Neutral Citation Number: [2017] EWHC 541 (Ch)

Case Nos: CH 2016 000118
CH 2016 000168

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM
THE COUNTY COURT AT CENTRAL LONDON
(MR RECORDER KENT QC)
B10CL343

Rolls Building, Royal Courts of Justice
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 17/03/2017

Before :

MR JUSTICE NEWEY

- -

Between :

CLIFFORD NNANTA CHUKU	**Appellant/ Claimant**
- and -	
OWEN CHUKU	**Respondent/ Defendant**

- -
- -

The Claimant appeared in person
Mr Justin Kitson (instructed by **Mishcon de Reya**) for the **Respondent**

Hearing dates: 31 January and 1 February 2017

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Judgment Approved

Mr Justice Newey :

1. This is an appeal against an order for security for costs made against the claimant by Mr Recorder Kent QC, sitting in the County Court at Central London, on 5 May 2016.

2. The proceedings concern 61 Childebert Road, Balham, London SW17 8EY. The property was bought and registered in the name of Chief Friday Chuku ("Chief Friday") in 1976. The claimant, Mr Clifford Chuku, and the defendant, Mr Owen Chuku, are both sons of Chief Friday. For convenience, and without any disrespect, I shall refer to them as "Clifford" and "Owen".

3. In total, Chief Friday had 37 children, and he left four surviving wives when he died in Nigeria on 2 August 2000. His will, which was dated 25 March 1996, was proved in Nigeria by Honourable Justice F. Ichoku and Mr Chizoba Atu ("the Executors"). With respect to 61 Childebert Road, the will said this:

> "i) I give to my family (Chief Friday Chuku's family) this house in common. If for any reason the house is to be sold it must be with the consent of my family heads as contained in this Will. Any money realised from the sale must be converted and paid into the common fund.
>
> ii) If the house is not sold all money realised as rents from tenants occupying same must be paid into my private account abroad for onward transmission to the common account here in Nigeria.
>
> iii) If any head of my family or few heads of my family sell this house without the consent of the whole heads, such sale is hereby declared null and void. Before the sale is made, my family solicitor must be notified for necessary advice and directives."

The will went on to provide for "all the monies realised from the common property" to be paid into a "common account", money in which was to be used to provide in specified ways for burial costs, children who were still at school, daughters who were as yet unmarried, daughters who married, the training of children of daughters who gave birth out of wedlock and Christmas celebrations. Clifford and six of Chief Friday's other children, each of whom had a different mother, were designated as heads of the family. The will stipulated that all the heads of the family "must be aware of all monies realised from the common property and how much were spent therefrom and for what purpose at any point in time" and that the family solicitor was to "organise meetings of all the heads of my family at intervals to check how monies realised from the common properties are being expended".

4. On 15 December 2013, the Executors executed a power of attorney appointing Clifford as their attorney and agent over 61 Childebert Road and authorised him, among other things, to apply to reseal and register their grant of probate and for a grant of representation in respect of 61 Childebert Road. In the same document, the Executors agreed to indemnify Clifford against any damage or loss which he might suffer in the exercise of the powers he was being given.

5. On 17 September 2014, the District Probate Registry at Newcastle Upon Tyne issued letters of administration with Chief Friday's will annexed to Clifford in respect of his father's estate, "for the use and benefit of [the Executors] limited until further representation be granted". Not long afterwards, on 21 November 2014, Clifford, as administrator of his father, was registered as the proprietor of 61 Childebert Road.

6. A claim for possession of 61 Childebert Road was issued by Clifford, as "Administrator of the Estate of Chief Friday Chuku", on 6 November 2014. In January 2015, Owen served a defence and counterclaim. The defence denies that Clifford "has any interest in the Property [i.e. 61 Childebert Road], whether legally or beneficially" and continues:

> "The current proprietor of the legal interest in the Property is the estate of Chief Friday, and the proprietor of the beneficial interest in the Property is the Defendant."

