Neutral Citation Number: [2019] EWCA Civ 225

Case No: A3/2018/0011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
BUSINESS LIST
MR JUSTICE HENRY CARR
[2017] EWHC 3596 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before :

LORD JUSTICE BEAN
LORD JUSTICE MALES

- -

Between :

GHASSEMIAN HAMILA SARTIPY (AKA HAMILA SARTIPY)	**Appellant**
- and -	
TIGRIS INDUSTRIES INC.	**Respondent**

- -
- -

The Appellant attended in person
The Respondent was not represented

Hearing date Thursday 21st February 2019

- -

Approved Judgment

.....

Lord Justice Males :

Introduction

1. This is an appeal from the order of Henry Carr J made on 18 December 2017 which (1) set aside an order made by Garnham J dated 25 July 2017, (2) struck out the appellant's claim on the basis that the real claimant was her son who is subject to an extended civil restraint order (hereafter "ECRO"), (3) granted in the alternative summary judgment against the appellant on the basis that the claim had no real prospect of success, (4) certified that the claim was totally without merit and an abuse of process, and (5) made the appellant subject to an ECRO.

2. Permission to appeal to this court was sought on a number of grounds, but was granted by Newey LJ only on one narrow point. This was that the judge had no jurisdiction to impose an ECRO on the appellant because she, as distinct from her son, is not a party who has "persistently issued claims or made applications which are totally without merit". It is said that the judge wrongly attributed to the appellant responsibility for applications which had been made by her son and not by her.

3. The appellant is Mrs Ghassemian Hamila Sartipy, also known as Mrs Hamila Sartipy. Her son is Mr Shahrooz Ghassemian, also known as Mr Shahrooz Langroody. For consistency I shall refer to them as Mrs Sartipy and Mr Langroody respectively. The respondent is Tigris Industries Inc ("Tigris"), the registered owner of a property at Earl's Court in London.

4. Mrs Sartipy was not legally represented below but the judge permitted Mr Langroody to make submissions on behalf of his mother. Tigris was represented by counsel and solicitors. On the appeal once again Mrs Sartipy was not legally represented but we permitted Mr Langroody to make submissions on her behalf. In addition we had the benefit of and have considered a skeleton argument and chronology prepared by counsel for Mrs Sartipy seeking permission to appeal. The respondent Tigris, which has apparently now received the money to which it is entitled, took no part in the appeal.

The *Taylor v Lawrence* application

5. At the hearing Mr Langroody sought permission pursuant to the *Taylor v Lawrence* jurisdiction [2002] EWCA Civ 90, [2003] QB 528 now set out in CPR 52.30 to reopen one of the grounds of appeal for which Newey LJ had refused permission. This was that Henry Carr J ought to have recused himself on the ground of bias. We permitted Mr Langroody to make this application orally, albeit that this was not in compliance with the procedure set out in CPR PD 52A, para 7. Once he had done so, we refused permission and indicated that we would give our reasons for this decision in writing.

6. It was Mrs Sartipy's case that Henry Carr J was biased against her and her son as a result of findings made by him in a judgment dated 3 March 2016 which had resulted in an ECRO being made against Mr Langroody. In that judgment the judge found that Mr Langroody had repeatedly attempted to mislead the court, had lied in his witness statement and had falsified documents to support his case. The judge referred this conduct to the Attorney General. We were told that the Attorney General referred it to the Crown Prosecution Service and that criminal proceedings against Mr Langroody are ongoing.

7. The question whether the judge should have recused himself was dealt with by Newey LJ in refusing permission to appeal on this point as follows:

> "There is no question of his having been obliged to recuse himself. The order said to have been made by Proudman J on 19 May 2016, even supposing it to be genuine (which seems very doubtful), dealt only with case allocation and cannot of itself have precluded the judge from hearing the matter. Nor would a fair minded observer conclude that there was a real possibility of the judge being biased. To the contrary, this familiarity with litigation involving Mrs Sartipy and Mr [Langroody] was an advantage."

8. I should explain that "the order said to have been made by Proudman J" was a reference to a document, apparently sealed by the court, which purported to be an order that "Any future matters relating to [Mr Langroody] or Mrs Sartipy including her claim issued today (HC-2016-001559) not be put before Mr Justice Henry Carr". Like Newey LJ, I have grave doubts as to the genuineness of this order.

