



IN THE COUNTY COURT AT MANCHESTER

Case No: A02MA985

Date: 25/05/2016

Before :

HIS HONOUR JUDGE BIRD

Between :

Dr. MALIK ANWAR

- and -

FARZANA ANWAR



Defendant

Mr Vinson (instructed by TLT LLP) for the **Claimant**
Mr Wilkinson (instructed by Mustafa Solicitor) for the **Defendant**

Hearing dates:

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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HIS HONOUR JUDGE BIRD

His Honour Judge Bird :

1. This case concerns the amount of money the Claimant Dr Malik is entitled to out of the net proceeds of sale of a property at one time occupied by the Defendant and charged to Dr Malik. The property has been sold.
2. There are 2 main protagonists in the claim, they are the Claimant and Mr Muhammed Sadiq Karim.

Background

3. Much of what appears under this heading is gathered from documents disclosed in the claim. The documents form a useful framework against which to assess the oral evidence of the witnesses.
4. In 2005 Dr Malik advanced sums of money to Mr Karim. At the time Mr Karim was, as he put it himself, "a man of substance", with a successful restaurant business and interests in property development. There is an issue about when the advance would be repayable. It is however agreed that when it was paid back, a lump sum of £30,000 or £40,000 would be paid with it.
5. Mr Karim provided workers to do work on properties owned by Dr Malik in Drake Street in Rochdale. The arrangement appears to have been an informal one with no agreement at the time about what Dr Malik would pay for such provision.
6. On 3 April 2010 Mr Karim wrote to Dr Malik whilst both were at Mr Karim's home. The letter records an acceptance that Mr Malik has received a cash advance of £163,500 from Dr Malik. The letter goes on to record the following proposal:

"I propose to have my sister grant you a second mortgage on the property 1 Wilton Road Crumpsall...to provide for that figure to be forwarded to you on August the 30th 2010 or sooner on such earlier date which the property is sold."
7. The letter then made reference to the work done for Dr Malik:

"we will have to agree the figure separately which you owe to me for the works carried out to your properties at 107 and 154 Drake Street Rochdale".
8. The payment date of 30 August 2010 came and went and the full sum was not repaid. Between August 2010 and August 2011 Mr Karim and Dr Malik negotiated. They did so with the assistance of a respected member of the Manchester Pakistani community, Mr Qayyum Ansari. With no objection from either side I have heard about the course of the negotiations and from Mr Ansari in evidence.
9. A charge over the property was executed on 3 November 2011. The following appears from the charge:
 - a. The parties to it are the borrower (the Defendant) and the Lender (Dr Malik).
 - b. The property is charged by clause 9.1 "with the payment to the Lender by [Mr Karim] on 20 April 2012 of the sum of £125,000 together with interest thereon calculated from the date hereof to the date of payment at the rate of 5% per annum above the bank of England base lending rate from time to time"

- c. The charge was to rank in priority behind an existing charge granted in favour of the Co-operative Bank on 28 August 1991 and "a charge to be granted by the Borrower to National Westminster bank by which the Borrower will charge the property to the said bank by way of legal charge to secure the payment to the said bank by the said [Mr Karim] of a sum not exceeding £110,000"
- d. By clause 9.4 the following is recorded: "The sum of £125,000 referred to in clause 9.1is acknowledged by the Borrower and the Lender to be the sum due and payable by the said [Mr Karim] to the Lender....."

10. There were difficulties in registering the charge. On 6 February 2012 Mr Brook, then Dr Malik's solicitor wrote to Mr Karim. He noted:

"we have not been able to obtain the security on the property and in such circumstances we are accordingly instructed by our client to require payment of the sum of £163,500 within 7 days"

11. The 20 April 2012 came and went without payment. On 30 November 2012 Dr Malik issued mortgage possession proceedings. On 20 May 2013 a possession order was made. On 4 July 2013 Dr Malik asked the court to issue a warrant of possession. The application confirmed the debt then to be £136,674.14.

12. In August or September 2013 a payment was made through intermediaries by Mr Karim to Dr Malik in Pakistan of 18 million Pakistan Rupees. The parties now agree that the payment was made and agree the payment had a sterling equivalent of £111,000. The agreement is however relatively recent.

13. In October 2013 Mr Karim's solicitor's raised the issue of the Pakistan payment. In a letter of 28 October 2013 the solicitor notes:

"my instructions are that the sum of moneywas duly paid over....in Pakistan...would you please confirm that Dr Malik accepts he has received payment ...and that it has been credited against the sum due as secured by the charge which he holds".

On 5 November 2013 Dr Malik's solicitor responded:

"I have now spoken with my client. I am advised by him that he has no knowledge of monies being paid to any members of his family."

