

ENGLAND AND WALES / JUDGMENT

Hussain v Salam

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Neutral Citation Number: [2012] EWHC 1760 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION IN THE MATTER OF AN APPEAL FROM A DECISION OF THE ADJUDICATOR TO HER MAJESTY'S LAND REGISTRY IN THE MATTER OF TITLE NUMBER EGL352518 Case No: CH/2011/0676 Royal Courts of Justice Strand, London, WC2A 2LL Date: 26/06/2012 Appellant Respondent Before : Sir William Blackburne

- ----- Between : ZAKIR HUSSAIN
- and - ABDUS SALAM
- -----
- ----- Philip Rainey QC and Marc Glover (instructed by Wiseman Lee LLP)
for the Appellant Robert Mackenzie (instructed by Lawmans) for the Respondent Hearing
date: 28 May 2012
- -----

Judgment

Sir William Blackburne : 1. 2. 3. 4. This sets out my reasons for allowing the appeal of Mr Zakir Hussain from the decisions of Deputy Adjudicator Ann McCallister, sitting as Adjudicator to HM Land Registry, on 13 October and 3 November 2011 and for directing that the matter be remitted for a rehearing before a person other than Miss McCallister. I so ordered following the conclusion of counsels' submissions on 28 May when I also dealt with various costs issues. Since there is to be a rehearing I propose to confine myself to what is necessary to enable the background to this appeal and my reasons for allowing it to be understood. I am anxious not to say anything which suggests what the correct findings of fact which are relevant to the matters in dispute, much less what the conclusions are which should be drawn from those findings. Those will be for the person conducting the rehearing. The appellant, whom I shall refer to as Mr Hussain, is the son of the respondent, whom I shall refer to as Mr Salam. Mr Hussain appeared before me by Mr Philip Rainey QC leading Mr Marc Glover and Mr Salam by Mr Robert Mackenzie. Mr Hussain's appeal is brought with the permission of Vos J after an oral hearing on 28 February 2012. The dispute which has led to this appeal concerns the interests of Mr Hussain and Mr Salam in a registered leasehold property, with title number EGL 352518, at Flat 22, Hamilton House, British Street, London, E3 4NJ ("the property"). The background facts are conveniently set out in the following passages from the judgment of Vos J, given when he gave

permission to appeal, and which I gratefully adopt. “5 ... On 6th March 1996 Mr Hussain paid £250 on account of the purchase costs of the property to Bowling & Co, solicitors who were then acting for Mr Hussain and Mr Salam. At that stage Mr Hussain was aged 26. In July 1996 Mr Hussain’s Abbey National account had a balance of £18,657.20. 6. On 10th October 1996 Bowling & Co, the solicitors acting for Mr Hussain and Mr Salam in relation to the property, received £16,346.31 according to their ledgers, from “Abbey National”. On 4th November 1996 Mr Hussain and Mr Salam completed the purchase of a long lease of the Property under the Council’s right to buy scheme. The purchase price was £15,680 net after a 44 per cent tenant’s discount, which it is common ground is attributable to Mr Salam. Mr Salam says that Mr Hussain only contributed £4,000 towards the purchase, which he [says] was later paid back, whereas Mr Hussain says that he paid the entirety of the purchase price from his Abbey National account. In other words, Mr Hussain claims that he was the person who paid the £16,346.31 to Bowling & Co on 10th October 1996. Unfortunately the records cannot prove or disprove this at this remove. On 17th November 1996, however, Mr Hussain relies upon the fact that his Abbey National account was closed, with a balance of £5,494.44, a sum much reduced from the £18,000 balance in July 1996. On 28th November 1996 Mr Hussain and Mr Salam were registered as proprietors of the lease of the property at the Land Registry. 7. In March 1999 a charge that had been granted on the property was discharged. On 14th December 1999 Mr Hussain and Mr Salam allegedly entered into what is termed a “general agreement”. There appears to have been considerable evidence about the circumstances in which that document was entered into, and whether it was indeed entered into in 1999 as it states, but the agreement actually reads: “This agreement is made the 24th December 1999 between me [Mr Salam] and [Mr Hussain] that I [Mr Salam] of [the property] and my son [Mr Hussain] (same address) have mutually agreed and confirm that when I bought the above address property from the Council I received £4,000 from my son as a help towards the buying of the above flat on condition that I [Mr Salam] put my son [Mr Hussain’s] name on the Land Registry until I returned his money back by instalments. Today is the last day I returned his all money back as his last instalment respectively. I [Mr Hussain], son of [Mr Salam] would also like to confirm that today I received full amount of money back from my father as last instalment, therefore I have no any ownership rights along with my father’s flat. My father can remove my name from the Land Registration when he likes. We both agreed and signed below.” The general agreement is purportedly signed by both Mr Salam and Mr Hussain and witnessed by two illegible signatories. It was alleged that Miss Saliha Begum, the sister of Mr Hussain, witnessed Mr Hussain’s signature. Mr Hussain says, however, that he signed a blank document at his father’s request, and that his sister and Mr Salam were in Bangladesh at the date of the general agreement. In 2000 Mr Hussain allegedly paid sums of £765, 8. £1,200 and £605 for improvements to the property. Also in 2000 Mr Hussain moved from the property with his wife into the house that he had bought at 12 Lovage Approach, Beckton, London E6. Between 2000 and 2002 Mr Hussain alleged in evidence that he had let the property on his father’s behalf. In 2001 Mr Salam alleged that he had fallen out with his son and not seen him since that date, which is said to be impossible in the light of the evidence as to later events. On 6th February 2007 Mr Praful Shah, a businessman 9. who had had dealings with Mr Hussain, obtained judgment against Mr Hussain in the sum of £22,000-odd, albeit that Mr Hussain denies any knowledge of that judgment. On