9. As CPR 52.30 makes clear, the jurisdiction to reopen the final determination of any appeal (which includes an application for permission to appeal) will not be exercised unless it is necessary to do so in order to avoid real injustice and the circumstances are exceptional and make it appropriate to do so. Those criteria do not come close to being satisfied in this case. No good reason was put forward to call Newey LJ's decision into question. I agree with his reasoning and conclusion on the point which I have set out above.

10. These were my reasons for refusing permission to reopen the refusal of permission to appeal on the bias issue. I turn therefore to the sole ground on which permission to appeal was given.

Background

11. The background to this appeal is somewhat tangled but much of it needs to be set out in order to explain how the issue arises. As Mrs Sartipy and Mr Langroody have been frequent visitors to the courts over a number of years, their story has often been told. I can adopt the account given by Lewison LJ in *Tigris Industries Inc v Ghassemian (aka Ghassemian Hamila Sartipy)* [2016] EWCA Civ 269:

> "2. The extraordinary story in this case begins with a bogus claim to have acquired title by adverse possession of land registered in the name of Tigris Industries Inc supported by forged and fabricated documents. One of the claimants was [Mrs Sartipy] and another was her son, [Mr Langroody]. The deputy adjudicator found that Mr Langroody had 'created an elaborate and false paper trail to support his case which … simply does not stand up to scrutiny'. The adjudicator awarded Tigris their costs and also ordered the payment of £60,000 on account. Neither [Mrs Sartipy] nor Mr Langroody complied with that order, so Tigris applied for a charging order over a flat registered in [Mrs Sartipy's] name. In fact, the name shown in the title register was 'Ghassamian Hamila Sartipy'.
>
> 3. In December [2010] an interim charging order was made. The next step in the procedure is for an application to be made to make an interim order final. If [Mrs Sartipy] had no beneficial interest in the flat, that would have been a complete

answer to the application to confirm the interim order. However, when the application came before Deputy Master Bard on 20 June 2011 the argument put before him was that [Mrs Sartipy] was not a party to the proceedings before the adjudicator and for that reason the charging order should not have been made.

4. As the Deputy Master put it, 'the issue for today is whether the Hamila Ghassamian named in those proceedings is, or falls to be, treated as Hamila Sartipy, the defendant Tigris seeks to enforce against'. After hearing evidence of identification, he held that they were one and the same. No other reason was advanced for not making the charging order final. Mrs Sartipy … applied for permission to appeal … That application came before Spencer J on 16 September 2011.

5. The only point of any substance that was argued by leading counsel then appearing for Mrs Sartipy was that she should have been permitted to give evidence by way of video-link from Iran. In a comprehensive judgment, Spencer J refused permission to appeal. The next thing that happened was that Mrs Sartipy made an application to reopen the appeal under CPR Part 52.17. The grounds on which the application was made all concern the question of Mrs Sartipy's whereabouts at the time of the hearing before Deputy Master Bard. Not surprisingly, on 2 February 2012 Nicol J refused to reopen the appeal, so the final charging order stood.

6. While all this was going on, Tigris issued a Part 8 claim form seeking to enforce the charging order by an order for sale. That application came before Master Teverson in the Chancery Division. The claim was issued on 23 December 2011 and was listed for a disposal hearing on 21 March 2012. Five days before the due date for that hearing solicitors apparently acting for Mrs Sartipy sent Tigris what purported to be a copy of a declaration of trust in the flat by Mrs Sartipy in favour of her late husband and a copy of her husband's will. The former bore the date 13 June 1986 and the latter bore the date 8 March 2001.

7. Under the terms of the declaration of trust, Mr Ghassamian [i.e. the late husband] owned the entire beneficial interest in the flat to the exclusion of Mrs Sartipy. Under the terms of the will, the flat was left to Mr Ghassamian's executors and trustees on very wide discretionary trusts. The argument that Mrs Sartipy now wished to advance was that she had no beneficial interest in the flat and therefore the order for sale ought to be refused. Not surprisingly, one question that arose immediately was why this defence had not been raised before. Mrs Sartipy was ordered to make a witness statement to explain her position. She duly did so, but has steadfastly refused to submit herself for cross-examination.

