Neutral Citation Number: [2022] EWHC 440 (Ch)

Case No: CH-2021-000059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDERS OF DDJ MACKENZIE DATED 25 FEBRUARY 2021 AND 5 MARCH 2021
COUNTY COURT CASE NUMBER 425 OF 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2022

Before :

RICHARD FARNHILL
(sitting as a Deputy Judge of the Chancery Division)

- -

IN THE MATTER OF DARRYL PRESTON

Between :

DARRYL PRESTON

Appellant and Debtor

- and -

JACK CHARLES BEAUMONT

Petitioner and First Respondent

- and –

THE OFFICIAL RECEIVER

Second Respondent

- -
- -

The Appellant represented himself
Mr David Warner (instructed by **Trethowans LLP**) for the **First Respondent**

- -

APPROVED JUDGMENT

Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division):

Background

1. This judgment concerns the questions of costs and the time for filing an appellant's notice arising out of my earlier judgment (the "First Judgment"), dismissing the Appellant's appeal against the Orders of DDJ Mackenzie of 25 February 2021 and 5 March 2021.

2. The First Judgment was provided to the parties in draft on 2 February 2022, at which time the parties were asked if they required a hearing to address consequential matters. Minor proposed corrections were received on 4 February 2022; neither party requested a further hearing and no applications were made. Accordingly, the First Judgment was handed down on 8 February 2022.

3. I understand that the parties have subsequently sought to agree costs but have been unable to do so. That has, in turn, meant that the terms of the Order have not been agreed and that no sealed Order has been issued.

4. The parties now seek determination on two points on the basis of their respective written submissions:

   i) A summary assessment of the First Respondent's costs in connection with the First Judgment.

   ii) An extension of time in which the Appellant can file its appellant's notice.

5. The Appellant has raised the question of my jurisdiction to determine at least the first issue in circumstances where no application notice has been issued by the First Respondent. He has noted the irregular manner in which submissions have been made to the court and questioned the basis on which I could render any judgment.

6. I agree that both issues have been addressed in an irregular manner, and one that I consider to be unsatisfactory. I make no criticism of the Appellant in this respect. He instructed counsel on a direct access basis to appear at the hearing of the appeal and has consulted her subsequently, but to a greater or lesser extent he is representing himself. Although issued very late in the day, his application is made by way of an application notice and supported by the evidence it contains. He has been asked to respond to the skeleton argument of the First Respondent on quite short notice. That timing was in large part driven by the Appellant's own desire to have a determination as to the time for filing an appellant's notice before the current deadline expires on 1 March and by the court's desire that he be afforded an opportunity to address new points raised by the First Respondent. I appreciate his efforts in doing so.

7. By contrast, although the First Respondent is represented by solicitors and counsel his application has been made in a more ad hoc fashion, leaving the

court to determine what basis (if any) exists for such an approach. No evidence has been offered in support.

8. I am comfortable that there is a proper basis for me to consider these issues even in the absence of an application notice and supporting evidence. As I will address in more detail below, in respect of matters consequential on a judgment, which these both are, paragraph 4.4 of PD 40E permits for applications to be made by way of written submissions. For reasons that I will also come to address the absence of evidence is relevant to certain of the matters I need to address, but in and of itself it does not deprive me of jurisdiction.

Costs

9. The Appellant's position is that no application for costs was made ahead of the handing down on 8 February 2022 and, under the terms of PD 40E, it is too late to do so now. The First Respondent relies on three linked arguments in response:

    i) On the basis of the *Re Barrell Enterprises* [1973] 1 WLR 19 line of cases, a judge remains seised of a case until the order disposing of it is drawn up and sealed, and so continues to have the power to make orders on consequential matters.

    ii) When the court asked whether a hearing was required to address consequential matters, no time frame was specified for a response.

    iii) The First Respondent acknowledges that "*an application for a consequential order should be made by 12 noon the day before judgment is to be handed down*". However, because the court retains jurisdiction, the First Respondent's failure to comply with the time limits in paragraph 4.4 of PD 40E in making his application for costs is not fatal and the court can still deal with that application.