Proprietary estoppel and constructive trust claims are then advanced, before the defence ends with these paragraphs:

> "37. In the premises, the Defendant has the benefit of a proprietary estoppel, the effects of which is that the estate of the late Chief Friday (acting by the Claimant) is estopped from asserting any beneficial interest in Property. The Defendant is entitled to occupy the Property by virtue of being its sole beneficial proprietor.
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> 38. Alternatively, by reason of the matters aforesaid, and in particular (a) the expectation in 1993 that the Defendant would repay the proposed £50,000 remortgage on the Property, (b) the 1999 Assurance, and (c) the Defendant's reliance thereon, there was a common intention that the Defendant had a beneficial interest in the Property. The Defendant relied on that common intention as aforesaid, and it would be unconscionable for the estate of Chief Friday (acting by the Claimant) to deny the rights that the Defendant has pursuant to the common intention. The Defendant is entitled to occupy the Property by virtue of the said constructive trust."

There follows the counterclaim, which, having repeated the defence, states (in paragraph 40):

> "By reason of the matters set out aforesaid, the Defendant seeks the following relief from the court, which the Defendant contends represents the minimum equity to give effect to the proprietary estoppel or constructive trust:
>
> (a) A declaration that the Defendant is the beneficial owner of the Property pursuant to a proprietary estoppel and an order that the Claimant does effect transfer of Chief Friday's estate's legal interest in the Property to the Defendant within 28 days. Insofar as the Claimant contends that he is unable to do so (which will be denied), then the Defendant will apply to the Court for the joinder of the executors of the estate of the late Chief Friday.
>
> (b) Alternatively, a declaration that the Property is held on constructive trust for the Defendant in its entirety, or in such proportions as the Court considers just, in so far as the Court finds that the Defendant is entitled to the entirety of the beneficial interest in the Property, then the Defendant further counterclaims an order that the Claimant transfers the legal title to him within 28 days and the second sentence of paragraph 40(a) is repeated."

Declarations and orders along these lines are, finally, sought in the prayer.

7. In November 2015, Owen applied for an order for security for costs against Clifford. Mr Recorder Kent QC acceded to Owen's application and ordered Clifford to make a payment into Court by way of security. It is against that order that Clifford now appeals.

8. CPR 25.13, pursuant to which the application for security for costs was made, empowers the Court to make an order for security where it is satisfied that it is just to do so and one or more of the conditions set out in CPR 25.13(2) applies. The conditions listed in CPR 25.13(2) include these:

> "(a) the claimant is—
>
> (i) resident out of the jurisdiction; but
>
> (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
>
> …
>
> (f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so …."

9. The Recorder concluded that Clifford was resident out of the jurisdiction and, hence, that condition (a) was satisfied. As regards condition (f), the Recorder rejected a submission advanced by Clifford that he was "a representative claimant under Part 19", and said this (in paragraph 17 of his judgment) about whether Clifford was a "nominal claimant":

> "Is he though a nominal claimant? He says that he is not because he is a beneficiary of the will of his father and therefore is indirectly concerned with the outcome of this litigation. I think, although it is a slightly difficult point and I do not really need to decide it, he is a nominal claimant. I think the point is … that the beneficiaries could not themselves have brought this action. The estate brings the action and the estate has to do so through its executors or someone else who is nominated for that purpose. The executors, who happen to be out of the jurisdiction and therefore would fall foul if they brought the action without any argument of condition 2(a), have chosen not to bring the action but to arrange for the claimant to gain letters of administration so that he can bring the action. I think therefore he is properly called a nominal claimant and he is one who would not be able to pay the defendant's costs if ordered to do so. But the point does not arise because I am satisfied that he is resident out of the jurisdiction."

10. The Recorder proceeded to ask himself whether it was just to make an order for security for costs and, after considering a number of matters, decided that Clifford should be ordered to provide security of £90,000. He further ordered that, unless security was given as directed, the claim was to be struck out without further order and:

> "On production by the Defendant of evidence of default, there shall be judgment for the Defendant without further Order with costs of the claim to be the subject of a detailed assessment, if not agreed."

11. The issues that arise now can, I think, conveniently be addressed under the following headings:

    i) Condition (a): residence;

    ii) Condition (f): nominal claimant;

    iii) The significance of the counterclaim;

    iv) Bias.