8. The case for Tigris was that both the documents on which Mrs Sartipy relied were either forgeries or shams. Mrs Sartipy failed to attend the hearing and thus her evidence was never tested. That was the issue that faced Master Teverson. He recorded in paragraph 12 of his judgment that 'I acceded to a request made on behalf of Mrs Sartipy to decide whether the documents now being relied upon by her were genuine in the light of the written evidence'. That was a binary question; the Master could answer 'yes' or 'no'.

9. The Master held a hearing on 9 and 10 August 2012 and arranged to give a judgment on 22 September. On 14 September an application was made on Mrs

Sartipy's behalf to rely on yet further evidence. This additional evidence contained what purported to be a transcript of a judgment by District Judge Madge in the West London County Court which was said to support the conclusion that the two documents were not mere forgeries.

10. Master Teverson allowed the evidence to be adduced and permitted Tigris an opportunity to answer it. The hearing was relisted for 26 October 2012. Master Teverson recorded in paragraph 66 of his judgment:

> 'I raised with counsel whether I should give directions for a trial rather than proceeding to determine the matter on the written evidence alone. Neither encouraged me to take that course. I asked Mr Upton [counsel for Mrs Sartipy] whether he wanted a further opportunity for Mrs Sartipy to attend for cross-examination in the future. Mr Upton did not invite me to give her that opportunity.'

11. When he considered the material before him, Master Teverson was not satisfied that the declaration of trust was what it purported on its face to be. What he said in paragraph 84 of his judgment was this:

> 'On the evidence before me I am not satisfied that the Declaration of Trust is what it purports on its face to be. I am not satisfied it was professionally prepared by Mills Thomas. I am not satisfied it was made on about the date on which it purports on its face to have been made.'

12. He also came to the clear conclusion that it was a sham document. He explained that by that he meant that 'whenever it was made it was not genuinely intended to create a trust but was intended to be 'put in the safe for a rainy day'.'. Master Teverson's order contained a recital to the following effect: 'AND UPON the Court not being satisfied that the Declaration of Trust and Will relied upon by the Defendant are genuine documents nor being willing to give effect to them.' Mrs Sartipy appealed again and her appeal was heard by Norris J. His decision is at [2014] EWHC 3362 (Ch) … Norris J recounted the procedural history in detail, including a number of disturbing procedural features of the appeal before him which need not be described for present purposes.

13. He dealt first with the burden of proof. He held that the overall burden of proof was on Tigris to show that it was entitled to an order for sale. He held that Tigris had discharged that burden by showing (1) that it had the benefit of the charging order against the property, and (2) that the property was registered in the name of Mrs Sartipy, the former registration being in a sole name without any restriction or notice, giving no hint of any trust and entitling it to rely upon the presumption that equity follows the law and that the beneficial ownership was identical with the legal ownership.

14. He made the highly questionable assumption in Mrs Sartipy's favour that she was entitled to go behind the charging order and mount a collateral attack on it. I would have thought that the argument being advanced, if it was to be advanced at all, should have been advanced when the question of making the final charging order was before the court because it would have been a complete answer. It is, I

think, difficult to conceive of a clearer case of an abuse of process, but the point was not argued so I leave that to one side for the moment.

15. Norris J continued at paragraph [25]:

> 'She alleged she was a bare trustee, and an evidential burden lay on her to prove what she alleged. She did so by producing the photocopy Declaration of Trust. Simply producing a piece of paper proves nothing, unless the paper is admitted to be genuine. For obvious reasons the authenticity of this document was put in issue. So an evidential burden then lay upon Mrs Sartipy to adduce evidence of such quality as to the authenticity of the document as to prevent Tigris persuading the Court on a consideration of all of the evidence that on the balance of probabilities, the property beneficially belonged to her: that is what being required to 'prove' the authenticity of the Declaration of Trust at trial entailed. Such was the strength of the presumptions deriving from the Charging Order and the form of registration (for the regularity of Court Orders and the accuracy of the registers of title is essential to civic and commercial life) that she had to show that the Declaration of Trust was probably authentic: for anything less than that would have left Tigris proving its case on the balance of probability.'

