeking (which I shall address below) that was hardly surprising.

5. The application by order came on for hearing before me on Friday 11 July 2014. Jack had, both before and after the hearing before Barling J, filed and served three witness statements, the major thrust of which was to make serious allegations against Don both for breach of his duties under the Partnership Act 1890 and, also, for dishonesty. However, the only evidence which Jack adduced as to the true value of the properties was not a formal Valuation thereof but, rather, a “Marketing Proposal” dated 10 March 2014 from GVA Grimley Limited.

6. As a result of the consequences of oral argument and, also, as the result of what might, uncharitably, be termed aggressive judicial intervention there was ultimately some measure of agreement between Don and Jack at the hearing before me. Thus, it came to be accepted:-

* + (1) that both properties should be sold forthwith at open market value by private treaty;
  + (2) that a wholly independent firm of solicitors (Spearing Waite LLP ) should have conduct of this sale;
  + (3) that both Don and Jack should have permission to bid or submit an offer to buy the properties of either of them; and
  + (4) that Spearing Waite LLP should be permitted to employ estate agents for the purposes of marketing the properties for sale.

An Order was drawn up to reflect these matters. However, one issue was left outstanding and is the subject matter of this reserved judgment. That issue was the submission by Don, vigorously opposed by Jack, that I should make what I will describe as a “pre-emptive sale order” in favour of a company called Thurney Properties Limited (“Thurney”). Thurney is a company whose shares are 70% owned by Don and 30% owned by James Kotak, one of Don’s sons.

7. In order to set the context for the issue which I had to decide I must now say a little more about (1) the nature and value of the two properties (2) the present indebtedness of the partnership and (3) the allegations and counter-allegations as made between Don and Jack.

**The Properties**

8. The most important of the two properties for present purposes is “Chartwell Drive”. This is a light industrial complex comprising three buildings of varying ages. The site is in an established industrial location in the suburb of Wigston, to the south of Leicester. The title to Chartwell Drive is registered under Title No LT 197855, albeit that a small part of the site is not comprised within the registered title. This small part appears to be an area enclosed by fencing upon which a part of one of the buildings is erected. It is said that Don and Jack have acquired title to this small area by adverse possession and, as I understand it, application has been made to HM Land Registry for them to be registered as proprietors of this unregistered land. Any sale of Chartwell Drive will be on the basis that Don and Jack transfer only such title, if any, as they have in this unregistered land. Defective Title Insurance has been arranged.

9. A large part of Chartwell Drive was formerly occupied by Pointer Design and Manufacture Limited but that company entered into administration in late 2012 and vacated. The present position is that only part of Chartwell Drive is now occupied. The Lambert Smith Hampton (“LSH”) valuation to which I will refer below suggests that the present annual income from the occupiers of Chartwell Drive is £263,165. However, LSH suggest that when Chartwell Drive is fully occupied then the aggregate annual rent could £516,960. The most important of the occupiers of Chartwell Drive is a company is called Jubb (UK) Limited, which pays a passing rent of £151,774. However, Jubb (UK) Limited’s lease expired on 25 November 2011 and it is presently holding over. Jubb (UK) Limited appears to be unwilling to enter into a new lease whilst issues arise over the freehold reversion on that lease. Jubb (UK) Limited is a company whose shareholding is owned as to 50% by a Mr and Mrs Stripp, as to 25% by two of Don’s children and as to 25% by two of Jack’s children Mr Stripp is a business associate of Don. Jack suggests that Don is deliberately manipulating the affairs of Jubb (UK) Limited by preventing Jubb (UK) Limited from entering into a new lease (so as to improve his, Don’s, position in respect of the sale of Chartwell Drive). I bear this allegation in mind when reaching the conclusions set out below.