Condition (a): residence

12. Clifford maintains that he is resident in this jurisdiction. In a witness statement dated 20 December 2015, he explained that, although he was born in London and initially lived at 61 Childebert Road, he was subsequently taken by his mother to Nigeria, where he was educated and then practised law as a barrister and solicitor of the Supreme Court of Nigeria from about 2006 or 2007 to 2011. In 2011, Clifford said, he moved into Flat 508 Webb Court, London SE28 ("Flat 508"), of which a childhood friend (and also, I gather, a nephew of a stepmother of Clifford), a Mr Obiyiniro Boms, was the tenant, returning to Nigeria only occasionally. From September 2013, according to Clifford, he and his wife and their children lived at 30A Azalea Terrace North in Sunderland, where his wife studied for a Master's degree. However, in January 2015, so Clifford stated, his wife and children returned to Nigeria in order to satisfy certain immigration requirements with a view to coming back to the United Kingdom for settlement purposes. Clifford said that he continued to reside at 30A Azalea Terrace on his own until 1 August 2015, when he moved out and relocated to Flat 508. In support of this account, Clifford exhibited, among other things, a final electricity and gas bill dated 5 August 2015 for 30A Azalea Terrace; a written agreement dated 16 July 2015 by which Mr Boms licensed him to share occupation of Flat 508 on a rent free basis, but making contributions to outgoings such as electricity and gas; a letter dated 29 July 2015 in which Clifford notified Owen's solicitors that his address after 31 July 2015 would be Flat 508; and Land Registry entries for 61 Childebert Road in which his address is given as Flat 508 (as well as 26 Station Road, Elelenwo, Port Harcourt in Nigeria). Clifford described himself as "a self-employed consultant on Nigerian legal proceedings and corporate practice" and said that he had "remained a pro bono consultant to the firm of Edward & William" and used the firm's facilities whenever he was in Nigeria.

13. Clifford stressed that he is a British citizen. He also explained without contradiction that he had told the Recorder at the hearing that he had voted that morning in the Greater London Authority Elections and that gas and electricity were supplied on a pay-as-you-go basis, making it impossible for him to provide documentation evidencing payments for them. He noted, too, that he had attended all the Court hearings, which, of course, were in this country.

14. The Recorder rejected Clifford's account. He observed that the licence agreement relating to Flat 508 contained no provision for Clifford to pay anything beyond contributions to outgoings and that there was "no specific detail as to what proportion of electricity and gas bills and other outgoings he was to make" (paragraph 7). He referred to a submission to the effect that the licence was either "a complete sham" or "a purported grant of a licence … that may, under the tenancy agreement, the full terms of which we do not have … be a breach of covenant by Mr Boms" (paragraph 8). The Recorder expressed the view (in paragraph 11) that "it is remarkable that there is no evidence produced, other than that purported licence agreement, to show that Mr Clifford Chuku was living at that address". In paragraph 13, the Recorder said this:

> "[Clifford's wife] is now back in Nigeria and therefore one has the situation that the claimant, having no apparent financial means to remain here, having no income here and admitting to no income from any other sources, chooses to remain living in this country, he says, with his family back in Nigeria. That makes little sense. He is a well-educated, qualified person, a lawyer ... in Nigeria and, in all the circumstances, I am entirely satisfied that he is not living at Flat 508 …."

15. The Recorder went on (in paragraph 14):

> "Does that mean that [Clifford] is resident out of the jurisdiction? I think it does. Clearly he has considerable family connections with Nigeria, whatever the facts about his birth and his UK passport may be. Indeed I think he said he came to this country only in 2008. As I have said, there is evidence that he is still connected with a Nigerian firm of attorneys and once I have got to the point where I am satisfied that he is not living at Flat 508 … (whether or not he occasionally visits that address) there is no fall-back position whereby I could conclude that he is resident anywhere other than Nigeria. So I am satisfied that condition (a) of sub-para.(2) of Part 25.1 is made out."

16. Was the Recorder justified in expressing himself "entirely satisfied" that Clifford was not living at Flat 508? Mr Justin Kitson, who appeared for Owen, argued that he was. Mr Kitson emphasised, in particular, the paucity of documentation relating to Flat 508, the existence of evidence indicating that Clifford worked for a firm of attorneys in Nigeria and the fact that Clifford's wife and children are in Nigeria. Mr Kitson accepted that, where there is a dispute of fact, the Court may not consider it possible to determine it summarily, without cross-examination, but he submitted that, on the material before him, it was open to the Recorder to make the findings he did. Mr Kitson relied in support of his submissions on *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 (where Potter LJ said, at paragraph 10, that "[i]n some

cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents"), *Optaglio Ltd v Tethal* [2015] EWCA Civ 1002 (where Floyd LJ said, at paragraph 32, "Given the nature of the summary judgment test, the court can only dispose of factual issues in this way when there is no real prospect of the evidence of one side on that issue being accepted") and *Ontulmus v Collett* [2014] EWHC 294 (QB) (where Tugendhat J made certain findings in relation to an application for security for costs, while also noting, in paragraph 31, that "contradictions between the evidence of [two witnesses] cannot be resolved on paper").

