



Neutral Citation Number: [2019] EWHC 138 (Ch)

Case No: PT-2018-000438

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 25 January 2019

Before :

MASTER TEVERSON

Between :

MARTIN BROWN
- and -
ALAN BROWN

Claimant

Defendant

P.M. Emerson (instructed by **Coles Miller Solicitors LLP**) for the **Claimant**
Howard Smith (instructed by **Luff Brook Carter**) for the **Defendant**

Hearing dates: 23 and 24 January 2019

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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MASTER TEVERSON

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1. This is a Part 8 claim brought by the Claimant, Mr Martin Brown, in his capacity as Executor of the Estate of Doris May Brown (“the Deceased”) who died on 25 January 2017. The Claimant is a son of the Deceased. The Defendant, Mr Alan Brown, is the brother of the Claimant, and the other son of the Deceased.
2. The Deceased died testate. She left a will dated 7 April 2004 made whilst her husband, Ronald Brown, the father of the Claimant and the Defendant, was still alive. He predeceased her in December 2015.
3. By her will, the Deceased appointed her husband Ronald and her two sons, Martin and Alan, to be the executors and trustees of her will. She left her estate to her sons Martin and Alan in equal shares in the event that her husband did not survive her.
4. It is apparent from the terms of her will, that the Deceased envisaged that her trustees would be at least two in number if not a trust corporation. By clause 9(m) of her will, she gave her trustees in the administration of her estate:-

“power to exercise all the powers of appropriation (and other incidental powers) conferred by statute on a personal representative without the necessity of obtaining any consents and notwithstanding that one or more of my trustees may be beneficially interested in the exercise of such power;”
5. In the event, probate of the Deceased’s estate was granted to the Claimant alone on 8 May 2017 with power reserved to the Defendant as the other named surviving executor.
6. The Deceased’s estate comprised of a property valued for probate at £420,000 and savings and other liquid assets worth £355,343.12. The residue of the estate after funeral expenses, tax and other liabilities was calculated as being £714,774.59 with 50% being £357,387.29 due to Martin and 50% being £357,387.29 due to Alan.
7. The property in question is 2 Birch Grove, West Moors, Ferndown, Dorset BH22 0HG. It is a 4 bed-roomed detached bungalow. The Defendant made clear to the Claimant that he did not want the property himself and asked the Claimant if he did. At the time, the Claimant and his wife Victoria were living in Singapore. The Claimant had suffered a stroke in December 2016. The Claimant discussed the idea of buying the property from the estate with his wife. On 12 February 2017 they told the Defendant they would buy the property and pay for its upkeep. By this time, the Defendant knew how much money there was in the estate.
8. On 14 February 2017, the Claimant and the Defendant signed an agreement in writing prepared by the Claimant recording that they had both agreed that the Claimant, Martin, would inherit the property, 2 Birch Grove, and that the Defendant, Alan, would inherit the cash balances, with a cash difference of £32,867.62 payable from Martin to Alan. It was agreed they would then each contribute half of the inheritance tax bill due of £23,640.88. These figures were based on a total estate of £774,264.76 made up of the property valued at £420,000 and cash balances totalling £354,264.76. The value of the property was based on an oral probate valuation which the Claimant had obtained from Brewer & Brewer, one of the two agents in the village of West

Moors, who had also provided a probate valuation of £400,000 for the property on the death of Ronald Brown.