23rd November 2007 Mr Shah obtained a final charging order over the property in respect of Mr Hussain's interests in that property but not of course Mr Salam's. On 25th March 2008 Mr Shah applied to register a restriction on the property to protect his charging order. 10. On 8th May 2009 an adjudication took place, directed by the Land Registrar. Professor Abby decided, as between Mr Salam and Mr Shah (but not Mr Hussain who was not a party to that adjudication) that the charging order did not attach to any part of the beneficial interest in the property. Professor Abby based himself on the general agreement of 24 th December

1999. It appears therefore that on that occasion Mr Salam was putting forward the general agreement as representing a true agreement between the parties. 11. On 4th November 2009 the Land Registry refused, at Mr Salam's request, to remove Mr Hussain from the title to the property. 12. On 17th February 2010 Mr Hussain allegedly signed a form ID1 (an identification form required by the Land Registry) and a form TR1 in respect of the transfer of the property from Mr Hussain and Mr Salam jointly to Mr Hussain alone. These documents were sent to the Land Registry by a firm of solicitors called Equitable Solicitors but were returned because, firstly, section B of the form ID1 had not been completed, and secondly because the TR1 was undated. On 24th May 2010 Mr Hussain wrote to the Land Registry saying that he was concerned about a fraudulent transfer of the property. The 17th September 2010 was the date that was entered on the signed transfer TR1 of Mr Hussain's interest in the property – the signed transfer TR1 to Mr Salam. 13. On 7th October 2010 the Land Registry gave Mr Hussain notice of an application for registration of a transfer. On 25th October 2010 Mr Hussain objected to the registration of the transfer, and on 10th February 2011 the matter was referred to the Adjudicator. On 14th September 2011 the Adjudicator heard the case and received evidence from Mr Hussain, his wife Miss Lily Khanam, Mr Salam and Mr Mohammed Abdul, who is married to another of Mr Salam's daughters, who said that he had witnessed Mr Hussain's signature on the TR1 transfer.” 5. In his statement of case setting out why he did not consent to the transfer of the property into the sole name of Mr Salam, Mr Hussain alleged that at all times he had been and remained the joint legal and beneficial owner of the property, that he did not understand what he was signing when he signed the transfer of the property and that the transfer in question was not properly executed as a deed. In his recital of the facts on which he intended to rely he explained, among other matters, how the purchase price for the property had been paid when he and Mr Salam acquired it in 1996 (setting out the matters summarised in the passages from Vos J's judgment which I have quoted). He noted that Mr Salam was relying, among other matters, on the general agreement in his attempt to have himself registered as sole proprietor and explained that he (Mr Hussain) had not knowingly signed that document and that, in any event, the agreement did not reflect the reality of the funding of the purchase of the property as earlier set out in the statement of case. He also denied having knowingly signed the TR1 form (the transfer on which Mr Salam relied) and the ID1 form (certifying who he was). 6. The Deputy Adjudicator gave her decision on 13 October 2011. She described the key issue as the validity of the transfer to Mr Salam. She concluded that Mr Hussain was aware, when he signed it, that he was signing a transfer to

