Neutral Citation Number [2019] EWHC 298 (Ch)

Claim No: BL-2018-000605

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date 18/02/2019

Before
Philip Marshall QC (sitting as a Deputy Judge of the High Court)

Between :

DAKSHU PATEL	**Appellant**
- and -	
KESHA PATEL	**Respondent**

William Webb (instructed by Devonshires Solicitors LLP) for the Claimant
Tim Parker (instructed by Anthony Gold Solicitors) for the Defendant

Hearing date: 7 December 2018

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

PHILIP MARSHALL QC:

Introduction

1. This is a challenge to an arbitrator's award brought by the Claimant, Dr Dakshu Patel, under sections 68 and 69 of the Arbitration Act 1996. The relevant award was delivered by the arbitrator, Mr Nigel Puddicombe, on 31 January 2018 ("the Award'). It determined the extent of the rights of the Claimant and the Defendant, Dr Kesha Patel, to profits under two partnership agreements concerning dental practices in Purley and Mitcham, Surrey.

2. Although the claim is an arbitration claim, since it involves an appeal under section 69 of the 1996 Act on a question of law arising out of an award, that aspect would normally be heard in public (see Civil Procedure Rules, Part 62.10(3)). Further the parties were in any event content for the entire hearing to be conducted in public. This judgment is therefore also delivered in public.

3. The proceedings began in the Commercial Court, in the normal way for arbitration claims, but were then transferred to the Chancery Division. This presumably happened because the underlying issues concerned partnership law.

4. Permission to appeal was granted by Mr Justice Snowden on 20 August 2018. Given the statutory requirements for permission to appeal under section 69(3) of the 1996 Act, Mr Justice Snowden must have been satisfied that, in respect of the section 69 appeal, the decision of the arbitrator on the relevant question of law was obviously wrong (since I do not understand it to have ever been suggested that the question was one of general public importance).

The Dispute

5. The following facts are largely derived from the Award.

6. The Claimant and Defendant are dentists and the Defendant was formerly married to the Claimant's nephew.

7. In June 2012 they entered into partnership to acquire an ongoing dental practice in Purley ("the Purley Practice") which was acquired for £289,074 using a loan that the Claimant and his brother-in-law obtained from Barclays Bank, a contribution of £103,718 provided by the Claimant and his brother-in-law and a further contribution of £21,500 provided by the Defendant.

8. A partnership agreement was entered into on 20 June 2012. This provided that the parties were to share profits and losses equally.

9. A little over a year later, in November 2013, a further partnership was concluded to acquire a further dental practice in Mitcham ("the Mitcham Practice") for £518,688. This time the acquisition was funded using a loan obtained by the Claimant and Defendant from Lloyds Bank, £52,290 from the Purley Practice and £85,000 from the Claimant and his family.

10. A further partnership agreement was executed in respect of this additional practice on 12 November 2013. This agreement again provided for the parties to share profits and losses equally.

11. It was the intention from the outset that the Claimant would not carry out dental work at either the Purley Practice or the Mitcham Practice but rather that the day to day activities of these practices would be conducted or managed by the Defendant.

12. In the first two years of the Purley Practice 100% of the profits were in fact allocated to the Defendant. There was no discussion between the parties regarding this. The Claimant simply communicated his decision to the partnership accountant and both parties then signed the Purley Partnership accounts which recorded this allocation of profit.

13. In January 2015 the Defendant and the Claimant's nephew separated and divorce and financial remedy proceedings then followed. It was after their estrangement that the next set of Purley Partnership accounts arose for completion. At this point the Claimant refused to allocate all of the profit to the Defendant and the parties could not agree on and sign a set of partnership accounts. It was following the matrimonial proceedings and this accounting dispute that a reference was made to arbitration.

14. In the arbitration proceedings one of the central issues concerned whether some course of dealing had occurred that had varied the provisions of the partnership agreements and what would in any event be the default position under section 24 of the Partnership Act 1890, regarding the equal allocation of profits and losses. Such course of dealing was said to fall within the provisions for variation of a partnership agreement in section 19 of the 1890 Act.