9. The Claimant and his wife then returned to Singapore in order to prepare to come back to live in Dorset after being in Singapore for 7 years. This was, as explained by the Claimant's wife, in her witness statement, "a huge deal".
10. The Claimant and his wife returned to England on 27 April 2017 and moved straightaway into the property in which they have lived ever since.
11. A few days earlier, the Defendant had been to see Dixon Kelly, the other estate agents in West Moors. They visited the property and in a letter to the Defendant dated 27 April 2017 recommended, should he decide to place the bungalow on the market, commencing marketing at a figure of £450,000. They described the bungalow as being maintained to a very good standard. They also recommended, before any move to sell the property, that the possibility of a building plot to the side of the bungalow should be explored. It appears this was explored at least to some degree by the Defendant who found out that their father had applied for a planning permission which had been refused both by the local planning authority and on appeal.
12. The Defendant confronted the Claimant and his wife with the information he had obtained from Dixon Kelly. The Claimant said he had known that some 20 years ago their father had applied for a planning permission in relation to the garden but that it had been turned down by the planning authority and on appeal. The Claimant and his wife sought to assure the Defendant that they were not interested in trying to build another bungalow in the garden and that they wanted to buy the property so that it could provide them with a quiet retirement home.
13. The Claimant obtained three market appraisals from three local estate agents and invited the Defendant to do the same to see if agreement could be reached over the valuing of the property. One agent advised marketing at £399,950 and the other two at £425,000 in June 2017.
14. The Claimant instructed Kiteleys Solicitors and the Defendant instructed Luff Brook Cooper solicitors. Sensibly an early meeting took place in July 2017 to see if a potential dispute between the brothers could be avoided. The Defendant's solicitor was unwell for a number of weeks and then went on leave with the result he did not reply until 13 October 2017. He said the Defendant would be happy to sell the property to his brother but in view of the difference between the figures obtained by the Claimant and that provided to the Defendant by Dixon Kelly the Defendant required the property to be sold on the open market.
15. On 14 November 2017 Kiteleys proposed that the property be marketed for 1 month with a dead stop and if a purchaser was not found at a figure greater than £420,000, the parties revert to the option of the Claimant purchasing for £420,000. The Defendant's solicitors responded saying that Dixon Kelly advised waiting until February or March to take advantage of the spring market.
16. The Claimant's solicitor, Mr Lee, moved to Coles Miller LLP, who took over acting on behalf of the Claimant at the end of January 2018. In February 2018 he instructed Mr Graham Thorne FRICS to prepare a valuation report on behalf of the Claimant as

executor of the estate. The report is dated 19 February 2018 and is in the form of an Expert Witness Report. Mr Thorne is a valuer with the RICS who has practised in Dorset for over 40 years.

17. Mr Thorne in his report describes the property as comprising a detached bungalow constructed of brick and standing on a plot totalling 0.267 of an acre. He says the property was constructed in the 1980's "*but does require general modernisation to encompass the kitchen and bathroom, electrics, heating, general decoration, carpets and upgrade to the conservatory roof*". He sets out the accommodation. This includes four bedrooms. Bedroom 3 is 3.1m x 2.1m with a built in cupboard. Bedroom 4 is 3.1m x 2.7m. The accommodation totals approximately 158 sq m including garage and conservatory. Mr Thorne lists 5 comparables. Two are in Birch Grove. 7 Birch Grove – a 3 bedroom detached bungalow comprising 100 sq m of accommodation which sold in September 2017 for £450,000; 8 Birch Grove – a 3 bedroom detached bungalow at that time on the open market having been "*thoroughly modernised*" at a figure of £485,000.
 18. Mr Thorne considers in paragraphs 5.1 and 5.2 whether there is a commercially viable building plot. He says he does not consider this is commercially viable. He says to obtain planning consent it might be necessary to demolish or restrict the existing garage which would have an impact on the value of the existing dwelling. He says more land might be required from the Highways Authority to exit the site closer to the corner of Birch Grove. He says there would be considerable objections following the refusal of the appeal for planning consent made in 2000. He says that if the vendors would be able to sell for a figure in the region of £438,000 "*this would be the more straightforward way to proceed as it is far from certain that a planning consent would be obtained without substantial work and/or further land acquisition which would further eat into any hypothetical uplift*".
 19. Mr Thorpe valued the property at a figure in the region of £438,000. He says:-

"We do not consider planning permission would be obtained to create an additional building plot, but if it was the current value of the existing property would decrease by approximately £50,000 (Fifty Thousand Pounds) due to the loss or re-arrangement of the garaging and possible alterations that may be required to the existing front door arrangement. In light of planning history, we consider it highly unlikely that planning permission would be granted, but in light of some of the above, we would only consider it marginally worth the costs that would be incurred."
- In paragraph 6 he makes declarations and statements of truth in the form required of an expert witness to the court.
20. Mr Thorne's report was sent to the Defendant's solicitors on 20 March 2018. The Claimant offered to pay the Defendant based on the value £438,000 for the property less £8,000 sales costs that would not be incurred meaning that the Defendant would receive £215,000 as his share of the property. The letter pointed out that the land was also subject to a restrictive covenant to use the land transferred only for a private single dwelling.
 21. The Defendant's solicitors said in reply that the Defendant had no objection to the Claimant buying the property but wanted the property to be put on the market. The

Claimant's solicitors took the view that this would be unreasonable and unethical in circumstances in which it was agreed that the Claimant should buy the property. It was said this would be to give the false impression to third parties that the property was being offered to third parties when it was not.