Mr Salam, also that he signed the general agreement and was aware of the contents and purpose of the ID1. At paragraph 30 she stated that: “[b]y signing the General Agreement, Mr Hussain accepted that he had no beneficial interest in the Property, and accepted that he had originally contributed £4,000. This seems to me to dispose of the question as to whether Mr Hussain paid, as he says, the purchase price. It does not seem to me to be necessary to venture into speculating as to why Mr Hussain, having executed the Transfer, now wishes to resile from it. Family arrangements are often complex and changeable.” 7. 8. She concluded that Mr Hussain was not under any fundamental mistake as to what he was signing and was neither under any disability nor subject to any misrepresentation or undue influence when he did so. She therefore directed that effect should be given to Mr Salam’s application to register the title to the property in his sole name. Mr Hussain challenges many of the Deputy Adjudicator’s findings and criticises as one-sided (and therefore against the weight of the evidence) her evaluation of the evidence. He does so on the basis that, broadly stated, she too readily dismissed Mr Hussain’s evidence while accepting uncritically Mr Salam’s notwithstanding that, in the case of Mr Salam’s evidence, it was either something volunteered at the last minute or contradictory or obviously incredible or gainsaid by other evidence. I do not intend to go into any of these matters beyond making the following observations. First, although she did not do so, I would have expected the Deputy Adjudicator to have expressed a view on the credibility or otherwise of Mr Hussain and Mr Salam, not least when she commented favourably on the credibility of another of the witnesses. This is no mere counsel of perfection. The evidence of father and son was in conflict in a great many respects. Whose evidence did the Adjudicator prefer where this was so? Second, having been taken to quite a number of passages in the transcript of Mr Salam’s evidence, it is a little surprising that his evidence did not receive a more critical appraisal in the Decision. Third, the fact that she did not believe some at least of the evidence of Mr Hussain, as plainly she did not, did not of course mean that the evidence of Mr Salam was to be uncritically accepted. 9. Whether Mr Hussain’s criticisms of the Decision, as set out in his grounds of appeal, are justified and, if justified, whether they justify his contentions as to what he did or did not know of the actions of Mr Salam and Mr Shah at the time of adjudication of Mr Shah’s disputed application to register a restriction to protect the charging order (he claims he was ignorant of what was happening) and as to what he did or did not know about the documents that he (Mr Hussain) was signing and what led him to sign them - all of which are relevant to the issues that the Deputy Adjudicator did decide - I do not intend to explore. Instead I concentrate on just one important issue. That is Mr Hussain’s contention that the general agreement was a sham.

10. Mr Hussain’s difficulty here was that his primary case was that he was unaware of and did not knowingly sign that agreement. Mr Glover cross-examined Mr Salam about the agreement and put to him that, for various reasons, what the document stated was untrue (questions which, according to the transcript, Mr Salam did not satisfactorily answer). But he had a problem when it came to asserting a sham. Thus, as I read the transcript, when the

Deputy Adjudicator, in the context, of the earlier proceedings against Mr Shah, raised the notion that it suited everybody to put that version of the case i.e. the arrangement between Mr Hussain and Mr Salam set out in the general agreement, and then stated “Let us be careful. If this was a sham, it was a sham which suited both of them” (meaning both Mr Hussain and Mr Salam); Mr Glover responded immediately by stating “Madam, it is only a sham if you know about it.”

11. Mr Glover was correct about that: the jurisprudence on sham transactions is, as Vos J pointed out in his judgment at the permission stage when he quoted from the judgment of Diplock LJ in *Snook v London & West Riding Investments Ltd* [1967] ZQB 786, that a sham involves an act done or documents executed by the parties to it which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create. Mr Hussain’s case, however, was that he was in the dark about what was going on and was not knowingly a party to the general agreement. That was the implication of Mr Glover’s reply to the Deputy Adjudicator that I have just quoted. There could not therefore be a sham transaction to which he was a party. 12. That said, Mr Glover’s written closing submissions to the Deputy Adjudicator did raise as a possibility that the general agreement was indeed a sham. But he did so in what, to me at least, seems to be a rather tentative way. After asserting that the general agreement was clearly a sham the submissions in support then made a series of points the general drift of which was that the agreement had been concocted by Mr Salam behind Mr Hussain’s back. Indeed one of the footnotes to the submissions goes so far as to submit that “It is of note that it was not put to ZH [Mr Hussain] that he was involved in any deceit in regard to the [General] Agreement.” It is only in the very last of the points listed in support of the contention that the general agreement was a sham that it is stated: “The court may consider that both parties conspired at some point in time to fabricate the Agreement, to deceive some other party; and that now AS [Mr Salam] seeks to turn that document on ZH. In those circumstances the document is simply a sham, and has no evidential significance.” (I have added the emphasis.) 13. It appears that there was no time following the conclusion of the evidence to proceed to oral closing submissions and no opportunity afterwards to go over any of the points set out in the written closing submissions. This meant that they were considered wholly on paper and without the opportunity to develop them in oral argument. It is hardly surprising therefore that the issue whether the general agreement was a sham (as properly understood) and, if it was, what the effect that finding should have on the validity of the transfer to Mr Salam was not as fully explored by the Deputy Adjudicator as perhaps it should have been. But it is to be noted that the Deputy Adjudicator was aware of the use to which the general agreement was being put: in paragraph 16 of the Decision she refers to Mr Salam stating that: “his son gave him the document [the general agreement] to sign because he knew that Mr Shah [the person who obtained the judgment for £22,000 or so against Mr Hussain] was, as he put it, ‘coming after him’. The [general] Agreement was signed by his son in his presence. It was given to Mr Salam by his son to ‘see off’ Mr Shah’s claim.” The point made in submissions to