17. Clifford sought permission to adduce additional evidence that he lives at Flat 508. Even aside from that those materials, however, it seems to me that the Recorder was not entitled to conclude that Clifford was not living at Flat 508 and, hence, that he was resident out of the jurisdiction. Mr Kitson did not dispute that Clifford was resident in this country during the period his wife was studying in Sunderland. The question must therefore have been whether Clifford had ceased to be so resident in or after January 2015, when his family returned to Nigeria. On the face of it, Clifford's evidence to the contrary was supported to an extent by the licence agreement and other documents that he exhibited; the lack of rent and limited detail could be attributed to the nature of his connection with Mr Boms; and the absence of proof of gas and electricity payments could be explained by the fact that they were being supplied on a pay-as-you-go basis. Nor, as it seems to me, was it by any means inconceivable that Clifford should have remained here when his wife and children went back to Nigeria: families sometimes do such things, especially where there are immigration issues to be considered. Further, while there can certainly be said to have been unanswered questions about Clifford's work and means, they do not strike me as having led inexorably to the conclusion that he had moved back to Nigeria: after all, the same points could have been made about the period when it is not disputed that Clifford was resident in Sunderland.

18. In all the circumstances, I do not, with respect, think that it was open to the Recorder to reject evidence that Clifford had given by way of a witness statement, on which he had not been cross-examined, and to conclude that Clifford did not live at Flat 508 and was resident out of the jurisdiction. There was no necessary inconsistency between Clifford's version of events and the documentary evidence. Neither on that basis nor any other was it clear that Clifford's account was incredible or lacking in real substance.

Condition (f): nominal claimant

19. Since the Recorder had already decided that Clifford was resident out of the jurisdiction, he did not need to arrive at a final conclusion on whether he was to be viewed as a "nominal claimant" within the meaning of CPR 25.13(2)(f). While voicing an opinion on the issue (see paragraph 9 above), he himself observed, "the point does not arise because I am satisfied that [Clifford] is resident out of the jurisdiction". Now, however, the question matters. If, as I have held, Clifford cannot be taken to be resident out of the jurisdiction, it is crucial to the application for security for costs that Clifford is a "nominal claimant".

20. I was referred to a number of cases in which judges have commented on the meaning of "nominal claimant" in the context of CPR 25.13(2)(f) or, before the Civil Procedure Rules were introduced, that of "nominal plaintiff".

21. The earliest of these is *White v Butt* [1909] 1 KB 50, where trustees to whom, in a separation deed, a husband had covenanted to pay an annuity in trust for his wife sued for arrears under that covenant. They were held not to be "nominal plaintiffs". Vaughan Williams LJ expressed the view (at 53) that "trustees of an ordinary settlement, or trustees under a separation deed such as the plaintiffs in this case, are not within the meaning of that expression [i.e. 'nominal plaintiff']". For his part, Buckley LJ said this (at 55):

> "It is a rule that a plaintiff cannot in a Court of first instance be called on to give security for costs merely because he is poor, it being deemed right and expedient that a Court of justice should be open to every one. An exception, however, from that rule is that, if a plaintiff is what has been called a 'nominal plaintiff' or what, by way of alternative expression, I will call a 'fictitious plaintiff', and is without means, security for costs will be ordered. An example of the kind of case in which that expression 'nominal plaintiff' is applicable is where a person in whom a cause of action was vested, not being minded to bring an action himself, has assigned that cause of action to another, whom he puts forward for the purpose of suing, but who has no beneficial interest in the subject-matter of the litigation. There are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs."

