Case No: 5/SD/2013 & CH/2013/0322

Neutral Citation Number: [2014] EWHC 996 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building
Fetter Lane
EC4A 1NL

Date: 04/04/2014

Before :

MR JUSTICE NORRIS

- -

Between :

Christopher Josife (By his authorised representative Maria Joseph)	**Claimant**
- and -	
Summertrot Holdings Limited	**Defendant**

- -
- -

Mr Stuart Hornett (instructed by **Jeffrey Green Russell**) for the Appellant
Miss Dawn McCambley (instructed by **G H Canfields LLP**) for the Respondent

Hearing dates: 12 March 2014

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Judgment

Mr Justice Norris :

1. On 3 February 2003 Christopher Josife suffered an acute stroke. It impaired in his ability to comprehend verbal and written communication and his decision-making and general competence in everyday ordinary tasks involving communication. But those around him (including in particular his wife Maria and his solicitors Clifford Harris & Co) considered that he had sufficient capacity to grant an Enduring Power of Attorney on 5 July 2004. In that power of attorney he declared:-

> "I intend that this power shall continue even if I become mentally incapable. I have read or have had read to me the notes in Part A which are part of, and explain, this form."

2. On 4 August 2004 his son Andrew and his wife Maria entered into a Share Option Agreement with a Cypriot company ("Summertrot") under which Andrew became the principal debtor in the sum of £1.3 million and Maria Josife became guarantor of that debt.

3. In due course both Andrew and Maria Josife defaulted on their obligations and Summertrot presented bankruptcy petitions against them. Their position was that all the assets of the family (consisting principally of shares in the family group of companies holding properties and hotels in England and Cyprus, as well as the matrimonial home) were in the name of Christopher Josife.

4. On 27 February 2006 in return for Summertrot (a) withdrawing the bankruptcy petitions (b) granting Andrew an extension of time for the payment of his debt until 31 December 2006 and (c) agreeing not to enforce the guarantee given by Maria Josife until 31 March 2007 Christopher Josife entered into a written Guarantee (under which he assumed the obligations of a primary obligor and not merely those of the surety). The sum due under the Guarantee was due three months after the date of demand. In the Guarantee Christopher Josife promised

> "Sums payable under this guarantee shall continue to be enforceable and payable by the Guarantor notwithstanding any intermediate payment to Summertrot or waiver granted to [Andrew] or [Maria Josife] or my death or mental incapacity or any other matter whatsoever"

5. At the foot of the Guarantee and immediately above Christopher Josife's signature in heavy black capital type was the endorsement:-

> "BY EXECUTING THIS DEED THE GUARANTOR CONFIRMS THAT HE HAS READ AND CONSIDERED CAREFULLY THE TERMS OF THIS GUARANTEE AND FULLY UNDERSTANDS ITS LEGAL TERMS. HE FURTHER CONFIRMS THAT HE HAS RECEIVED INDEPENDENT LEGAL ADVICE ON THE PROVISIONS OF THIS DEED AND THE OBLIGATIONS ON THE PART OF THE GUARANTOR CREATED BY ITS TERMS AND THAT BY SIGNING THIS GUARANTEE HE MAY

BECOME LIABLE AS WELL AS OR INSTEAD OF THE PRINCIPAL DEBTOR/S"

Below that was a record that Dionisios Dionissiou, a solicitor of Morland& Co had personally explained to Christopher Josife the terms and conditions of the Deed of Guarantee, and had satisfied himself that Christopher Josife fully understood those terms and conditions and had executed the Deed of his own free will; and the solicitor certified that he was not aware of any reason which would prevent the enforcement of the guarantee in the event of default by the principal debtors.

6. In fact Marie Josife was unable to meet her obligations within the extended time. Indeed she was herself made bankrupt on 27 January 2008. On 10 July 2008 she entered into an agreement ("the 2008 Deed") under which she obtained further time by pledging some shares belonging to Christopher Josife and by granting a second charge over the matrimonial home that was registered in his name, executing the Deed in her own name and in the name of Christopher Josife "acting by his lawful attorney Maria Joseph under an enduring power of attorney dated 5 July 2004". (In fact that Power of Attorney had been revoked automatically by her bankruptcy).

7. Maria Josife was unable to fulfil her obligations. On 15 November 2012 Summertrot made demand of Christopher Josife under the Guarantee. On 28 November 2012 Summertrot served a statutory demand in respect of the sum of £1.3 million falling due under the Guarantee on 19 February 2013.