14. The denial of receipt clearly caused some consternation in the Karim camp. On 14 November 2013 Mr Karim's solicitor provided Dr Malik's solicitor with a statement prepared by Mr Berjeez. The solicitor asked for confirmation that Dr Malik accepted that he had received the money. The following appears from the statement:

- a. Mr Berjeez acted as a go between for Mr Karim and Dr Malik.
- b. Mr Karim paid Mr Berjeez 18 M PR for onward transmission to Dr Malik.
- c. Dr Malik agreed that he would accept the money in reduction of the charge and that the money should be handed to his nephew Mohsen Malik.
- d. On 13 September 2013 Mohsen Malik visited Mr Berjeez's office where Mr Berjeez gave him a cheque for 18 Million Pakistani Rupees drawn on his own account.
- e. The cheque was cashed.

15. Despite being chased for a response to the request nothing had been received by 9 January 2014 when it came to the attention of Mr Karim's solicitors that the property was to be auctioned. On 13 January 2014 Dr Malik's solicitors responded saying that they were unable to get full instructions as Dr Malik was unwell.
16. By 21 January 2014 there was still no response. On that date Mr Karim's solicitors wrote to Dr Malik's. They set out a calculation which took account of the September payment made in Pakistan and of interest. Taking a lower sterling value for the September payment of £105,000 the sum required to redeem the charge was put at £33,582.22.
17. Again there was no answer. On 27 January 2014 Mr Karim's solicitors threatened to issue proceedings. The letter enclosed a further statement, this time from Mr Ansari. The following appears from the statement:
 - a. He acted as intermediary in the discussions that led to the grant of the charge
 - b. Dr Malik had confirmed to him that he had received the money paid in Pakistan and that it was in reduction of the debt covered by the charge
18. Mr Karim found himself in a difficult position. He had given £111,000 to Mr Berjeez to pay to Dr Malik. Dr Malik said he had not received the money. Mr Karim appears to have trusted what Dr Malik said. He therefore made a criminal complaint against Mr Barjeez in Pakistan and issued civil proceedings there to recover the money.
19. The property was sold at auction on 30 April 2014. The purchase price was £226,000. Completion was due to take place on 28 May 2014.
20. On 3 June 2014, more than 7 months after the question had been asked, Dr Malik's solicitor wrote:

"I have now taken instructions from my client he does not accept that he has received payment of any of these monies due and owing to him and as such he is insistent that I repay the balance of the monies due and owing to him together with any interest thereon".
21. On 5 June Dr Malik's solicitors forward a detailed statement showing monies received and paid out from the sale proceeds. Total receipts were £226,289.20. Payments including costs and the redemption of the first charge left a total of £152,800.80 retained in the hands of Dr Malik.
22. On 12 June 2014 a letter was written on the headed notepaper of Malik Legal Solicitors Limited. It is addressed to Mr Karim and is striking in a number of respects. First its content is unusual. For example, referring to the advance it says this: "the loan was for £163,500 for the purchase of a school on 22 July 2005 and was sold on 30 April 2007. Our client only became aware of this sale in 2011, therefore you mislead our client whilst not being a fully, honest, trustworthy individual". Secondly it makes assertions about the law which are outlandish and plainly wrong:

"as you are aware unsecured loan interest can be charged anything from 30% to 50%. Therefore, the total now due is £960,431.00. Our client has calculated this based on 30% compounded yearly".

The letter goes on to say this:

"On 1 August 2008 you paid £20,000. On 17 February 2012 our client obtained a charge on your property for the sum of £125,000. A further payment of £111,000 was paid by you on 22 August 2013. These deductions have been made in our client's calculation".

23. The letter of 12 June was relied upon by Mr Berjeez in the ongoing proceedings in Pakistan.
24. Dr Malik issued proceedings on 22 July 2014. The solicitors acting for him were Abbey Solicitors.
25. It was only on 29 September 2015 on service of the amended Defence to Counterclaim that Dr Malik accepted money was received in Pakistan.

The Issues

26. The real issues in the claim are narrow:
 - a. Is Dr Malik to give credit for the £111,000 received in Pakistan in August or September 2013?
 - b. Does the November 2011 charge rank behind a debt of £110,000 to the Nat West bank?
27. In resolving the first issue I must decide if the payment of £125,000 plus interest of 5% above base from the due date of payment in April 2012 secured by the charge represented a compromise of debts owed by Mr Karim to Dr Malik or if there were debts which were not compromised.
28. In considering the second issue I need only consider the terms of the charge dealing with priorities. Insofar as relevant the charge provides that it will rank behind "a charge to be granted by the Borrower to National Westminster bank by which the Borrower will charge the property to the said bank by way of legal charge to secure the payment to the said bank by the said [Mr Karim] of a sum not exceeding £110,000".
29. It is agreed that no charge was ever formally granted or registered in favour of the Bank. The position then in my judgment is clear. If a charge had been registered in favour of the Bank it would have had priority over the charge of November 2011. No such charge was created or has been registered. It follows that no issue of priority arises.