16. I agree. Norris J then turned to the second ground of appeal, which he described thus at [29]:

> 'The second ground of appeal as formulated proceeds on the footing that in order not to accept the Declaration of Trust as genuine the Master had to be persuaded by Tigris that it was a fraudulent document or a sham: and that these serious allegations required cogent evidence for their proof. As I have indicated I consider that this wrongly excludes the possibility of the Master simply not being satisfied as to the authenticity of the document. But the ground of appeal can be reformulated as a submission that the only lawful conclusion on the evidence produced was that the Declaration of Trust was a genuine document.'

17. Again, I agree. Norris J then traversed the evidence that had been before the Master and rightly paid tribute to the Master's 'careful and conscientious judgment'. He said at [47]:

> 'I have a strong impulse to uphold his judgment (i) because the whole conduct of this entire litigation on the part of Mrs Sartipy has been disgraceful, (ii) because the decisions of Masters on Part 8 claims are not as a matter of policy to be treated as open to appeals on fact and (iii) because the nature of the decision is an evaluative one (not the exercise of a discretion, but of a complex nature where a similar approach may be justified … Because of that impulse I have given the most anxious consideration to Mr Upton's well-structured submissions to the effect that the Master erred in law in deciding that he was not satisfied as to the authenticity of the Declaration of Trust because he did not sufficiently address the evidence that *was* produced as to the existence of a trust in July 1986'."

12. Despite this strong impulse, however, and despite her "disgraceful" conduct, Norris J felt constrained to allow Mrs Sartipy's appeal from the Master and remitted the issue of the authenticity of the declaration of trust and will for trial before a Master with oral evidence. The Court of Appeal held that he was wrong to do so: the burden of proving the authenticity of the declaration of trust lay upon Mrs Sartipy; the Master had decided that she had not discharged that burden; both parties had agreed that there should be no oral evidence and that the Master should decide the case on the materials before him, which is what he had done; the judge was only entitled to interfere with that finding if he was satisfied that it was "wrong" (see CPR 52.11(3)(a)); but the judge had not concluded that it was wrong (i.e. that the documents were authentic), only that there should be a trial. Accordingly the appeal from Norris J on this issue was allowed with the consequence that the Master's decision stood.

13. Lewison LJ concluded his judgment by finding that the argument that Mrs Sartipy wished to raise (i.e. that she did not have a beneficial interest in the property which was subject to the charging order and order for sale) was an abuse of process:

> "25. I have said that, as I see it, the raising of the argument that Mrs Sartiby wished to raise was an abuse of process, because if it was to have been advanced it could and should have been raised before (see *Johnson v Gore Wood* [2002] 2 AC 1). It is not, as the judge thought, a collateral attack on a previous decision of the court; it is a direct attack on the court's jurisdiction to make the order in the first place. Indeed it may well be that Mrs Sartiby is precluded from raising the argument by a cause of action estoppel (see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at paragraph [22]).
>
> 26. The principle is not simply one of justice between the parties but has a public dimension as well. The public dimension includes not bringing the administration of justice into disrepute, the public interest in the finality of litigation, and that part of the overriding objective which requires the court only to allot to an individual case an appropriate share of the court's resources while taking into account the need to allot resources in other cases (see CPR Rule 1.1(2)(b)).
>
> 27. The time which Master Teverson, Norris J and we have taken in dealing with this aspect of the case has meant that other litigants have been made to wait. The power to prevent abuse of its process is part of the inherent jurisdiction of the court. If there is an abuse of process the court should stop it. …"

14. Other decisions by Norris J, given in his judgment dated 22 July 2013 (*Ghassemian v Tigris Industries Inc* [2013] EWHC 2170 (Ch)) were not affected by the appeal to this court on the authenticity issue. In that judgment Norris J dismissed a further application by Mrs Sartipy to re-open the making of the final charging order. She sought to do so in reliance on the same grounds as those on which she had initially resisted it, namely that she was not the person who was a party to the proceedings before the adjudicator, an issue which had been determined against her by the decision of Deputy Master Bard. Norris J said at [17]:

> "For these reasons I would refuse permission to appeal: there is no real prospect of achieving (what is in effect) the setting aside of Nicol J's order within the existing proceedings."