15. The Award records what was common ground between the parties in respect of the issue of a course of dealing in the following way (Award, paragraph 46): *"The parties agree that the only course of dealing that could qualify in this dispute are the decisions by the Claimant and the Respondent to allocate to the Respondent all the profits of the Purley Practice (and for part of the later period those of the Mitcham Practice) for the first two financial periods ending on 31 March 2013 and 31 March 2014. This course of dealing was then evidenced by both parties signing the partnership accounts for those two years. The key question is whether that is sufficient in law".*

The Award

16. In the Award the arbitrator held the shares of profits and losses in the partnership agreement concerning the Purley Practice were held 0% for the Claimant and 100% for the Defendant. From paragraphs 87 and 101 of the Award it is apparent that the arbitrator arrived at this conclusion on the basis that there had been a variation of the written partnership agreement. The variation was said to have arisen through the Claimant instructing the partnership accountant, a Mr Magecha, that the Defendant was to have 100% of the profit in the first two years' accounts and then signing those accounts. The arbitrator concluded in paragraph 92 of the Award that *"the parties did agree to vary the partnership for the Purley Practice and that such agreement can and should be inferred from their course of conduct".*

17. In relation to the Mitcham Partnership the arbitrator held that the Claimant had a 35% share of the profits and losses and the Defendant a share of 65%. This was also held to be the result of variation of the written partnership agreement. The way in which this came about was explained in paragraphs 74, 76 to 77 and 102 of the Award as follows:

> *"[74] I have been assisted by what the Claimant and the Respondent admitted under cross-examination on this point. The Claimant accepted that for both practices the Respondent should receive more profit that (sic) he, due to her greater work and contribution to those profits. Conversely, the Respondent accepted that if she were to die having a 100% profit share in the Mitcham Practice, the Claimant would still have to service the bank loan and that he would need a profit share greater than 0% to be able to do so. It is irrelevant that the Claimant has always considered that each practice could be staffed by associates if the need arose, which should enable each to continue and hopefully make a profit. I regard this recent, if somewhat reluctant meeting of minds between the parties as a variation of the partnership agreement, which I should recognise in a meaningful way....*
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> *"[76]...I find that the parties have now expressed their agreement that the Claimant should have enough of a profit share to enable him to service the Lloyds loan on his own should the need arise. [Counsel for the Defendant]'s suggestions therefore translate in my view to a share of between 30% and 40% for the Claimant but just in the Mitcham Practice...*
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> *[77]...I am satisfied that this range is broadly what the parties now accept and that it is justified due to the factors that I have identified...I have decided to fix the Claimant's profit share at the mid-point of this bracket".*

18. It was clear that the variation to the partnership agreement regarding the Mitcham Practice had not come about as a result of the course of dealing that was held to have varied the agreement concerning the Purley Practice. Thus in paragraph 93 of the Award it was said: *"Because the parties and Mr Magecha*

have always regarded the two partnerships as one business, which as I have stated in my view they should not be, I find that no proper thought was given by the Claimant, the Respondent nor Mr Magecha to whether the Mitcham Practice ought to be included in the course of dealing that I have found applies to the Purley Practice. In my view it should not be included, not least as it would only comprise a single act in a separate course of dealing and as that practice's accounting period had only run for just over 4 months at 31 March 2014".

19. Clarification was sought from the arbitrator pursuant section 57(3)(a) of the Arbitration Act as to the evidence referred to paragraph 74 of the Award that he had identified as containing an acceptance by the Claimant that, for both practices, the Respondent should receive more profit than he did due to her greater work and contribution to profits. The arbitrator responded by identifying the following passage of the Claimant's evidence:

"Q. If it was not a variation of the agreement, do you agree that Kesha was entitled, following the usual practice in dental surgeries, that she should have her additional endeavour both in clinical work and in the administrative work recognised in the division of the partnership profits?
A. Yes. Yes, and so should mine"

The above passage was followed by the following further evidence:

"Q.If she was receiving more than the partnership agreement reflected, that was as a result of her additional work; is that right?
A. The partnership agreement stipulates as to how the profits need to be distributed on an annual basis.
Q. Yes, but you were not following that. You were going a different way.
A. I chose to give the profits to Kesha for the 2013 and 2014, but not subsequently".

The Appeal

20. The Claimant appeals against the determination made in the Award regarding the profits shares in the partnership concerning the Purley Practice under section 69 of the 1996 Act. This is on the basis that the arbitrator erred in law in concluding that the Claimant's instructions to the partnership accountant that the Defendant was to have 100% of the profit in the first two years accounts and thereafter his execution of those accounts resulted in a variation of the partnership agreement by a course of conduct within the meaning of section 19 of the Partnership Act.

21. In relation to the determination of the profit shares regarding the Mitcham Practice the Claimant challenges the arbitrator's decision under both sections 68 and 69 of the Arbitration Act. The contention under section 68 is that the decision was the subject of seriously irregularity. This is because the proposition that the parties had reached agreement on a variation of the partnership agreement in the course

of their evidence was never advanced by the Defendant and arose for the first time in the Award. The Claimant contends he was not given a proper opportunity to address the point.