8. The time for challenging the Statutory Demand expired on 17 December 2012 without any challenge being made. But on 9 January 2013 Maria Joseph/Josife applied to set aside the statutory demand on behalf of Christopher Josife who, she said, "was incapable of managing his affairs by reason of mental infirmity".

9. The first ground relied on was that the statutory demand had not been validly served. This ground was abandoned.

10. The second ground relied on had two elements: (a) that Christopher Josife had been without his faculties since the stroke and undoubtedly was without his faculties in February 2006 when the Guarantee was signed; and (b) that those faculties had been lost to the certain knowledge of Summertrot's owner and director Mr Kazolides, who knew that Christopher Joseph had no idea what he was signing, and that the presence of an independent solicitor was "a charade".

11. Third, Maria Josife said that Summertrot had the benefit of securities which it ought to have valued: but this argument was entirely inconsistent with the Power of Attorney having been revoked on her bankruptcy in January 2008, and so it, too, was abandoned.

12. Summertrot filed evidence in answer. This explained that the 2006 Guarantee had arisen out of a meeting at the office of Clifford Harris & Co (the solicitors to Christopher Josife), which had been attended by Christopher Josife, Clifford Harris (his solicitor), and Andrew; that the Guarantee had been negotiated exclusively between Clifford Harris and Summertrot's solicitors; and that although it had been envisaged that Clifford Harris (as Christopher Josife's solicitor) would tender advice to his client, in fact an independent solicitor had been selected. The evidence

also stated that Christopher Josife had attended board meetings in the period 2008 to 2011. Whilst what he did was to be challenged, that fact that Christopher Josife was throughout a director of the Desilu Group was not challenged.

13. Shortly before the hearing of the application Maria Josife put in additional evidence (too late for Summertrot to address). This included:-

    a) A Certificate of Mental Capacity by Dr Barretto following an examination of Christopher Josife on 5 December 2006 in which he said: "This patient's brain damage has now made him unable to manage its own affairs".

    b) A letter from Christopher Josife's GP who had known him since the summer of 2009 and said that he found it difficult to envisage Christopher Josife "having significant input into managing complex business affairs".

    c) A letter from Dr Dighton, Christopher Josife's cardiologist, who said that although he could not claim expertise as a clinical psychologist, it was his opinion that since the stroke in 2003 Christopher Josie had been incapable of fully informed consent.

    d) A witness statement from Dr Dighton who said that in his professional opinion he did not believe that Christopher Josife had been able to manage or administer his affairs since his stroke, nor would he have been able to understand the personal guarantee document which he was asked to sign in February 2006. Although this was tendered as expert opinion evidence there had been no attempt to comply with CPR Part 35.

    e) A witness statement from Mr Tarrin Constantine (Group Financial Director of the Desilu Group who were involved in the 2008 Deed) who said Christopher Joseph had not been involved in any business activities or decision-making since he suffered a stroke in 2003, although on some occasions he was present at meetings but was not in a position to participate in any discussion.

14. The application was argued before Deputy Registrar Garwood on 4 June 2013. He refused to set aside the statutory demand. In his judgment the judge:-

    a) Identified the issue for decision as whether there was "a triable issue" (which he expanded into the question whether, if a claim was issued, there was enough evidence to suggest that the issue of capacity would be something which would require proper and thorough consideration by the court);

    b) Directed himself by reference to the decision in Imperial Loan Company v Stone [1982] 1 QB 599 at 601

        "When a person enters into a contract, and afterwards alleges that he was so insane at the time

> that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect…as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about… "

c) Reminded himself that those attending on the negotiation and signing of the guarantee included Clifford Harris (Christopher Josife's solicitor), Mr Dionissiou (who specifically addressed and certified the degree of understanding displayed by Christopher Josife), and Andrew (who did not protest at the incapacity of his father);

d) Observed that before the Guarantee Christopher Josife had signed an Enduring Power of Attorney which had never been registered;

e) Noted that all family assets were in the name of Christopher Josife and yet since 2003 he and Maria Josife had managed their lives (notwithstanding Maria Josife's bankruptcy) in a reasonably orderly manner without the need to have any step taken to put someone in control of Christopher Josife's affairs;

f) Noted that Christopher Josife had throughout remained a director of a substantial company and had been present at board meetings;

g) Commented that the Guarantee had been in existence since 2006 but its validity and effectiveness had not previously been challenged, and indeed it had been the subject of the 2008 Deed apparently granting security in support of it;

h) Held that Mr Josife would have a defence if he could establish at trial both (i) that he was completely incapable of understanding things like legal documents and (ii) that "he was outwardly so incapable of understanding [the Guarantee] that Summertrot should not be allowed to rely on having procured his signature to it".