The evidence

30. The Claimant was the only witness called in support of his case. Dr Malik is a frail man who is unwell. He is a wheelchair user and is dependent on oxygen. Despite his difficulties I am satisfied that Dr Malik had every opportunity to present his case.
31. In support of the Defendant's case I heard from the Defendant herself, from Mr Karim and Mr Ansari. They were the main witnesses. In addition, I heard from Mr Ali and from Mr Ahmed. They gave evidence which was designed to corroborate the evidence of others.
32. The Claimant told me that the workers Mr Karim had arranged to do work for him were "cowboys" and drank all the time. He told me that no agreement about payment was ever

reached and that he would only pay if the work was “good”. Whilst he accepted that the charge over the proceeds of sale of the Defendant’s home was limited to £125,000 he told me that “it was always understood that I was entitled to more”. He told me that the acceptance of £125,000 was not a compromise of the debt owed to him by Mr Karim. When asked about the money paid to him in Pakistan he told me that the money was accepted “under compulsion”. He also said that the money remains in Pakistan. When asked why his solicitors had conveyed his instruction on 5 November 2013 that he had received no money in Pakistan, he told me that the money he received had nothing to do with the charge. He told me that when faced with the letter of 21 January 2014 he told his solicitors that the money paid had nothing to do with the charge, rather the money was paid by reason of a dispute with Mr Karim who owed him “a lot of money”, but that they failed to pass on that explanation. He told me that in 2007 Mr Karim “gave everyone money” but asked rhetorically: “why did he not give any to me?”. When pressed for more in re-examination about what he had said to his solicitors Dr Malik said this:

“I told them I had a case against Karim. At least £150,000. If that money had been given to me in 2007 I could have enjoyed my life. But all my life savings were given to him. I was a vulnerable old man.”

33. The Defendant’s evidence revealed that she knew nothing about the dealings between her brother and Dr Malik.
34. Mr Karim was a confident witness. Mr Karim told me that a good deal of business is transacted in the Pakistani community on the basis of trust. He told me that when dealing with Mr Ansari he was simply interested in discussing a final figure that could be agreed upon and had little interest in how the figure was reached as a matter of mathematics. He told me that the money that was paid in Pakistan was paid in part settlement of the charged debt. When it was put to Mr Karim that the sum was not related to the charged debt he asked “what other sum is there?”. His evidence was that the agreement to pay £125,000 was in full and final settlement of the dealings between him and Dr Malik.
35. Mr Ansari seemed to me to be uncomfortable when giving evidence. He appeared to have a good deal to say and was anxious to get things “off his chest”. He told me that Dr Malik had asked him to take on the role of mediator. He told me that he had brokered the deal that led to the execution of the charge and that Dr Malik agreed that the payment of £125,000 (plus interest if needs be) was a payment made “in full and final amount to settle”. He told me that, apart from the £125,000, “there was no other money”. He told me “there was only one loan....it was all settled in 2011”. Of Dr Malik he said this: “Dr Malik was a very honourable respected manhe was a humble and honest man for most of the time I knew him. He never told me he believed that Mr Karim owed him more money.” He told me that he took his responsibility as a community mediator seriously. He said that when Dr Malik began to claim that he had not received the money in Pakistan or that the money was unconnected to the charged sum, that he felt that these issues were not “just someone else’s problem. I wanted to go to the end. It was my responsibility. The choice of me as mediator was a matter of respect.”.
36. Mr Ali told me that he was present when Dr Malik agreed that the charged sum of £125,000 was in full and final settlement of debts owed by Mr Karim to Dr Malik and of debts owed by Dr Malik to Mr Karim. He denied when it was put to him, that the £125,000 was a temporary measure. He told me that he remembered Dr Malik talking about taking revenge on Mr Karim. When it was suggested that he was mistaken he was adamant that that was not the

case. As he put it to me "it was in my language and I remember it".

37. Mr Ahmed told me about the process of mediation of disputes in the Pakistani Community. He said: "we often in our community sit together and try to resolve things before they get to court."
38. Before leaving my factual account of the evidence I observe that there was no oral evidence or documentary evidence about any debt owed to Dr Malik by Mr Karim apart from the debt that arose out of the advance of £163,5000 and that there was no evidence of the quality of building works undertaken by Mr Karim's workers for Dr Malik.