me by Mr Rainey was simply that if, as was being submitted to the Deputy Adjudicator on Mr Hussain's behalf and as she herself had heard in the evidence, the general agreement was used, to the knowledge of both Mr Salam and Mr Hussain (whom, she found had known what he was signing when he signed it), as a device to prevent Mr Shah from resorting to Mr Hussain's share of the property to satisfy the judgment debt obtained against him, there was at the very least a question mark over the genuineness and honesty of that agreement. Moreover it had been Mr Hussain's contention that the agreement had been entered into at some other (and much later) time than the date it bears, in support of which he was able to advance some cogent points. Once there was a credible basis for suggesting that the general agreement was indeed a sham then there existed a credible basis for the possibility (to put it no higher) that it did not represent any kind of agreement on, or recognition of, the basis upon which the property had been acquired by father and son in 1996. In that event, it fell to the Deputy Adjudicator to consider and come to a view on just how much Mr Hussain had contributed to the purchase of the property in 1996 and whether, as he contended, he had paid the entirety of the purchase price over and above the discount which, it was common ground, constituted Mr Salam's contribution to its acquisition. The Deputy Adjudicator had reviewed some of the evidence on this but had felt it unnecessary to reach any conclusion as, in her view (see the paragraph of the Decision set out above), the matter was concluded by the terms of the general agreement. But in so stating the Deputy Adjudicator was begging the very question which was raised by the allegation of a sham (admittedly not very cogently made) and the evidence before her supportive of that conclusion and indicative of a quite different sharing of the beneficial ownership of the property when it was acquired. 14. 15. 16. As a matter of law there was no reason why Mr Hussain should not have been entitled to impugn the general agreement as a sham, notwithstanding its purpose as a 17. 18. 19. dishonest means of enabling him to "see off" Mr Shah. See *Vickers v Jackson* [2011] 3 EGLR 65 (CA) at [20] to [23] to which Mr Rainey drew my attention. If the general agreement was a sham then it must follow, as it seems to me, that Mr Hussain's objection to the registration of the TR1 signed by him in purported pursuance of that agreement is well founded. It is not necessary in reaching that conclusion to advert to the points on section 25 of the Land Registration Act 2002 and on various of the Land Registration Rules 2003 set out in the skeleton argument of Mr Rainey and Mr Glover. In the result therefore the failure of the Deputy Adjudicator to reach a conclusion on these matters (was the general agreement a sham and, if it was, how was the property beneficially owned by father and son?), means that the case must be remitted for the necessary findings of fact to be reached to enable these matters to be determined. The material does not exist to allow this court, sitting in a purely appellate capacity, to do so. I should add that Mr Mackenzie sensibly did not suggest that these matters were not ones that should have been investigated. As the Deputy Adjudicator disbelieved important parts of Mr Hussain's evidence going to issues which Mr Hussain seeks on appeal to challenge (and in respects, so far as they were explored, which were not without substance) and as she had seemingly accepted uncritically much if not all of the evidence given or adduced by Mr Salam, it would only be right, I think, that the remitted hearing be conducted by some person other than Miss McAllister. It is to be hoped

that when the matter is reheard there is none of the noise interference from neighbouring building works which (as was evident from the transcripts and as counsel informed me) made Miss McAllister's task even more difficult than it was already. 20. These then are my reasons for the decision I announced at the conclusion of the argument before me.

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