Like, however, Vaughan Williams LJ, Buckley LJ did not consider that trustees would ordinarily be "nominal plaintiffs". He said (at 56):

> "I am startled that any one should put forward the proposition that trustees, like the plaintiffs, come within the rule as to 'nominal plaintiffs,' because they have no beneficial interest in the subject-matter of the litigation. If this proposition were true, it would apply equally to any trustees, whether of a marriage settlement or a will, or for debenture-holders, and it would follow that trustees could be ordered, if impecunious, to give security for costs in any action brought by them as trustees, on the ground that they, personally, had no beneficial interest in the subject-matter of the action. Such a proposition appears to me altogether untenable."

22. The next authority is *Envis v Thakkar* [1997] BPIR 189. In that case, the plaintiff had entered into an individual voluntary arrangement under which he undertook to pay the net proceeds of the action to the supervisor of the arrangement. He was held not to be

a "nominal plaintiff". Kennedy LJ, with whom Nourse and Evans LJJ agreed, explained (at 192-193):

> "When this plaintiff began his action he was no doubt in considerable financial difficulties, but no one could even contend that he was only a nominal plaintiff. Since then he has made the voluntary arrangement, but that does not mean that he has ceased to have a genuine personal interest in the action, nor has it increased the exposure of the defendant in relation to costs. The plaintiff pursued his action because if it succeeds he will be able to discharge his liabilities and hopefully have something left over for himself. If he succeeds, others, namely his creditors, will benefit, but so will he, and so I cannot regard him simply as a nominal plaintiff suing for the benefit of some other person. Indeed, it is my view that before a person can be branded as a nominal plaintiff for the purposes of RSC Ord 23, r 1(b), there must be some element of deliberate duplicity or window-dressing which operates and probably was intended to operate to the detriment of the defendant."

23. The first case to involve CPR 25.13 as such was *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572. There, the registered owner of some design rights had covenanted to pay half of the net recoveries to the liquidator of a company that had formerly been the beneficial owner of the rights. Neuberger J dismissed an application for security for costs. He said (at 577):

> "I must confess that there is force in [counsel for the applicant's] point that the nominal claimant ground for obtaining security for costs in CPR 25.13(2)(f) may be said to be of precious little value if it can be avoided by ensuring that the person who is the claimant is given some interest in the proceeds of the action even if it is only a relatively small one. It may be that, on different facts, the court would be prepared to give a more extended meaning to the concept of nominal claimant than the cases, to which I have referred, appear to indicate in relation to nominal plaintiff. On the facts of this case, however sympathetic I am to the suggestion that there should be an order for security for costs against [the claimant], I do not think that he can be said to fall within CPR 25.13(2)(f) if the assignment is not champertous."

24. *Compagnie Noga d'Importation et d'Exportation SA v Australia & New Zealand Banking Group Ltd* [2004] EWHC 2601 (Comm) also concerned CPR 25.13(2)(f). In the course of his judgment, Langley J said (at paragraph 115):

> "Although there is little authority on the point I think 'a nominal claimant' is one whose name is used to bring a claim in which he does not have any or at least any significant legal or beneficial interest. On the evidence currently available I think Mr Gaon does have such an interest. It follows that there

> is no jurisdiction to order him to provide security under this rule."

25. It is also relevant to note *Allen v Bloomsbury Publishing plc* [2011] EWCA Civ 943, in which a claimant who had been ordered by a judge to make a payment into Court argued that he could not have been ordered to provide security for costs under CPR 25.13(2)(f) because he was a "representative claimant under Part 19" within the meaning of CPR 25.13(2)(f). As to this, Lloyd LJ, with whom Rix and Sullivan LJJ agreed, said the following (in paragraph 24):

> "I would reject that argument. A claimant may be a representative claimant under rule 19.6 or rule 19.7. Neither of those rules applies to the present case. [Counsel for the claimant] relied instead on rule 19.7A, which provides that trustees or personal representatives can bring a claim as such without joining the beneficiaries and the judgment is binding on the beneficiaries. Mr Allen [i.e. the claimant] is of course a trustee. The proceedings can be brought without joining the beneficiaries and the judgment would be binding on them. However, this rule does not constitute the claimant as a representative claimant. There is nothing in the rule to that effect, unlike the terms of rules 19.6 and 19.7. Accordingly this point seems to me to be wrong and irrelevant."