10. The insurmountable difficulty with that approach is that it is entirely inconsistent with the terms of paragraph 4.4 of PD 40E. This provides:

    "Where a party wishes to apply for an order consequential on the judgment the application must be made by filing written submissions with the clerk to the judge or Presiding Judge by 12 noon on the working day before handing down." (my emphasis)

11. This goes to the First Respondent's third point. Paragraph 4.4 is not framed in terms of what parties "should" do; it addresses what they "must" do. It is mandatory. No specific sanction is set out in PD 40E, but given the mandatory language coupled with a clear time limit it seems to me clear that the effect of paragraph 4.4 is that no application can be made after that time.

12. I therefore agree with the Appellant that this is properly a question of relief from sanctions. No application has been made for relief under CPR 3.9 and the requisite evidence explaining the noncompliance has not been provided.

In the circumstances, I am not in a position to consider granting relief from sanctions. Even had such an application been made it would have faced significant obstacles. This was an obvious failure to comply with a clear rule in circumstances where compliance would have been straightforward. The argument that the First Respondent's lawyers did not make an application while they were seeking to agree the terms of the order goes nowhere. That should happen in every case but applications for costs by the successful party are so common as to be almost uniform. In any event the making of an application for costs would in no way have precluded the parties from continuing discussions.

13. The second point, that no time frame was specified for a hearing on consequential matters, does not advance the First Respondent's position. Paragraph 4.4 of PD 40E is by reference to the time of the handing down, which did not require a hearing on consequential matters and has now happened.

14. Equally, this is not a case to which *Re Barrell Enterprises* applies. The fact that I may retain jurisdiction over some matters until the order is sealed does not create jurisdiction where none exists under the CPR in the first place. Paragraph 4.4 is clear: any application for costs had to be made before the First Judgment was handed down; no such application was made and there has been no application for relief from sanctions. *Re Barrell Enterprises* does not change any of that.

15. The position might have been different if I had exercised the jurisdiction from the *Re Barrell Enterprises* line of cases and in some way altered my judgment. To the extent that changed the identity of the successful party, that party would have strong arguments for saying that it ought to be allowed to pursue an application for its costs. Paragraph 4.4 allows for that, however, because the reference to "the judgment" would then have been to the revised judgment, effectively resetting the clock. In any event, that is not this case; the First Respondent has not sought to alter the substance of the First Judgment in any way.

16. The First Respondent references the fact that the Schedule of Costs was served before the appeal hearing. I do not understand that to be an argument that serving the Schedule amounts, in itself, to the making of an application. Such a submission would be at odds with the acknowledgment made by the First Respondent that there has been a failure to comply with the requirements of PD 40E. It is also clear from paragraphs 9.5 and 9.6 of PD 44 that the statement of costs is an element of the application for costs but not the application itself.

17. Ultimately, the position is a straightforward one. The CPR makes limited provision for deemed costs orders, none of which apply here. To the contrary, the default position under CPR 44.10(1)(a) is that in the absence of specific provision there is no order as to costs. It was therefore incumbent on the First Respondent if he wanted to seek his costs to make an application within the time permitted. He did not do so. If he wanted relief from sanctions he needed to explain that failure. Again, he has not done so. In the

circumstances, costs were not sought in accordance with the relevant rules and it is too late to do so now. There will be no order as to costs in the appeal.

Time for filing the appellant's notice

18. Prior to the parties' submissions there had been exchanges on this question, some of which were with the court. In particular, while emphasising that I had made no determination on the matter I had suggested that it would be helpful if the parties' submissions could address the following points:

"1. The first question is when time starts to run. *McDonald v Rose* [2019] EWCA Civ 4 is obviously a decision that is binding on me. The Court of Appeal stated there (at [13]): '*This establishes that "the date of the decision of the lower court which the appellant wishes to appeal" for the purpose of CPR 52.12(2)(b) is the date that the decision is formally announced in court. Thus the 21 days within which an appeal must (in the absence of an extension) be filed run from that date and not the date – which may be days, or sometimes even weeks, later – that the formal order recording the decision is issued.*' My decision was formally announced at the handing down, such that *McDonald* sets time running from that point.