10. The most recent formal valuation of Chartwell Drive is that of LSH dated 30 January 2014. This is a very detailed “Red Book” valuation. Somewhat surprisingly it gives as the valuation date the 21 August 2013. This becomes less surprising when it is realised that LSH valued Chartwell Drive on behalf of HSBC Bank Plc (“HSBC”) in September 2013 and that the LSH valuation of 30 January 2014 is, largely, a re-issue of that earlier valuation for HSBC. As I shall explain below, the pre-emptive sale order which Don seeks would, in largest part, be funded by a loan from HSBC. It would appear, therefore, that the LSH valuation of September 2013 was prepared for HSBC in anticipation of, or in support of, that loan. This appears, therefore, to answer one question raised by Dr Ahmad, who appeared before me on Direct Public Access (as he had before Barling J) for Jack. Dr Ahmad asked, rhetorically, where was the valuation which HSBC had obtained? The answer is that it would appear to be reflected in the LSH Valuation of 30 January 2014.

11. In the 2014 Valuation LSH said this:-

* + “Appetite for freehold industrial buildings remains reasonable and due to the size of the property we consider that a marketing period of approximately 12 months would be required in order to achieve our opinion of market value”.

LSH then went on to value Chartwell Drive at £3,710,000 but stressed yet again:-

* + “We consider 12 months to exchange contracts, from the date of valuation, is a realistic period required to achieve a sale of this value.”

If marketing were restricted to a period of 6 months then LSH valued Chartwell Drive at £2.7 million. And if marketing were restricted to a period of three months then LSH valued Chartwell Drive at £2,150,000.

12. There is some information before me from other agents, presented in evidence by Don, which might suggest that the LSH Valuation was somewhat optimistic. But it is only fair to Jack that I should take the LSH Valuation at face value since it is the highest valuation before me of Chartwell Drive.

13. The most that Jack was able to produce by way of evidence, following the Order of Barling J, was the marketing proposal of GVA Grimley Limited. This expressly stated that it had been prepared for marketing purposes only and did not constitute a formal “Red Book” valuation. However, GVA Grimley Limited concluded that Chartwell Drive should be marketed at a guide price of £3.65 million. They were of the opinion that offers received would range between £3.25 million and £3.5 million. This, however, was on the assumption that Jubb (UK) Limited entered into a new ten year lease.

14. The second property is known as “St Johns”. As the pre-emptive sale order was not sought in respect of St Johns I will deal with it only briefly. It is a former textile factory with ancillary buildings located just to the north of Leicester City Centre and comprises some 7.84 acres. Substantial parts of the site are demolished or unoccupied and those parts that are occupied are subject to temporary lets to a diverse range of small businesses. The freehold title to St Johns is registered under Title No. LT 56835. Don suggests, based on valuation evidence, that St Johns has a market value of some £3.5 million. At one time it might have had a much higher value (perhaps £7.2 million) if it could have been redeveloped for supermarket uses. But Morrisons, the supermarket which had expressed an interest in developing the site, had changed its business plans. Don exhibits a letter dated 22 January 2014 from Jones Lang Lasalle indicting that the latest feedback from Morrisons had been that Leicester was not an option which Morrisons wished to progress “at this time” due to a change of focus, weakening trading results and the feedback of Morrisons’ retail team. However, Jones Lang Lasalle go on to say that:-

* + “As always with the food sector, requirements are fast changing and we will continue a dialogue with [Morrisons]. It may be that if a mixed use scheme is promoted, we could secure a small format store as part of this, as Morrisons, as with all of the big four food retailers, are rolling out an aggressive programme of “local” format stores, at the same time, significantly rolling back their large store roll out programme”.

15. GVA Grimley Limited, in the marketing proposal, suggest an estimated realisation for St Johns of £7 to £7.5 million. But that is subject to significant caveats and assumptions. Most importantly, GVA’s marketing evaluation expressly states that it assumes that demand does exist for St Johns from a food store operator. Whilst it may, perhaps, be going too far to say (as Mr Lundie on behalf of Don submits) that there is no realistic possibility whatsoever of concluding a sale of St Johns to a food store operator, nevertheless the prospects of this occurring, presently, look extremely speculative.

**The Partnership – Financial Position**

16. The financial position of the partnership is perilous. Don and Jack owe The Royal Bank of Scotland Plc (“RBS”) £11 million which is secured by all monies charges on both properties. The partnership debt has recently been moved to the branch of RBS dealing with bad or doubtful debts (RBS Capital Resolution Group). I should, perhaps, add that, in fact, the lender to the partnership was National Westminster Bank Plc but the debt has been managed by its parent, RBS, and the parties throughout refer to the lender as being RBS (and I shall do the same).