22. The Defendant's solicitors disagreed with that position but said at the end of a letter dated 25 May 2018 that the Defendant would be willing for figure at which the property was treated as sold or valued to be £465,000 "*in terms of trying to reach a quick and sensible solution,..*".
23. The Claimant's solicitors responded on 5 June 2018 saying that no basis for that figure of £465,000 had been put forward. The Claim form, in the form of the draft previously sent to the Defendant's solicitors, was issued on 11 June 2018. On 4 July 2018 the Claimant offered the price of £440,000 for determining the value of the property.
24. On 2 August 2018 the Defendant obtained a drive by valuation from Edwards Estate Agents. They assumed the property was in generally good repair and good order and said the current market evidence pointing to the value of the property being £465,000. As comparable evidence, they referred to number 8 Birch Grove being currently on the market and "*currently under offer with the asking price being £475,000*". They said they had sold 7 Birch Grove in September 2017 for £450,000 which they said, applying the Nationwide house price index, would value that property in today's market at £460,000.
25. The matter came before the court for a directions hearing on 16 August 2018. Prior to the hearing on 16 August 2018, it was confirmed as is recorded in a recital to the order that the Claimant did not allege that the agreement dated 14 February 2017 was binding on the parties or the court. (The order refers mistakenly to the Agreement dated 4th February 2018).
26. Each party was given permission to rely on expert evidence as to the current open market value of the property and the rental value of the property.
27. That direction was interpreted before me by the parties differently. Mr Emerson, counsel for the Claimant, interpreted it as meaning that the main issue before the court was as to what was the correct value for the property. Mr Smith, counsel for the Defendant submitted that the Defendant had never agreed to a sale at a valuation. He referred me to his skeleton argument filed for the purposes of that hearing. In paragraph 5 D's position was set out as being
 - "a. the document dated 14.2.17 is not a binding agreement or is liable to be set aside
 - b. it is not appropriate that the court should direct a sale at C's valuation
 - c. the proper course is for the property to be marketed by D, C being permitted to bid;
 - d. if it were appropriate for the court to direct a sale at a valuation, directions should be given for appropriate valuations to be filed;

e. as a concession, D has offered to agree a sale at £465,000 (which figure has since been supported by a drive-by valuation).”

28. I do not feel able to conclude that the directions given by the court last August unequivocally determined that there should be a sale to the Claimant at a valuation. I think it remains open to the Defendant to seek to persuade the court that the proper course is to direct that the property should be marketed for sale with the Defendant or his solicitors being given conduct of sale but with the Claimant having permission to bid. There is however force in Mr Emerson’s submission, that if an order for the property to be marketed was envisaged in any event, the cost and delay and expense to the parties of obtaining separate expert valuation reports is difficult to justify.
29. The order resulted in the Claimant obtaining a further report from Mr Thorne dated 20 September 2018 and the Defendant obtaining a report from Mr Munnings MRICS of Dorset Property Surveys dated 11 October 2018.
30. Mr Thorne in his report dated 20 September 2018 continued to value the property in the region of £438,000. He described the general market in 2018 as being very difficult. He said bungalows had continued to sell but with buyers generally being more cautious and he said properties requiring attention have been more difficult to sell without reductions in price to take into account their condition. In paragraph 9 of his report, Mr Thorne says that generally the bungalow is of its age, and has not been updated. He says that in his opinion these updating works would be quite extensive. He lists them and gives a total minimum costing figure of £48,500. These include replacement of the heating system/plumbing together with bathroom and kitchen fittings; £10,000 and replacement of the double glazing and conservatory to include its leaking roof; £20,000.
31. Included as comparables, Mr Thorne refers again to Nos 7 and 8 Birch Grove. In the case of 8 Birch Grove, he refers to this as:-

“A well modernised 3 bedroom detached bungalow sold for a figure of £465,000 which is of a similar size to the subject property but with re-arranged accommodation in a more updated form to include heating, conservatory, kitchen and bathroom fittings all recently fitted and we understand having a total cost of £57,000”.
32. The report of Mr Munnings of Dorset Property Surveys is dated 11 October 2018. He is a Member of the RICS and the owner of Dorset Property Surveys. He refers to the property being in reasonable condition throughout, although he would expect the purchaser to replace the forced air heating system. He says the purchaser would probably want to replace the kitchen and bathroom facilities with more modern fittings.
33. Mr Munnings refers to market conditions in October 2018. He says the market in Dorset has been quiet over the summer months. He says this could be the result of a downturn in the wider market.
34. Mr Munnings refers to comparable evidence in two categories. The first is in Birch Grove. He refers to number 8 Birch Grove as being under offer at a price close to the guide of £475,000. He has apparently not found out the sale was at £465,000. He says from his research that properties in Birch Grove command a premium selling price.