The present proceedings

15. Undeterred by her failure to achieve her object within the existing proceedings, Mrs Sartipy issued the present proceedings on 19 May 2016 seeking to set aside (among other orders) the final charging order and the order for sale. Once again she contended that she had not been a party to the proceedings before the adjudicator and that the orders against her had been obtained by fraud. It was these proceedings which came before Henry Carr J and which have given rise to this appeal. The route by which they did so, however, has not been straightforward.

16. The proceedings were issued in the Chancery Division but were transferred to the Queen's Bench Division by an order made on 31 May 2016. On 25 July 2017 Garnham J acceded to an application by Mrs Sartipy for judgment in default of acknowledgement of service. His order set aside all of the orders previously made against Mrs Sartipy. Initially Mrs Sartipy had submitted to Garnham J that his order could be made without requiring proof of service of the application for judgment on the respondent. Garnham J refused to make the order without such proof so Mrs Sartipy filed a certificate of service of the application notice. Garnham J then made his order on the papers and gave both parties liberty to apply.

17. Tigris did apply to set aside the order of Garnham J by an application dated 16 November 2017. At the same time the proceedings were transferred back to the Chancery Division. By the time the matter came before Henry Carr J on 18 December 2017 Tigris was seeking not only to set aside the order of Garnham J, but also to strike out the claim (or alternatively summary judgment in its favour) and an ECRO.

The judgment

18. The judge acceded to Tigris's applications. Dealing with the application to set aside the order of Garnham J, he found that (contrary to the certificate of service which had been filed by Mrs Sartipy) the application for a default judgment had not been served on Tigris, either at its address for service in Panama where it is registered or at its address for service in this country, and had not been served on it solicitors either. The judge said:

> "22. I can only conclude that that was entirely deliberate on the part of Mr Langroody who has been conducting these proceedings on behalf of his mother. He deliberately did not serve the proceedings at the correct address and then sought to mislead Mr Justice Garnham into believing that the proceedings had been served, relying upon a certificate of service. Therefore, I have no hesitation in setting aside the order of Mr Justice Garman. If he had known the true facts, he would not have made that order.

19. Dealing with the strike out or summary judgment application, the judge concluded that the action was an abuse of process:

> "23. I then turn to the application to strike out the claim or for summary judgment. This claim relies on the same allegations which had been raised before as part of the claimant's application for permission to appeal, which was heard by Norris J and which was dismissed by him on the basis it was plainly an abuse of the process of the court.

> 24. To attempt to rely on the same allegations again is plainly another attempt to reopen the case which has already been dismissed and is [an] abuse of process of the court in a case which is littered with similar abuses of the process of the court, for which Mr Langroody, in collusion with his mother, is entirely responsible."

20. He added at [26] that the proceedings were totally without merit and an egregious abuse and that this would be recorded in the court's order, as in due course it was.

21. The judge then turned to the application for an ECRO. At [27] he summarised what he described as "various judgments in which the relevant court or tribunal has referred to Mr Langroody's propensity to lie to the court and fabricate documents, on occasion using Mrs Sartipy as claimant". The list was as follows:

> "(a) Paragraph [12] of the decision of Miss McAllister [the adjudicator] in the adverse possession proceedings referred to the fact that Mr Langroody had forged documents on which those proceedings were based and at paragraph [63] she found that Mr Langroody had created an elaborate and false paper trail to support his case.
>
> (b) Paragraphs [16] – [17] and paragraph [65] of the judgment of Patten J, as he then was, sitting as long ago as 19 February 2002, characterised Mr Langroody as devious and dishonest.
>
> (c) Paragraph [38] of the judgment of Arden LJ, dated 8 June 2009 stated that a referral should be made to the Crown Prosecution Service in respect of an allegation made against Mr Langroody that he forged a letter.
>
> (d) Paragraph [52] of the judgment of Mr Michael Mark, dated 30 November 2009, sitting as a deputy adjudicator in HMLR, found that Mr Langroody had concocted his case, fabricated letters and misled the court.
>
> (e) Paragraphs [85] and [88] of Master Teverson's judgment dated 11 January 2013 determined that documents relied upon by the claimant, Mrs Sartipy, namely a declaration of trust and a will, were respectively, a sham and not a genuine document.
>
> (f) Deputy Master Bard's decision was that the claimant, Mrs Sartipy, had been a party to the adverse possession proceedings despite her signed witness statement to the contrary.
>
> (g) I found in a judgment given on 3 March 2016 that Mr Langroody had repeatedly attempted to mislead the court, lied in his witness statement and falsified documents to support his case."