26. In the light of these cases, it seems to me that:

    i) A person with a significant interest in the outcome of a claim will rarely, if ever, be considered a "nominal claimant" within CPR 25.13(2)(f);

    ii) A personal interest is not, however, essential. While a trustee, executor or personal representative will not be a "representative claimant under Part 19" merely because CPR 19.7A is in point, he still will not ordinarily be a "nominal claimant", regardless of whether he is also a beneficiary;

    iii) At least typically, there "must be some element of deliberate duplicity or window-dressing" for a person to be a "nominal claimant".

27. Arguing that Clifford is a "nominal claimant", Mr Kitson pointed out that he was appointed by the Executors as their attorney and agent, that he has the benefit of an indemnity from them and that the grant to him of letters of administration was specifically for their benefit. He argued, too, that Clifford is no more than a contingent beneficiary under Chief Friday's will (as it is not known what, if any, assets are comprised in the estate) and that there is no evidence to show that success in the litigation with Owen would enure to Clifford's benefit.

28. On balance, however, I have concluded that Clifford is not to be characterised as a "nominal claimant" within CPR 25.13(2)(f). I did not understand Mr Kitson to maintain that he could show an "element of deliberate duplicity or window-dressing". In any case, it seems to me that Clifford has a real role and interest in the present proceedings. He has, of course, been appointed as the Executors' agent and as administrator of his father's estate and, in that capacity, is the legal owner of 61

Childebert Road (since he is its registered proprietor). In addition, though, to those matters, he is one of those for whose benefit Chief Friday gave the property "in common", could potentially benefit from the "common fund" into which any money realised from the property is to be paid under the terms of the will, and has significant functions as one of the seven heads of the family.

The significance of the counterclaim

Legal framework

29. The authorities show that the existence of a cross-claim will sometimes lead a Court to decline to make an order for security for costs in respect of a claim.

30. The decision of the Court of Appeal in *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43 is much cited in this context. In that case, a building contractor brought proceedings to recover money said to be due to it for additional work. The employer denied that it had authorised such work and also counterclaimed for damages for defective and uncompleted work. The Court of Appeal concluded that the contractor should not be ordered to give security in respect of its claim. Bingham LJ stressed (at 49) that there could be "no rule of thumb as to the grant or refusal of an order for security" in the circumstances. On the facts of the case, he considered the most important factor to be that the rival claims "raise essentially the same issues and are going to be fully litigated anyway so far as one can tell" (see 54). Bingham LJ was concerned in part about the risk of one-sided litigation if security were ordered. As to this, Bingham LJ said (at 52):

> "It is … necessary, as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy– that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.
>
> Mr Phillips for the defendants submits there would really be no problem because, if the defendants failed in their counterclaim and the plaintiffs' case contrary to the counterclaim effectively succeeded, then the stay could be lifted and the plaintiffs could be given judgment. But on that assumption one is bound to ask what would be the point of making the order at all except to give the defendants a tactical advantage in the litigation."

31. Bingham LJ also had in mind the fact that the costs in respect of which security would be awarded could be said to be costs of pursuing the employer's own claim. He said (at 53):

> "It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim…. The fact that the plaintiffs are plaintiffs and the defendants are counterclaiming defendants instead of the other way round appears on the facts here to be very largely a matter of chance."

32. The other member of the Court, Parker LJ, observed in his judgment (at 55) that:

> "if the money is not paid into court and the plaintiff's claim is therefore stayed, the defendant will still raise issues on the counterclaim which are precisely the same as the issues which he would raise on the claim."

33. In *Love & Care Ltd v Kiernan* [2005] EWHC 2180 (Ch), where Kitchin J dismissed an application for security for costs, one of the matters that led him to do so was the form of order sought by the relevant defendants. Kitchin J said this on the subject (in paragraph 18 of his judgment):

> "[D]uring the course of the hearing I invited counsel for the Estate [i.e. the defendants applying for security] to specify precisely the order that the Estate sought. In response to that invitation I was invited to make an order that 'unless security is given as ordered, on production by the Second and Third Defendants of evidence of default, there be judgment for the Second and Third Defendants without further order with costs of the claim to be the subject of a detailed assessment'. In short, it was submitted that the Estate would be entitled to judgment on the counterclaim. It is of course not appropriate to order security for costs against a defendant and the framing of this Order confirms, to my mind, that in substance that is what is sought by the application before me."