Findings on the evidence

39. The correspondence provides a useful framework against which to measure the oral evidence. The context in which the dispute arose and a community mediator appointed is important.
40. I found Mr Karim to be a helpful and honest witness. I accept that he trusted Dr Malik implicitly until the latter stages of this dispute. It is striking that he commenced criminal and civil proceedings in Pakistan against Mr Berjeez, simply because Dr Malik denied that he had received the money. It did not occur to Mr Karim to doubt what Dr Malik said. I accept Mr Karim's evidence that the figure of £125,000 (plus interest if paid late) was a figure agreed in full and final settlement of all debts between him and Dr Malik. I have been unable to find, and Dr Malik was unable to identify any debt which arose outside the arrangement that was compromised at £125,000 (plus interest). He made payments towards the debt when he could and signed the 3 April 2010 letter acknowledging the debt but making it plain that the payment for work done would need to be brought into the mix.
41. I found Mr Ansari to be a very impressive witness. His anxiety to tell his story and occasional discomfort was in my view borne of a real desire to convey to me and to the court the weight of responsibility that he had accepted as an appointed mediator. Mr Ansari took the responsibility that had been given to him very seriously. He regarded it as a privilege to be asked to mediate. I have no doubt that in giving his evidence he was absolutely truthful. I accept that he brokered a deal that was acceptable to both parties and that that deal was partly recorded in the terms of the charge and that the payment of £125,000 (plus interest) was always to be a payment in full and final settlement of the disputes between the parties. I find that there was no question that the charge was a temporary measure or that there was any common understanding that a payment of any more than that set out in the charge would be needed to bring matters to a close.
42. I accept Mr Ali's evidence and Mr Ahmed's evidence which fully supports and corroborates that of Mr Ansari and Mr Karim.
43. I take a different view of Dr Malik's evidence. Dr Malik's explanation as to why the money received in Pakistan should not be credited to the sums due under the charge was empty and unbelievable. The only basis for there to be further sums owed was Dr Malik's own view that he had somehow been short changed and let down by Mr Karim and that he should be compensated for being kept out of his money for what he felt was a long time. He maintained the denial that the money should be credited throughout his evidence and even resorted (wrongly in my judgment) to blaming his former solicitors for failing to pass on in correspondence the limited explanations he had given. Dr Malik's evidence was entirely self-

serving.

44. The letter written on the headed notepaper of Malik Legal Solicitors Limited is an enigma. I have not heard from Malik Legal Solicitors and so am in no position to make a finding about whether they wrote the letter or it came into existence in some other way. If the letter was written by a solicitor or employee of a solicitor it is little short of shocking. I accept the submission that the letter was created in order to help Mr Berjeez in the Pakistan litigation. It seems to me that the letter also allowed Dr Malik to admit that he had received the money and yet still maintain, because the debt was apparently so large, that the payment should not be credited to the sum secured by the charge.
45. I therefore have concluded that I should reject Dr Malik's evidence, save to the extent that it is corroborated by the Defendant's witnesses entirely. I regret to say that I found Dr Malik's evidence to be dishonest.
46. Before leaving my conclusions I should deal with one further evidential matter. In a statement not prepared for these proceedings Mr Berjeez has recorded that the money paid over in Pakistan was nothing to do with the charge. I have not heard from Mr Berjeez. I am satisfied that the evidence I heard and rejected from Dr Malik and heard and accepted from the Defendant's witnesses is amply sufficient to allow me to reject that evidence.

Submissions

47. I need not dwell on the submissions. They were focussed and helpful. The outcome of this dispute turns in my view on my determinations of fact and not on the law.
48. The terms of the charge were referred to. It seems to me that those terms confirm the conclusion I have reached. Dr Malik had legal advice and accepted that the charge recorded an agreement that the account between him and Mr Karim had been agreed at £125,000.

The result

49. Mr Wilkinson, counsel for the Defendant, has prepared a useful analysis of the present state of account between the parties. For reasons that I need not go into the net proceeds of sale of the house were paid to Dr Malik (and received for his benefit) in the sum of £152,800.80. When account is taken of the sum received in Pakistan and interest added in accordance with the terms of the charge Dr Malik must, in the findings I have made, account to the Defendant in the sum of £125,833.01.
50. In short Dr Malik has received much more than he was entitled to.

Conclusion

51. My order is that Dr Malik must pay the sum of £125,833.01. The parties may agree any further interest calculations and in default of agreement I will determine the issue.

-end-