22. The judge's list included not only proceedings and applications in which Mrs Sartipy had been a named party where forged documents had been concocted and relied on by her son and in which she herself had been found to have given false evidence, but also proceedings to which Mrs Sartipy was not a party in which Mr Langroody had fabricated documents or given false evidence. It included also at least one application, the application to Deputy Master Bard to make the interim charging order final, in which Mrs Sartipy had been the respondent, not the applicant.

23. The judge described the effect of this history at [28] as being that:

> "… [Mrs Sartipy] and Mr Langroody have worked together to defraud the defendant as well as other parties. I also find that, contrary to a claim that was advanced by Mrs Sartipy before Deputy Master Bard, Mrs Sartipy gave Mr Langroody authority to act for her and she allowed his actions to be treated as her own."

24. After considering and citing from the judgment of Newey J in *CFC 26 Ltd v Brown Shipley & Co Ltd* [2017] EWHC 1594 (Ch), [2017] 1 WLR 4589, the judge concluded that "the real claimant" in the case was Mr Langroody. It was he who had drafted the various legal documents in the case (Mrs Sartipy's knowledge of the English language was very limited) and he "was using his mother's name in an attempt to avoid the effects of an ECRO" which had previously been made against him. In those circumstances the judge was prepared to make an ECRO against Mrs Sartipy:

> "33. For the reasons which I have set out in this judgment, I take the view that the various and repeated applications by Mrs Sartipy, based as they were upon forged documents and lies to the court, were paradigm examples of applications which were totally without merit."

The requirements for an ECRO

25. The power to make an ECRO is contained in CPR 3.11:

> "A practice direction may set out—
>
> a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;
>
> b) the procedure where a party applies for a civil restraint order against another party; and
>
> c) the consequences of the court making a civil restraint order."

26. The relevant practice direction is Practice Direction 3C, which provides for three kinds of civil restraint order, a limited civil restraint order, an extended civil restraint order, and a general civil restraint order. A limited order may be made "where a party has made 2 or more applications which are totally without merit". An extended order may be made "where a party has persistently issued claims or made applications which are totally without merit". A general order may be made "where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate". A limited order may be made by a judge of any court, but an extended or general order may be made only by specified judges. The consequences of the three kinds of order differ, but the differences do not need to be considered on this appeal.

27. A claim or application is totally without merit if it is bound to fail in the sense that there is no rational basis on which it could succeed: *R (Grace) v SSHD* [2014] EWCA Civ 1091, [2014] 1 WLR 3432 and *R (Wasif) v SSHD* [2016] EWCA Civ 82, [2016] 1 WLR

2793. It need not be abusive, made in bad faith, or supported by false evidence or documents in order to be totally without merit, but if it is, that will reinforce the case for a civil restraint order.

28. In *CFC 26 Ltd v Brown Shipley & Co Ltd* Newey J considered what was meant by "persistently" in the phrase "a party has persistently issued claims or made applications which are totally without merit" in CPR PD3PC para 3.1. He held, in agreement with previous first instance authority, that "persistence" in this context requires at least three such claims or applications. I respectfully agree. I would add some further points by way of clarification.

29. First, "claim" refers to the proceedings begun by the issue of a claim form. In the course of those proceedings one or more applications may be issued. If the claim itself is totally without merit and if individual applications are also totally without merit, there is no reason why both the claim and individual applications should not be counted for the purpose of considering whether to make an ECRO.

30. Second, although at least three claims or applications are the minimum required for the making of an ECRO, the question remains whether the party concerned is acting "persistently". That will require an evaluation of the party's overall conduct. It may be easier to conclude that a party is persistently issuing claims or applications which are totally without merit if it seeks repeatedly to re-litigate issues which have been decided than if there are three or more unrelated applications many years apart. The latter situation would not necessarily constitute persistence.