i) As to requirement (i) accepted that it was possible that in 2006 Mr Josife did not really understand what he signed;

j) As to requirement (ii) ("that his state had to be such that it was obviously apparent to Summertrot that he lacked capacity") held that

> "….even if he did lack capacity, it does not appear to me that there is any reasonable prospect that he could demonstrate to the satisfaction of the court at a full trial that his lack of capacity would have been apparent to Summertrot and was apparent to Summertrot."

15. The appeal is brought with permission of the judge. Three discrete Grounds of Appeal are advanced. All are advanced in the context that the judge accepted that

there was a real issue as to whether Christopher Josife actually had capacity to give the Guarantee (and that it had therefore to be assumed for the purposes of argument that he did not).

16. First it is said that the Deputy Registrar applied the wrong legal test as to what Christopher Josife would need to prove at trial to avoid the Guarantee. Attention focused on the use by the Deputy Registrar of the words "obviously apparent that he lacked capacity". It was said that what Christopher Josife would have to establish is that Mr Kazolides actually knew of, or constructively knew of, or (perhaps) suspected Christopher Josife's incapacity, and the core issue was "knowledge" not "appearance".

17. This was a careful extempore judgment. The precise phraseology is not to be scrutinised as if it were an Act passed by Parliament. The judge plainly understood (having cited Imperial Loan) what the legal requirements were, and his paraphrase of those requirements does not betray any lack of understanding.

18. This led to a debate between Counsel as to what the legal requirements were. Miss McCambley (Counsel for Summertrot) argued that it would be necessary for Christopher Josife to establish at trial that Mr Kazolides *actually* knew of Christopher Josife's incapacity: in argument she explored the Australian authorities, and in particular the decision of Mr Justice Prichard in The Public Trustee (WA) v Brumar Nominees Pty Limited [2012] WASC 161 as demonstrating that actual knowledge or actual awareness on the part of one contracting party of the incapacity of the other contracting party was necessary before the latter could be relieved of his contract. Mr Hornett (Counsel for Maria Josife on behalf of Christopher Josife) argued that constructive knowledge of the incapacity of the other contracting party (or even suspicion) would be sufficient, and that since the legal test was in doubt it was inappropriate to determine the issue within the context of a summary disposal (such as setting aside a statutory demand). He referred to Bailey v Warren [2006] EWCA Civ 51 at paragraph 130 per Arden LJ ("It is not suggested that the respondent or his insurers knew or ought to have known that Mr Bailey was a patient…."): and to Hart v O'Connor [1985] 1000 at p.1014 ("The traditional view in English law was that it must be proved that the other contracting party knew of or ought to have appreciated such incapacity").

19. Immediately after the conclusion of argument the Supreme Court handed down its decision in Dunhill v Burgin [2014] UKSC 18. In paragraph 25 of her judgment Lady Hale says:-

> "In Imperial Loan Co v Stone the Court of Appeal held that a contract made by a person who lacked the capacity to make it was not void, but could be avoided by that person provided that the other party to the contract knew (or, as is now generally accepted, ought to have known) of his incapacity. As [Counsel] points out … this rule is consistent with the objective theory of contract, that a party is bound, not by what he actually intended, but by what objectively he was understood to intend."

This may be taken as a statement of the law by reference to which this appeal must be decided.

20. In my view the Deputy Registrar's judgment demonstrates that he understood that the question to be addressed was the state of Mr Kazolides' knowledge of Christopher Josife's incapacity: and that he took the view that (even if ignorant of the true position) Summertrot would be bound if it would have been obviously apparent to Mr Kazolides that Christopher Josife lacked capacity. This was the correct test: and the first ground of appeal fails.

21. The second ground of appeal was that the Deputy Registrar was wrong to determine that there was no reasonable prospect of Christopher Josife proving Mr Kazolides' knowledge of his incapacity. Essentially two points were made.