22. As regards the challenge under section 69, it is contended that the arbitrator erred in law in concluding that the evidence given by the parties could amount to a variation of the partnership agreement affecting the Mitcham practice.

The Purley Practice

23. Much of the argument of the parties before the arbitrator and before me focussed on the supposed question of how many actions or instances of conduct must exist before there could be a "course of conduct" sufficient to amount to a variation under section 19 of the 1890 Act. However, in my judgment, this is a misconceived approach. The real issue to which section 19 is directed (in common with the law of contract more generally) is whether objectively the parties can be said to have reached a consensus. Where conduct is concerned, for this to result in an agreed variation, it would need objectively to be capable of unambiguous interpretation as evincing an intention to vary the existing contractual terms which was then acceded to. Where only one or a small number of actions are involved it may be more difficult objectively to interpret them as indicating such an unambiguous intention. They are more likely to be capable of a number of interpretations and as having a degree of ambiguity. The true question remains, however, how the relevant act or acts can reasonably be interpreted irrespective of the number involved.

24. The above approach appears to me to be supported by early partnership cases such as Peat v Smith (1899) 5 TLR 306, where it was observed that one act of great importance might lead to the ambit of a partnership being enlarged, but on the facts the actions focussed upon were reasonably capable of being interpreted as consistent with the existing partnership deed and therefore were held not to have varied it. This approach also appears to be supported by later decisions on general principles of contract law such as Hollier v Rambler Motors (AMC) Ltd. [1971] 2 QB 71. In that case the Court of Appeal rejected the contention that there had been a course of dealing sufficient to import a condition into an oral contract. In doing so Salmon LJ, at 76-77, distinguished cases, such as Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association [1969] 2 AC 31 on the grounds that the conduct in those cases would have left the other party with good cause to assume that they were agreeing to a variation or additional term. Hardwicke Game Farm was described as a *"a typical case where a consistent course of dealing between the parties makes it imperative for the court to read into the contract the condition for which the seller was contending. Everything that the buyer had done, or failed to do, would have convinced any ordinary seller that the buyer was agreeing to the terms in question"*. In other words the objective impression given by the conduct was clear and unambiguous and supported the variation or incorporation of the term contended for in that case.

25. The need for the conduct to give a clear and unambiguous impression to any reasonable recipient, is also, in my judgment, supported by more recent decisions such as Joyce v Morrissey [1999] EMLR 233. There Waller LJ, at 244, remarked on the need for conduct of this quality when it was alleged to give rise to a major variation to a contractual right to equal profits in the context of a partnership. The case of Hodson v Hodson [2010] PNLR 8 is also instructive. As Rimer LJ explained at [38] a partner had not released a profit share by giving up her entitlement to profits earned in two accounting periods. This could properly be interpreted as a mere waiver of that entitlement for those periods rather than an agreement to give up the right to share in profits entirely.

26. Having regard to these principles, in my judgment it is clear that the arbitrator wrongly overlooked the need for clear and unambiguous conduct from which it could reasonably be concluded that there was an intention to vary the partnership agreement governing the Purley Practice. It seems to me that the situation in this case has close parallels to that considered by the Court of Appeal in Hodson v Hodson. The giving up of his profit share by the Claimant in two accounting periods could reasonably be interpreted as no more than a waiver of his entitlement for those two periods rather than the giving up of his rights to share in profits for any longer period. There was no basis for objectively concluding from these actions alone that the partnership agreement was varied by conduct. This is reinforced by the provisions of clause 20 of the written partnership agreement itself, which expressly provides that the failure or delay of a partner in enforcing a term will not affect his right to enforce that term subsequently and that any variation to the agreement ought to be in writing and executed as a deed.

27. I should add that, had the circumstances warranted the conclusion that the conduct could potentially have given rise to a variation, it would still have been necessary for consideration to have been provided to support it. As explained in Joyce v Morrissey at 244, absent provision for variation in a written partnership agreement, consideration will be needed and will often be provided by an agreement not to terminate the partnership if the new terms are agreed. Here the agreement expressly provided for any variation to be by way of deed. Absent a deed, it would have been necessary to consider whether some other form of variation with consideration such as suggested in Joyce v Morrissey, was viable or whether some other form of consideration could be found. This was not explored by the arbitrator in the Award. However, since this point does not feature in the grounds of challenge in the claim form in these proceedings I say nothing further regarding it.

28. In these circumstances, in my judgment, the profit shares under the written partnership agreement, requiring equal division, remained unchanged and the arbitrator ought to have so found. The appeal in connection with this aspect under s.69 of the Arbitration Act therefore succeeds.