31. Third, only claims or applications where the party in question is the claimant (or counterclaimant) or applicant can be counted (although this includes a totally without merit application by the defendant in the proceedings). A defendant or respondent may behave badly, for example by telling lies in his or her evidence, producing fraudulent documents or putting forward defences in bad faith. However, that does not constitute issuing claims or making applications for the purpose of considering whether to make an ECRO. Nevertheless such conduct is not irrelevant as it is likely to cast light on the party's overall conduct and to demonstrate, provided that the necessary persistence can be demonstrated by reference to other claims or applications, that an ECRO or even a general civil restraint order, is necessary.

32. Fourth, as Newey J also held in *CFC 26 Ltd*, the term "a party [who] has … issued" such claims or applications refers not only to the named party but also to someone who is not a named party but is nevertheless the "real" party who has issued a claim or made an application. Again, I respectfully agree. Although "the real party" is not a concept expressly found in the Civil Procedure Rules, it is a concept which has been deployed from time to time, for example in the context of funding proceedings (cf. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807 at [25]), while security for costs may be ordered against a claimant who "is acting as a nominal claimant" (CPR 25.13(1)(f)). It is unnecessary to explore in this appeal the limits of the "real party" concept, but it must extend to a person who is controlling the conduct of the proceedings and who has a significant interest in their outcome.

33. In the present case Mrs Sartipy was the named claimant in the proceedings but, on the judge's findings, her son Mr Langroody could be regarded as the "real" party. For the purpose of considering whether to make an ECRO against Mr Langroody, it would

therefore have been legitimate to "count" the present proceedings against him. However, as there was already an ECRO against him, that question did not arise.

34. Mr Langroody submitted that the judge was wrong to say at [31] that he had issued proceedings in his mother's name in order to avoid the effect of the ECRO made against him. He said that the proceedings had to be issued in his mother's name because she was the party against whom the charging orders and order for sale which it is sought to set aside had been made. That may well be correct. However, it does not detract from the judge's finding that Mr Langroody is the "real" claimant in this action. As he told us, the property over which the charging orders and order for sale were made was his home.

35. Fifth, where the named claimant allows the use of his or her name to issue claims or make applications which are totally without merit, an ECRO may be made against the named party notwithstanding that he or she is personally innocent of any misconduct or even ignorant of the claims or applications which the "real" party has been making. By permitting his or her name to be used, the named claimant or applicant takes responsibility for the conduct of the individual who exercises control over the conduct of the proceedings.

36. Sixth, however, in that situation the named claimant is not responsible for claims and applications made by the "real" party in his or her own name in other proceedings. In the present circumstances, therefore, applications made by Mr Langroody in his own name in proceedings to which his mother was not a party cannot be counted for the purpose of considering whether to make an ECRO against Mrs Sartipy.

37. Seventh, when considering whether to make a restraint order, the court is entitled to take into account any previous claims or applications which it concludes were totally without merit, and is not limited to claims or applications so certified at the time, albeit that in such cases the court will need to ensure that it knows sufficient about the previous claim or application in question: *R (Kumar) v Secretary of State for Constitutional Affairs (Practice Note)* [2006] EWCA Civ 990, [2007] 1 WLR 536 at [67] and [68].

The appellant's case

38. The case put forward on behalf of Mrs Sartipy was that the judge wrongly counted the claims and applications listed at [27] of his judgment and set out above when those claims and applications involved her son Mr Langroody and not Mrs Sartipy herself; and that some of those matters went back many years and could not satisfy the test of "persistence".

Analysis

39. There would be merit in this appeal if the judge had done what Mrs Sartipy complains that he has done. The list at [27] of the judgment includes proceedings to which Mrs Sartipy was not a party which therefore cannot be counted for the purpose of making an ECRO against her. However, as I read the judgment, this is not a list of claims and applications which the judge has counted for that purpose. Rather it had different purposes, as the introductory words of [27] and the terms of [28] make clear. It was intended to demonstrate, first that courts and tribunals had frequently referred to Mr

Langroody's propensity to tell lies and to fabricate documents, on occasion (but not always) using his mother as claimant; and second that Mr Langroody and Mrs Sartipy had worked together to make fraudulent claims, with Mrs Sartipy giving authority to her son to act for her, allowing his actions to be treated as her own.