The other category is that of 4-bedroom detached bungalows in the area. He refers to one that was sold in April 2018 at a price of £475,000. He says this selling price substantiates a similar value for the subject property. Mr Munnings concludes that even with the need to modernise the property, it would achieve a selling price in the region of £475,000.

35. I have not had the benefit of hearing or seeing the valuers cross-examined on their reports. The valuers have however provided the court with a statement of agreed and un-agreed items following a meeting on 29 October 2018. Both valuers agree that 8 Birch Grove is the best comparable. They both accept it was sold on 4 September 2018 for £465,000. According to Mr Thorne, this is the highest value achieved for any property in Birch Grove. Mr Munnings says the selling price of 2 Birch Grove would be higher, because it has 4 bedrooms. He says if in good condition, it would sell for £500,000 and allowing £25,000 for modernisation suggests a current valuation of £475,000. Mr Thorne does not agree £25,000 would be sufficient to modernise No 2 to a similar standard to No 8 or that the selling price of No 2 would be greater than No 8 when modernised. Mr Thorne confirms his valuation of £438,000.
36. Since the reports were filed, the Claimant has offered to purchase at £445,000 on 3 January 2019 and at £448,000 as a last effort to agree the price. The Defendant's position is that the market should be tested but as a concession he would agree to the property being purchased by the Claimant at a price of £465,000.
37. On behalf of the Defendant, much weight was placed by Mr Smith on the self-dealing rule. There was in the present case a conflict or potential conflict between the interest of the Claimant as intending purchaser and his position as executor. It was in my view unwise that the Claimant initially sought and obtained the Defendant's agreement to a sale at the probate valuation. That was done at a time before either the Claimant or the Defendant had legal advice.
38. On an application of this type, by an executor or trustee seeking permission to purchase, the court must be satisfied that the proposal is fairly made. Where it is not possible for a trustee to obtain the consent of all beneficiaries because some are children or unborn, the court expects to have before it evidence from a surveyor or valuer instructed independently of the purchasing trustee: see Lewin on Trusts 19th edition para 20-141. In the case of two adult beneficiaries who cannot agree over price, that exact model does not work and the executor beneficiary faced with this difficulty is in my view acting fairly and properly in accordance with his duties by obtaining a valuation report from a fully qualified valuer who is instructed to give his report on the same basis as an expert witness for the court.
39. In my view, the position therefore changed once the Defendant had been served with Mr Thorne's report on 20 March 2018. That report made clear that there was in Mr Thorne's view no potential for getting planning permission to build another bungalow, and even if such a permission could be obtained, it was highly unlikely to benefit the estate. It was in my view at that stage incumbent on the Defendant within a reasonable time to make clear whether he was pursuing the potential development issue and, if not, to address the valuation issue. The Defendant had been recommended by Dixon Kelley on 27 April 2017 to commence marketing at a figure of £450,000. The difference between that figure and Mr Thorne's professional valuation was £12,000. Instead, the position adopted by the Defendant was that

unless the Claimant agreed to purchase at £465,000, the property should be put on the market. The Defendant did not at that time explain how he had arrived at his figure of £465,000. A drive-by valuation was obtained by the Defendant early in August 2018 but this was without inspection of the internal condition of the property and in part based on No 8 Birch Grove being described as being “*under offer with the asking price being £475,000*”. It happened to be at £465,000.