22. First, there was evidence from Maria Josife that the whole thing was a charade in which she had participated because of duress. The Deputy Registrar had not addressed this in his judgment. I can understand why. It is fanciful to suppose that Mr Kazolides actually knew of Christoher Josife's incapacity but was determined to give up the opportunity to bankrupt Andrew and Maria Josife in return for a guarantee which he and everyone else actually knew could be avoided. It is equally fanciful to suppose that Marie Josife and Andrew both knew of the incapacity of Christopher Josife but decided to exploit the incapacity of their husband/father to obtain a Guarantee a which they knew could be avoided (simply to escape bankruptcy). There was no real prospect of establishing at a trial that everyone knowingly entered into a continuing transaction in which veryone knew Christopher Josife was incapable of participating, and left that Guarantee as the continuing basis of the commercial relationship between them for six years without challenge.

23. Second, reliance was placed on the family relationships between Mr Kazolides and the Josifes. The thrust of the argument here was that whilst an independent solicitor like Mr Dionissiou might think that Christopher Josife had capacity (and so felt able to give the relevant certificate), where parties have a long-standing relationship prior to entering into the contract then knowledge of incapacity can be proved by virtue of that relationship (even though an independent third party might not realise that the relevant person lacks capacity). But this argument completely overlooks the fact that Clifford Harris (Christopher Josife's solicitor) plainly thought his client both capable of giving instructions for and capable of entering into the transaction which he embodied in the Guarantee which he had drafted together with Summertrot's solicitor. It also overlooks the fact (as the Deputy Registrar noted) that Andrew permitted his father to give a guarantee in order that he (Andrew) and his mother (Maria Josife) should escape bankruptcy.

24. I consider that the indicators on which the Deputy Registrar relied compellingly point to the absence of any real prospect of showing either that those who participated in the grant of the Guarantee did so in full actual knowledge of the incapacity of Christopher Josife, or that it should have been apparent to Mr Kazolides (though not to others) that Christopher Josife lacked capacity to grant the Guarantee.

25. The third ground of appeal is that a determination as to whether or not there is a triable issue involves a consideration not only of the evidence actually before the court, but also of evidence that would or might become available to the parties in the context of trial. It was said that a trial the issue of Mr Kazolides' knowledge would involve disclosure of solicitors files relating to the drawing up of the

guarantee and, in particular, in relation to the circumstances in which a purportedly independent solicitor witnessed Christopher Josife's signature. It was pointed out that the evidence of Summertrot had been given by its solicitor and not by Mr Kazolides himself.

26. I accept that on an application to set aside a statutory demand if there are reasonable grounds for believing that a full investigation into the facts of the case would add to or alter the evidence available to a trial judge such that there is a real prospect that the evidence will affect the outcome of the issue, then the statutory demand can properly be set aside. But this is not an invitation to Micawberism: the submission that "something might turn up" will not succeed. The assertion that the evidence (the nature of which must necessarily be particularised) will affect the outcome and the reasonable grounds for thinking it will be available at trial (but is not available at the hearing of set-aside application) must each be established: and the reason for non-availability of the evidence at the hearing will require particular scrutiny.

27. In fact, the Deputy Registrar did contemplate what would be the position at a full trial. But he did not speculate what other evidence might be available. The unchallenged evidence was that the Guarantee was drawn up at the offices of Clifford Harris & Co immediately after a meeting, that the idea of a certificate at the end of the Guarantee had been that of Summertrot's solicitor, but that it had been contemplated that the relevant advice would be given by Mr Clifford Harris. If there was something in the files of Clifford Harris which threw doubt on this then this was available to Christopher Josife and it would have been adduced before the Deputy Registrar. It is inherently unlikely (and unreasonable to expect evidence) that Clifford Harris would have noted that Christopher Josife was to all appearances incapable of giving instructions but that the solicitor had nonetheless continued to act. The evidence from the files of Clifford Harris that could reasonably be expected at trial would be to the effect that they accepted their client's instructions and drew up a document that they considered he had capacity to execute. The files of Summertrot's solicitor would be the subject of legal professional privilege. I do not think there is anything in this point.

28. In the result I would dismiss the appeal. In my judgment the Deputy Registrar reached the right answer for the right reasons.

29. I order that Christopher Josife shall pay Summertrot's costs of the appeal, such costs to be the subject of detailed assessment in default of agreement.

30. I will hand down this judgment in Leeds on 4 April 2014. I do not expect attendance of legal representatives.