17. Don has estimated that the annual shortfall to the partnership (outgoings over income) is some £162,105. Whilst the partnership has a modest overdraft that appears to be exhausted. The partnership appears to be unable to pay its debts as they fall due.

18. Don’s evidence suggests that he is a businessman of some substance in the Leicester area and that he cannot afford to suffer the potential losses which would arise if there were a forced sale of both properties. He is the person, he says, against whom the RBS will turn to recover any shortfall. Nor does he wish to suffer the reputational damage which would arise if, for example, RBS were to appoint LPA Receivers to both properties. Jack, he says, is being totally unreasonable and, in any event, Jack has no assets to meet the RBS loans. It is in these circumstances, Don says, that he puts his schemes to deal with the properties before the courts.

**The Allegations**

19. I have just dealt with the most important parts of Don’s allegations against Jack. Jack’s counter allegations are, put simply, that Don has been milking the partnership for a large number of years. Obviously these allegations, if put forward in a formal pleaded case, will have to be tried in due course. I express no views whatsoever on them.

20. I do need to note two aspects of Jack’s counter-allegations:-

* + (1) Jack suggests that to the extent that Don is funding Thurney in its proposed purchase of Chartwell Drive then Don is using money which he has wrongly acquired from the partnership;
  + (2) more importantly, Jack alleges that his signature has been forged on virtually all of the loan and security documentation entered into between (1) Don and Jack and (2) RBS. But, under section 5 of the Partnership Act 1890, Don would have been able to bind Jack as his partner. This applies “unless the partner so acting has in fact no authority for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.” The dealings of RBS were with the partnership. In the course of oral submissions I put to Dr Ahmad that whatever might be the ultimate result as between Don and Jack (if this forgery allegation were proved) still the RBS would not be affected (and the entitlement of the RBS to recover its monies from the properties would not be affected) unless RBS in some way knew that Jack’s signatures on the loan and the security documentation were forged. Dr Ahmad appeared minded to accept this proposition (albeit he was thinking on his feet and so I do not hold him to it). He indicated that he would have to take careful instructions after the hearing as to whether any such allegation could be made against RBS. He also indicated, with perfect propriety, that he would have to consider very carefully whether he, as a member of the bar, considered that there was sufficient evidence available to enable him to him to make any such allegation against RBS (whatever his instructions).

21. The present position, therefore, is this. Although, since before the hearing before Barling J, Jack has been threatening to join in the RBS in these proceedings still RBS is not a party to these proceedings. It may well never be a party to these proceedings. And no allegation whatsoever is presently before me to the effect that RBS is not entitled to enforce its loans and security against the properties. Perhaps such allegation will never be before the court.

22. I must, in these circumstances, proceed upon the basis that RBS is fully entitled to enforce its loans and securities. In any event, even if there were doubt about this, the basic point remains that in a winding up of a partnership all the assets of the partnership must be sold for the purposes of the winding up. The forgery issues do not, therefore, affect the decision which I have to make as to the manner of sale of, in particular, Chartwell Drive.

23. However, I am more than satisfied that there is a real risk that, before long, RBS will lose patience and take steps to enforce its security. Whether the figures for reduction in sale price quoted by LSH on a forced sale be right or wrong, I am more than satisfied that on any forced sale there will be a major loss to each of Don and Jack and that there will be a major reduction in the ultimate sale proceeds. I am also more than satisfied that the combined sale price of the properties will still leave the partnership indebted to RBS.

**The Pre-Emptive Sale Order**

24. I put to one side the order which Mr Lundie sought on Don’s behalf in respect of St Johns (since this was not the main focus of the hearing before me and was not the issue on which I reserved my judgment). If necessary the St Johns’ order can be considered in oral submissions at the next hearing before me (a hearing which I shall direct below).