40. Unfortunately the judge did not go on to specify precisely which claims and applications he had taken into account for the purpose of making an ECRO against Mrs Sartipy. It would have been better if he had, although it is clear that he had well in mind the background set out by Lewison LJ which I have cited above and clear too from his citation of the *CFC 26 Ltd* case that he was aware of the requirement for three totally without merit claims or applications.

41. In my judgment the requirement that there be at least three totally without merit claims or applications and that these taken together demonstrate persistence was fully satisfied for the following reasons.

42. First, the 2009 application to the adjudicator for an order for adverse possession was made in the name of both Mrs Sartipy and her son. The adjudicator concluded that Mr Langroody, who conducted the proceedings on behalf of both claimants, deliberately presented false evidence and fabricated documents in support of a claim that was false and without substance. Although it appears that the adjudicator did not certify the claim as being totally without merit, that is what her findings amount to. Mrs Sartipy must take responsibility for what Lewison LJ described as this "bogus claim".

43. In the proceedings thereafter to enforce the costs order made by the adjudicator, Mrs Sartipy put forward what has been found to be false evidence, denying that she authorised her son to commence or pursue the adverse possession proceedings in her name and denying that she attended at least one hearing in those proceedings, on 28 September 2009. Although this was done in resisting an application by Tigris and therefore cannot be counted as a claim or application issued by Mrs Sartipy, it demonstrates at the very least that she is prepared to sign documents containing lies.

44. Second, Mrs Sartipy sought permission to appeal against the making final of the interim charging order. The only ground of the application was that she ought to have been permitted to give evidence by video link from Iran. However, the evidence of her passport was that she was able to attend a hearing in this country without difficulty and, in any event, the Deputy Master had permitted her to rely on her written witness statements. It seems highly likely that there was nothing at all in the application for permission, which Spencer J rejected. Nevertheless, I am prepared to proceed on the basis that this application was not totally without merit and therefore cannot be counted against her. Even so there was no basis for the application to Nicol J which sought to reopen the appeal on the same ground and was bound to fail. Accordingly this constituted a second totally without merit application.

45. It was followed by the production of what were found by Master Teverson to be sham documents, namely a declaration of trust by Mrs Sartipy and a copy of her husband's will. These were produced in response to the application by Tigris seeking to enforce the charging order by an order for sale. That application cannot therefore be counted as having been issued by Mrs Sartipy. Nevertheless it is relevant for the reasons which I have explained. The reliance on these documents was described by Lewison LJ as a clear case of abuse of process. The application in the course of the proceedings before

Master Teverson to rely upon a transcript of a judgment by DJ Madge was an application made by Mrs Sartipy and there is a strong hint in Lewison LJ's description of it as a "purported" transcript that this application was made in bad faith, but not enough is known about it for this to be taken into account for present purposes.

46. Third, the application to Norris J to re-open the making of the final charging order on the same grounds as had already been determined against her, that she was not a party to the proceedings before the adjudicator, was also totally without merit.

47. Fourth, following the decision of the Court of Appeal which made it abundantly clear that the conduct of Mrs Sartipy and her son constituted an abuse of process which should be stopped, Mrs Sartipy issued the present proceedings. These proceedings repeat points which have already been decided and have been found by the judge to be totally without merit. There is no appeal from that characterisation of them.

48. Fifth, and perhaps most serious of all, the application to Garnham J for judgment in default of acknowledgement of service and the filing of a fraudulent certificate of service was clearly totally without merit.

Disposal

49. In these circumstances I have no doubt that the judge had jurisdiction to make an ECRO against Mrs Sartipy. Whether he should have done so as a matter of discretion is not formally before us as permission to appeal was limited to the question of jurisdiction. For the avoidance of doubt, however, I am entirely satisfied that the judge was right to make an ECRO in this case and to make it for the maximum period of two years. The history which I have set out indicates that this is exactly the kind of case in which an ECRO is necessary. I would dismiss the appeal.

Lord Justice Bean :

50. I agree.