2. The second question is what the time period is. CPR 52.12(2)(a) allows the judge to set a time period '*at the hearing at which the decision to be appealed was made or any adjournment of that hearing*'. '*[W]here the court makes no such direction*' CPR 52.12(2)(b) applies and the period is 21 days. There was no consequentials hearing and accordingly I made no direction, so the default provision of CPR 52.12(2)(b) applies and the period for filing the appellant's notice is 21 days.

3. Finally, there is the question of varying any time limit that has been set. CPR 52.15(1) provides that any application for varying the time limit for filing an appellant's notice must be made to the appeal court.

The starting point would therefore seem to be that time runs from the handing down, although I could have altered the period at a consequentials hearing I did not do so meaning the default period of 21 days applies and only the Court of Appeal can now vary that. I reemphasise that I am open to submissions on these points, but in fairness to the parties I think it is useful that they understand what, at a minimum, those submissions need to address."

19. The Appellant largely accepts that reasoning but argues that it should not apply where no sealed Order has been received. An application for an extension of time can only be made as an additional application alongside or after an appellant's notice has been filed. PD 52B paragraphs 4.2(b) and 4.3 require there to be a sealed Order before an appellant's notice can be filed and so CPR 52.15(1) must pre-suppose receipt of such an Order. In circumstances where no sealed Order yet exists, it does not apply. A finding to the contrary would push the Appellant into making a retrospective application for time to file to the Court of Appeal, which would be undesirable.

20. The First Respondent agrees that I have the power to extend the time for filing an appellant's notice but on the basis of his arguments on *Re Barrell Enterprises*. However, he argues that, in circumstances where the Appellant has known of the substance of the First Judgment since 2 February, I should refuse any extension or grant only a very short extension.

21. With respect to both parties, neither of their approaches address the concern that I raised with them.

22. Taking the *Re Barrell Enterprises* point first, this suffers from the same lacuna here that arises in the context of costs. Although I retain some jurisdiction over this case up until the final sealing of the order, the scope of that jurisdiction is defined by the CPR. If the CPR prescribes my jurisdiction, *Re Barrell Enterprises* in and of itself does not extend it. Were I to exercise the jurisdiction there would be a new judgment and time would be reset for these purposes in the same way that it is for costs. That has not happened here, however.

23. The Appellant engaged more directly with the concern I had raised. Ultimately, however, I do not agree with his analysis.

24. The Appellant refers to PD 52B. In fact, that deals with appeals within the County Court and appeals to and within the High Court (see paragraph 1.1). Appeals to the Court of Appeal are addressed by PD 52C.

25. PD 52C also contains a requirement that the appellant's notice be accompanied by a copy of the sealed Order (paragraph 3(3)(a)). Importantly for these purposes, however, it sets down the process for requesting a retrospective extension of time at paragraph 4. I therefore do not accept that much weight can be placed on the Appellant's contention that it is undesirable to make a retrospective application to the Court of Appeal for an extension of time. That is precisely what paragraph 4 of PD 52C contemplates.

26. Paragraph 4 makes no reference to anyone other than the Court of Appeal determining the question of an extension of time. It is therefore entirely consistent with the terms of CPR 52.15 and inconsistent with some residual jurisdiction of the judge to extend time. That simply reinforces the points I asked the parties to address.

27. Again, therefore, I consider that I have no jurisdiction under the CPR to make the Order sought, whether by way of some form of renewed hearing on consequential matters or by way of a subsequent application.

Terms of the Order

28. This matter has highlighted, to the extent it was necessary, the importance of complying with the requirements of the CPR, particularly those framed in mandatory terms. Failure to comply with those requirements can have significant consequences for parties.

29. With a view to achieving finality on the terms of the Order, it should provide as follows:

    i) The appeal is dismissed; and

    ii) There is no order as to costs.

30. Consistent with my finding that I have no jurisdiction now to alter the date for the filing of the appellant's notice, the Order should not address the issue of timing, which is already dealt with by CPR 52.12(2)(b).