25. As to the main issue, Chartwell Drive, Mr Lundie sought both before me and before Barling J an immediate, pre-emptive, order to sanction Chartwell Drive being sold to Thurney at a price of £3.4 million. There is evidence before me that a £3.1 million facility has been obtained by Thurney with HSBC (and which was accepted as long ago as 30 September 2013). I am satisfied, on the evidence before me, that Don has the balance of the monies available to fund Thurney in completing its purchase. Whilst the HSBC facility became time expired on 15 February 2014 (hence the urgency of the application before Barling J) it is now clear that HSBC would be prepared to re-offer the facility once a loan draw-down date were ascertained. But as with RBS the patience of HSBC cannot be taken as being incapable of exhaustion.

26. The essence of Mr Lundie’s submissions to me, on Don’s behalf, in support of such an order were:-

* + (1) that the partnership would be unlikely to get a better price and that the Thurney offer was in accordance with the valuation evidence before me;
  + (2) that there was great urgency in selling Chartwell Drive granted the perilous financial position of the partnership and, in particular, the threat of major losses if RBS were to enforce its security;
  + (3) that it could not be hoped that the HSBC funding would remain available to Thurney indefinitely.

27. When I asked Dr Ahmad whether I had jurisdiction to make such an order he conceded that I did. In my judgment he was right so to concede. As I have indicated, the assets of the partnership must be sold for the purposes of its winding-up. The court has power to control, and sanction, the terms of any sale. I undoubtedly have power to allow any partner to bid on that sale (notwithstanding the fact that Don has only a 70% shareholding in Thurney I treat him and Thurney as one and the same for present purposes). CPR 40.16 gives the court power to order a sale of land. Under paras 2 and 3 of PD40D the court has wide powers as to the manner in which such sale should be conducted (including authorising a party to bid). I do not see why the court should not have power, in an appropriate case, to sanction a particular sale to occur immediately, even if it is to a party.

28. But Dr Ahmad also cautioned me to exercise extreme care in making such an order. He submitted that such an order was most unusual and more than capable of working injustice on his client. Again he was right so to caution me. The order as sought by Mr Lundie is one for which Mr Lundie could find no precedent. And it is one whereby, against the wishes of Jack, Don will acquire an asset of the partnership.

29. When oral submissions were concluded, and even though I reserved my judgment, I had reached (in my own mind but not disclosed to the parties) the following broad conclusions:-

* + (1) that Chartwell Drive, granted the perilous financial position of the partnership and the threat of enforcement proceedings from RBS, needed to be sold very quickly;
  + (2) that, in this context, the Thurney offer looked extremely attractive;
  + (3) but, still, that I was not prepared to make the draconian pre-emptive sale order sought by Mr Lundie unless and until independent solicitors and estate agents had been appointed and some attempt had been made to assess the present market;
  + (4) that I was minded to re-list this matter before me sometime in September to review matters and to consider whether, at that time, I should sanction acceptance of the Thurney Offer.

30. The reasons set out above, and below, are the reasons for the conclusions which I had reached at the end of oral submissions on 11 July 2014 and. Thus, my decision on Mr Lundie’s application for a pre-emptive sale order as made on 11 July 2014 is that it is refused. My decision is that the matter will be re-listed before me in September so that I can consider whether, then, to sanction the sale of Chartwell Drive to Thurney.

31. Now, as it happens, my decision has been subsequently vindicated by what occurred after 11 July 2014. Without any permission from me, Don has produced a fourth witness statement dated 25 July 2014 which appears to have been submitted to me without the prior consent of Jack. Dr Ahmad has responded by email protesting at this course of conduct. I have considerable sympathy with what Dr Ahmad says. But there is one point contained in this fourth witness statement which I cannot ignore. Thurney has now increased its offer to purchase Chartwell Drive to £3.7 million. Apparently HSBC has agreed to increase its mortgage offer to Thurney by £100,000 on the basis that HSBC will be given additional collateral security over a property owned personally by Don’s son, James. Secondly, HSBC has agreed to lend Don, personally, £100,000. Thirdly, Don says that he has arranged a personal loan of £100,000. Don concludes his witness statement by saying that he has increased his offer in an attempt to prevent a damaging, costly and inconclusive marketing exercise rather than because he believes that Chartwell Drive is worth more than his own original offer. Whether that be right or wrong, the simple fact is that the effect of not granting Don his pre-emptive sale order on 11 July 2014 is that this refusal has increased the monies available to the partnership, from the sale of Chartwell Drive, by £300,000.