The Mitcham Practice

29. The arbitrator appears to have proceeded on the basis that the parties varied the partnership agreement regarding the Mitcham Practice in the course of giving evidence in the arbitral proceedings. On the face of it that is a very surprising conclusion. It is not unusual for a party to make admissions or concessions in the course of his evidence which then affects the assessment of what had occurred in the past or for it to lead to the proceedings being resolved by a subsequent compromise or even by a subsequent discontinuance. However, I have not previously seen a decision in which one party is held to have effectively made an offer to enter into an agreement in the course of evidence which was then accepted by the other party when they came to testify.

30. Be that as it may, having looked at the passage relied upon by the arbitrator for the purposes of arriving at this conclusion, in my judgment it is obvious that it could not possibly be interpreted as an offer to alter the existing written partnership agreement regarding the Mitcham Practice. The question said to have elicited such a response was qualified with words indicating that the discussion was not directed at a variation of the partnership agreement and the response was at best equivocal as indicating even a concession to the propositions being advanced by counsel for the Defendant regarding the Defendant's entitlement to a larger share of profits based on the supposed practice of dentists. Further the subsequent evidence indicates that the Claimant was not intending to concede anything regarding his case.

31. I should add that, having considered the relevant passages of the Defendant's evidence that I was taken to, I cannot find anything to suggest that she considered that she was accepting an offer to vary the partnership agreement.

32. For these reasons I conclude that the arbitrator's conclusions on this issue were also incorrect. There was no conduct or agreement that, as a matter of law, could be said to amount to a variation arising out of the matters identified in the Award in connection with the Mitcham Practice. The provisions for an equal share of profits in that partnership therefore also remained unvaried and the appeal under section 69 of the Arbitration Act therefore succeeds on this aspect also.

33. This makes it strictly unnecessary to consider the appeal under section 68 of the 1996 Act. However, had it been necessary to do so, I would have concluded that there had been a serious irregularity by the failure of the arbitrator to raise the matter and permit submissions to be made regarding the form of variation he had in mind. To act otherwise did not allow the Claimant a fair opportunity to address a point that was to be taken against him, contrary to section 33 of the Arbitration Act.

Disposal

34. I raised with counsel for both parties in the course of argument whether they wished me to remit matters for reconsideration to the arbitrator under sections 68(3)and 69(7) of the 1996 Act and they confirmed that they did not. Having concluded that the appeals based on section 69 succeed, I am satisfied that is

appropriate for me to vary the Award in paragraph 112 (and all earlier passages supporting the conclusions there stated) so that paragraphs 1 and 2 shall read as follows: "The parties did not vary the written partnership agreements relating to the Purley Practice and the Mitcham Practice and the Claimant and Respondent were entitled to share the profits and losses of the same equally".

35. The arbitrator provided a supplementary award regarding costs on 22 February 2018. He awarded costs to both parties in respect of different issues. After setting off the various amounts there was a balance of £35,312.32 to be paid to the Defendant by the Claimant as well as a further sum of £13,440 in respect of the arbitrator's fees. This allocation of costs in large part followed from the findings in the Award which I have now varied.

36. I raised with the parties how this supplementary award was to be addressed in the light of the fact that the claim form in these proceedings is directed at the Award rather than the supplementary award on costs. The parties agreed that the claim form should be amended so as to encompass the supplementary award and that permission to appeal should be granted in respect of that award also so that it can be varied in the light of my judgment on the appeal against the Award. I am content to proceed on that basis, granting permission as necessary, and therefore proceed on the basis that the supplementary award is also before me and should also be varied by me rather than remitted.

37. The basis on which the arbitrator awarded costs against the Claimant rather than in his favour has now gone. Using the figures of recoverable costs found by the arbitrator his supplementary award, the costs award should be varied so that the Claimant recovers 80% of £95,865.72, namely £76,692.57 and the Defendant recovers 10% of £80,353.80, namely £8,035.38. This means that the Defendant must repay any sums she has received from the Claimant and in addition make further payment to the Claimant so that he receives a net balance in his favour of £68,657.19. These figures reflect the way in which the parties put their case before the arbitrator and therefore their level of success. In addition the Defendant should repay the sum of £13,440 paid to her by the Claimant in respect of the arbitrator's fees. She should then pay an additional sum of 70% of the amount of £28,000 the Claimant paid in respect of the arbitrator's fees, namely £19,600. This takes account of the separate issues on which the arbitrator held she won or there was no winner and those on which the Claimant has now succeeded as well as the figures approved by the arbitrator.

38. I will hear further from the parties regarding the costs of these proceedings and any further consequential matters insofar as these cannot be agreed.