The judgment

34. The Recorder referred in paragraph 18 of his judgment to the "*Crabtree* point", which he outlined in these terms:

> "there is a counterclaim in this case and, of course, if the counterclaim had been the only proceedings brought, so that Mr Clifford Chuku was simply defending the counterclaim, there would be no question of getting security for Mr Owen Chuku's costs, however unlikely it may be, that in due course those costs would be recovered from Mr Clifford Chuku".

35. The Recorder explained his conclusion on the issue as follows (in paragraph 32):

> "Ultimately the question to be decided where there is a counterclaim in my view is this. Is this a case where the counterclaim was the sort of claim that would have been made anyway but, by chance, the claim came first or is it something that would never have seen the light of day were it not for the fact that the proceedings brought by the claimant were brought and it was felt necessary to respond to it? I think it is the latter type of case. The defendant is doing no more than responding to an assertion that he has no interest in the property and must give possession of it by not only defending that claim but by making good that defence by seeking declarations. In a sense, he is simply reacting to a situation which the claimant started by these proceedings and even if, for whatever reason, the claimant does not proceed – whether that is because the security which I am going to order is not given or otherwise – there does not seem to be any reason why the counterclaim should not proceed or that the defendant should be out on terms."

Discussion

36. Clifford made the point that the passage in the Recorder's order that I have quoted in paragraph 10 above is almost identical to the wording which, in *Love & Care Ltd v Kiernan*, Kitchin J took to mean that, if security were not provided, the defendants could obtain judgment on their counterclaim. Initially, Mr Kitson seemed to construe the Recorder's order in the same way: he suggested in his skeleton argument that the Recorder had in mind that the Court would be entitled to strike out the defence to counterclaim. I doubt, however, whether that was what the Recorder intended. In any event, Mr Kitson accepted during the hearing before me that the Recorder's order meant that, if security for costs were not given, Clifford's claim would be struck out but the counterclaim would remain to the litigated: Owen would not be able to obtain judgment on his counterclaim.

37. None the less, it seems to me that, even supposing (contrary to the conclusions I have arrived at thus far) that CPR 25.13(2)(a) and/or CPR 25.13(2)(f) were applicable in the present case, it could not be appropriate to order Clifford to provide security for costs in the light of Owen's counterclaim. My reasons include these:

    i) Clifford's claim and Owen's counterclaim raise very much the same issues. The defence is essentially reflective of the counterclaim;

    ii) If Clifford failed to provide security for costs as ordered, with the result that his claim were struck out, the counterclaim would still fall to be fought out. It would thus be open to Clifford to dispute the very proprietary estoppel and constructive trust arguments that had been put forward as the answers to the claim that he would no longer be allowed to pursue. Were Owen ultimately to lose on the counterclaim, the basis of his defence to Clifford's claim would have fallen away, yet Clifford would, on the face of it, continue to be unable to obtain possession of 61 Childebert Road;

iii) The costs that Owen is incurring to defend himself "may equally, and perhaps preferably, be regarded as costs necessary to prosecute [his] counterclaim" (to echo Bingham LJ in *Crabtree*). It is noteworthy in this context that, even where a proprietary estoppel equity has been established, the Court has a discretion as to how the equity should be satisfied. Megarry & Wade, "The Law of Real Property", 8th ed., for example, explains (in paragraph 16-028)

> "The equity which arises by estoppel is an equitable proprietary right to go to a court to seek relief. The court has a wide discretion as to the manner in which it may satisfy the equity, which may or may not involve the grant to C of a proprietary right over O's land. If the court does order that C be granted a property right, that grant is not retrospective, but operates only from the time of the execution of the court's order."

> This serves to emphasise the extent to which Owen's defence depends on his counterclaim (in which he "seeks … relief from the Court" as "the minimum equity to give effect to the proprietary estoppel or constructive trust");

iv) Mr Kitson said during submissions that, if Clifford's claim were struck out, Owen might decide not to proceed with his counterclaim. I find it hard, however, to see how that could be a satisfactory outcome. Clifford would presumably, after all, remain the registered proprietor of 61 Childebert Road. Moreover, it is by no means clear that Owen could insist on discontinuing the counterclaim on a basis that would leave him free to reassert the proprietary estoppel and constructive trust claims in the future (as to which, see e.g. CPR 38.7).