**Directions**

32. I direct that a further hearing take place before me in the 14 day period commencing Monday 22 September 2014. The parties are to liaise to agree a listing convenient to me. At that hearing I will consider whether, in the light of what has occurred since 11 July 2014, Thurney’s present offer of £3.7 million for Chartwell Drive should be sanctioned for acceptance by the court. At that hearing Jack will have the opportunity to answer (if he wishes to do so) any of the factual allegations contained in Don’s fourth witness statement (albeit that any evidence in answer from Jack must be served at least two clear days before the hearing).

33. But I think it is important that each of Don, Jack, RBS and HSBC should understand my present perceptions of what is likely to occur at that hearing. As it presently seems to me:-

* + (1) there is an urgent need for Chartwell Drive to be sold;
  + (2) the offer of £3.7 million from Thurney seems to me to be an extremely good one and unlikely, on the evidence presently before me, to be bettered;
  + (3) whilst I cannot fetter any future decision (since I do not know what submissions I will hear or what evidence will be before me) I should point out that, on the evidence presently before me, I am minded to sanction Thurney’s offer of £3.7 million for Chartwell Drive for immediate acceptance and exchange of contracts. I am likely to do so unless I have before me the most cogent evidence which suggests I should not so act. Such evidence is unlikely even to be arguably sufficiently cogent unless either (a) it comes from Spearing Waite LLP and/or the estate agents appointed by them and is to the effect that I should not sanction the sale at £3.7 million to Thurney or (b) it comes from a proper Red Book up to date valuation of Chartwell Drive which suggests that there has been a major change in the true market value of Chartwell Drive over and above the figures identified by LSH.

34. I am fortified in reaching these conclusions in that no sale of Chartwell Drive is possible without RBS agreeing to release its security thereover. Granted the large shortfall there will be to RBS even on the sale of Chartwell Drive at £3.7 million then I can derive some considerable comfort from the fact that RBS would not agree to release its security over Chartwell Drive unless it considered that a proper price were being paid.

35. At the next hearing I will also give directions for the conduct of the allegations which Jack presently makes against Don. Clearly, as it seems to me, the present Part 8 Claim Form needs to mutate into a true partnership action (since there will need to be a taking of accounts etc). But if Jack wishes to bring the allegations presently set out in his witness statements against Don, then provision must be made for these allegations to be properly pleaded, and fully particularised, in a statement of case. Equally, at the next hearing, consideration can be given as to whether RBS should be joined in these proceedings (if Jack wishes to join them in). I am conscious that, since the commencement of these proceedings, Jack has been willing to wound but afraid to strike so far as RBS is concerned. He has threatened to join RBS and challenged RBS’ right to receive the proceeds of sale of the property. But he has not actually formulated any case against RBS. The next hearing will be decision time for Jack on this.

**Hand down**

36. All judgments must be handed down in public (even if to an empty court). However, such are my commitments that I will not be able to hand down this judgment until at least a fortnight from the date of its first circulation to the parties (that first circulation occurring on 3 September 2014). Therefore, it would seem sensible to hand down judgment at the commencement of the hearing which is to take place in late September or early October.

37. But, in these circumstances, I must address the provisions of PD40E to CPD Part 40. Unless I direct otherwise, my judgment as circulated will be supplied in confidence to the parties and no action can be taken thereon (until formal hand down). As it seems to me, it is important not merely that Don and Jack but, also, that RBS and HSBC (and for that matter Spearing Waite LLP and the estate agents engaged by them) should know about, and be able to act upon, this judgment before its hand down.

38. Accordingly, under paragraph 2.2 of PD40E I direct that the provisions of paragraphs 2.3 to 2.9 (inclusive) of PD40E should not apply. Accordingly (and putting it in the simplest possible language as Jack is a litigant in person):-

* + (1) no confidence whatsoever attaches to this judgment as circulated by me prior to its hand down. It contents are in the public domain; and
  + (2) any one is free to take whatever action they deem to be appropriate on this judgment prior to its hand down.