40. On behalf of the Defendant, Mr Smith submitted that it would generally be inappropriate for the court to order a sale at a valuation because valuations do not properly test the market. He submitted that as the Defendant had obtained a valuation from an expert valuer, Mr Munnings, valuing the property in the region of £475,000, it would plainly be inappropriate for the court to authorise a sale at a lower valuation where the market has not been tested. Mr Smith submitted that the proper course was for the property to be marketed for sale by private treaty, giving the Claimant permission to bid. He submitted that the Defendant would need to have conduct of the sale and, if necessary, could be appointed as executor in place of the Claimant.
41. I think the court should begin by looking carefully at the valuation evidence before it.
42. The valuers agree that 8 Birch Grove is the best comparable. In February 2018, it was referred to by Mr Thorne as being on the market with an asking price of £485,000. In August 2018, it was referred to by Mr Dehon of Edwards as being “*currently under offer with the asking price being £475,000*”. It is now known to have sold on 4 September 2018 for £465,000.
43. The view of Mr Munnings is that this is consistent with his valuation of in the region of £475,000 because 2 Birch Grove is 4 bed-roomed and has a larger garden. The view of Mr Thorne is that the size of the bungalow does not in this case necessarily mean a higher value. Mr Thorne does not consider Mr Munnings to have taken into account the works that are required at the property.
44. Both valuers agree that current market conditions are quiet with the impact of Brexit causing uncertainty in the minds of purchasers and sellers. Neither is talking of a buoyant, rising market. It is known that 8 Birch Grove, which before sale had been thoroughly modernised, took at least 7 months to sell, and sold after its asking price had been reduced in stages by £20,000.
45. There must plainly be a significant risk that if No 2 is put on the market now at or around £475,000 that it will not sell at or near that price and that it will take a number of months to complete a sale at what may well turn out to be a significantly lower price.
46. The Claimant is now willing to agree a value at £448,000. As Mr Emerson pointed out in his submissions in reply, marketing the property and selling to a third party, if that is the outcome, will incur agent’s fees in the region of £6,750 to £9,500 depending on the price achieved and the commission rate. To this there will fall to be added VAT at 20% and solicitor’s costs. Those costs may well be considerably higher than standard conveyancing costs because of the need to report on offers received, seek agreement as to how to proceed, and if necessary, refer back to the court. Mr Emerson submitted that the extra costs of going down that route could be in the region

of £20,000. This would mean a sale in excess of around £468,000 would be needed to justify the expense and the delay.

47. In circumstances in which a very experienced valuer, Mr Thorne is of the opinion that the property is valued at £30,000 less than would be required to justify that exercise, there is plainly good reason to question whether that is likely to turn out to be in the interests of the estate.
48. In my view, on the evidence as it stands before the court, the court ought to permit the Claimant to purchase the property at £448,000, the price he is now willing to offer. That price is £10,000 more than Mr Thorne's valuation. It is £27,000 less than the valuation of Mr Munnings. That valuation is £10,000 higher than any previous appraisal or marketing recommendation by anyone else. Market conditions are not favourable. If the property is marketed, it could well take several months to sell. It is now two years since the death of the Deceased. There is the very real potential for a marketing exercise and the conduct of sale to give rise to significant further legal costs. I shall therefore give permission to the Claimant to purchase at £448,000.
49. The further issue before me was whether the Claimant should be required to account to the estate for an occupation rent. The Claimant accepts he should pay rent for a period of 4 months. He says matters should have been resolved by that point.
50. The Defendant seeks an order that the Claimant be required to pay an occupation rent to the estate for the full period of the Claimant's occupation from May 2017 to date at the rate of £1,400 per month.
51. This is not a situation in which one beneficiary or co-owner has excluded another from occupation of the property. The Defendant has never wanted to live at the property. He has been content for the Claimant to live in the property and buy it. The Defendant can however say that whilst he and the Claimant have been in dispute over the purchase price and how it should be determined, the estate has been undistributed and whilst the Claimant has had the benefit of occupying the property rent-free, the Defendant has not received his share of the estate.
52. The court has in my view a broad equitable jurisdiction to do justice between the Claimant and Defendant as intended equal residuary beneficiaries in this situation. The Defendant's conduct has in my view been difficult and unpleasant at times. The Claimant for his part was unwise to have suggested valuing the property at probate value for the purposes of its sale to him.
53. I propose to direct that the Claimant account to the estate for a notional occupation rent for a period of 12 months. That period of 12 months runs from the time when the Claimant went into occupation on 27 April 2017 to a month after the Defendant had received the first report of Mr Thorne. In my view after that twelve month period, the position changed. The Defendant chose to hold out for £465,000. He did not obtain a proper valuation of his own. The difference between the value provided by Mr Thorne and Dixon Kelley for the Defendant was not sufficient to merit the suspicion that the Claimant was seeking to profit from his position.
54. Mr Thorne considers the current rental value of the property would be £1,200 per month in its current condition. Mr Munnings says the property would achieve a rental

of £1,400 at the current time. On the basis of the available evidence I will award a notional rent for the period 1 May 2017 to end 30 April 2018. Mr Munnings says the rental market was stronger in 2017. Mr Thorne emphasises again the condition of the property. I note that Dixon Kelley estimated a realistic rental level of £1450-£1500 per calendar month unfurnished on 31 May 2017. I will direct the notional rent to be at the rate of £1,300 per month for 7 months in 2017 and at £1,200 for 5 months in 2018. This gives rise to a total notional rent of £15,100.

55. I will hear the parties on costs and consequential matters.