38. Mr Kitson stressed that the grant or refusal of security for costs involves an exercise of discretion and that there is "no rule of thumb" (to quote from Bingham LJ in *Crabtree*) as to whether security should be awarded where there is a cross-claim. Here, submitted Mr Kitson, there is no sufficient basis for interfering with the Recorder's exercise of his discretion.

39. On the other hand, it is not apparent that the Recorder had in mind the various matters listed in sub-paragraphs (i) to (iv) of paragraph 37 above. Further, the Recorder was, to my mind, mistaken in considering Owen's counterclaim to be "something that would never have seen the light of day were it not for the fact that the proceedings brought by [Clifford] were brought and it was felt necessary to respond to [them]". The Recorder's view, as it seems to me, ignores (a) the fact that the registered proprietor of 61 Childebert Road has been Chief Friday and, latterly, Clifford rather than Owen and (b) the fact that the proprietary estoppel equity that Owen asserts amounts to a "right to go to a court to seek relief". In the circumstances, the rival claims to the property were surely bound to see the "light of day" sooner or later. On the particular facts, it appears to me that an order for security for costs was plainly inappropriate.

Bias

40. In November of last year, Clifford applied for permission to rely on additional grounds of appeal. In essence, Clifford complained that he had not been told that the Recorder had been instructed by Owen's solicitors, Mishcon de Reya LLP.

41. The connections between the Recorder and Mishcon de Reya are addressed in a witness statement made by a partner in the firm, Mr Mark Keenan. It appears from the evidence that the Recorder was instructed by Mishcon de Reya to act for Foxtons Limited in a claim brought by the Office of Fair Trading in 2008 which came before Morgan J in July of that year, the Court of Appeal in April 2009 and Mann J at about the same time. There is no reason to suppose that the Recorder has been instructed by Mishcon de Reya on any other case or that he has worked with the team handling the present litigation. It also seems that the Recorder has never been paid by Mishcon de Reya themselves.

42. On 21 December 2016, I dismissed Clifford's application to introduce the additional grounds of appeal, taking the view that such dealings as the Recorder had had with Mishcon de Reya some seven or eight years earlier in an unrelated matter and in a professional capacity could not provide a sound basis for alleging either bias or a breach of the principles of judicial conduct. Clifford renewed his application at the hearing, but my view remains the same.

43. A passage from *Taylor v Lawrence* [2001] EWCA Civ 119 is, as it seems to me, apposite. Chadwick LJ, with whom Keene LJ agreed, said (at paragraph 33):

> "In my view, no fair-minded observer would reach the conclusion that a judge would so far forget or disregard the obligations imposed by his judicial oath as to allow himself, consciously or unconsciously, to be influenced by the fact that one of the parties before him was represented by solicitors with whom he was himself dealing on a wholly unrelated matter. It is a matter of everyday experience that judges are acquainted, in one capacity or another, with those who appear before them as solicitors or advocates. That is a matter of which an informed observer would be well aware. The informed observer would be well aware, also, that judges, solicitors and advocates can be expected to recognise that it is a matter of paramount importance that the public should retain confidence in the administration of justice; and to recognise that they are required to conduct themselves accordingly. But judges, solicitors and advocates are entitled to expect from a fair-minded and informed observer a corresponding recognition that they will endeavour to be true to their judicial oath and to the standards set by their respective professional codes. It is not to be assumed, without cogent evidence to the contrary, that a judge's acquaintanceship, whether social or professional, with those conducting litigation before him in a professional capacity will lead him to reach a decision in that litigation that he would not otherwise reach on the evidence and the arguments."

44. In my view, the additional grounds of appeal that Clifford wishes to advance have no real substance. I shall therefore decline to grant him permission to rely on them.

Conclusion

45. In my view, the Recorder was not, with respect, entitled to reject Clifford's evidence and conclude that he was resident out of the jurisdiction for the purposes of CPR 25.13(2)(a), and CPR 25.13(2)(f) (nominal claimant) is not applicable either. In any case, the existence of Owen's counterclaim would make it inappropriate to order security for costs. Notwithstanding, therefore, Mr Kitson's helpful submissions, I shall allow the appeal.