



Neutral Citation Number: [2022] EWCA Civ 1509

Case No: CA-2022-001102-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
REVIEW UNDER CPR 52.24 (5)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE BIRSS

Between :

(1) MICROSOFT IRELAND OPERATIONS LIMITED
(2) MICROSOFT LIMITED
(3) MICROSOFT CORPORATION

Defendants/
Appellants

- and -

JJH ENTERPRISES LIMITED
(trading as ValueLicensing)

Claimant/
Respondent

No appearance from the parties

Hearing date: 11 November 2022

Approved Judgment
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Lord Justice Underhill :

1. The short but important procedural point raised by this application is whether, where an Appellant's Notice is filed with the Court of Appeal electronically in accordance with "Electronic Working Pilot Scheme" introduced by Practice Direction 51O ("PD 51O"), it may be filed at any time up to midnight on the last day of the permitted period or must, either generally or at least in the case of an appeal from the Commercial Court, be filed by 4.30 p.m.
2. The issue arises in the context of proceedings brought in the Commercial Court by the Claimant, JH Enterprises Ltd, trading as ValueLicensing, ("VL") against three Defendants to whom I can refer compendiously as "Microsoft". VL is represented by Charles Fussell & Co LLP ("CF") and Microsoft by CMS Cameron McKenna Nabarro Olswang LLP ("CMS"). The procedural history can be sufficiently summarised as follows:
 - (1) On 14 April 2022 Picken J dismissed applications by Microsoft to strike out VL's claim against one of the Defendants, or grant summary judgment, and to stay its claim against the others on grounds of *forum non conveniens*. I should quote para. 3 of his order, which reads:

"The time for filing any appellant's notice shall be extended under CPR 52.12 (2) (a) until the date 21 days after the determination of any application for permission to appeal made to this court in accordance with paragraph 2, or, if no such application is made, 21 days after the deadline specified for that purpose in paragraph 2 (2)."

I need not elucidate the references to paragraph 2 of the order: what matters for our purposes is simply that the Judge extended time for filing an Appellant's Notice and that he did not specify a time on the final day by which it should be filed.
 - (2) On 13 May 2022 Picken J refused permission to appeal. It is common ground that, accordingly, Microsoft's time for filing an Appellant's Notice expired on 6 June.
 - (3) At 4.52 p.m. on 6 June 2022 Microsoft filed an Appellant's Notice in this Court electronically in accordance with the procedure prescribed by PD 51O.
 - (4) The following day CF informed CMS that they regarded the Appellant's Notice as having been filed out of time because it was filed after 4.30 p.m. and asked whether they would be applying for an extension.
 - (5) In response CMS on 9 June 2022 made an application, supported by a witness statement from the responsible partner, Kenneth Henderson, seeking a declaration that the Appellant's Notice had been filed in time but asking for an extension if that were wrong.
 - (6) On 29 June 2022 Master Bancroft-Rimmer made an order on Microsoft's application declaring that the Appellant's Notice had been filed in time. Her reasons were incorporated on the face of the order. In essence she held that the

effect of paragraph 2.1 of PD 51O was that documents could be filed at any time up to midnight.

- (7) By letter dated 5 July 2022 CF requested, pursuant to CPR 52.24 (5), that the Master's order be reviewed by a Lord or Lady Justice of Appeal: the letter incorporated substantive submissions challenging the Master's conclusion and reasoning.
 - (8) The Master was obliged to grant that request, and by e-mail dated 7 July 2022 she asked for Microsoft's submissions in response to those made on behalf of VL.
 - (9) In the meantime, on the basis of the Master's initial ruling, Microsoft's application for permission to appeal had been referred to Males LJ. By order dated 8 July he refused permission.
 - (10) On 8 July 2022 CMS wrote to the Court saying that the review of the Master's order had become "otiose" as a result of Males LJ's order, and asking whether it would proceed. CF wrote in response maintaining their request for a review, both on the formal basis that Males LJ's order was invalid if the Appellant's Notice had not been filed in time and on the more substantial basis that the question of when time expired was of importance to practitioners generally.
 - (11) On 13 July 2022 Master Bancroft-Rimmer, who was aware of the wider significance of the point, confirmed that the review would proceed. CF indicated that they did not wish to add to the submissions already filed. CMS filed short submissions on 14 July principally relying on Mr Henderson's earlier witness statement.
 - (12) VL's request for a review was then passed to me. On 2 August 2022 I gave directions for an oral hearing. I directed that the submissions already filed could stand as the parties' skeleton arguments.
3. That is how the matter comes before us. Once the members of the Court had had the opportunity to read the submissions in full, together with some subsequent inter-solicitor correspondence questioning the need for oral submissions, we notified the parties that it was not in our view necessary for them to attend, and they have not done so. We have reached our decision on the basis of the earlier written submissions to which I have already referred. However, it remains appropriate for us to give our decision in the context of an oral hearing so that it can readily be reported.
 4. I will first set out the provisions of the directly relevant Rules and Practice Directions.
 5. Part II of Practice Direction 52C prescribes how to start an appeal to the Court of Appeal. Paragraph 3 (2) provides that an Appellant's Notice "must be filed in the Civil Appeals Office Registry", specifying the room in the Royal Courts of Justice ("the RCJ") where the Registry is situated.
 6. Paragraph 2.1 (a) of Practice Direction 2A provides that court offices for the Senior Courts (which include the Civil Appeals Office Registry) shall be open on weekdays between 10 a.m. and 4.30 p.m.: I will refer to those as "office hours".

7. “Filing” is defined in rule 2.3 (1) of the Rules themselves as “delivering a document or information, by post or otherwise, to the court office”. The Court of Appeal in *Van Aken v Camden London Borough Council* [2002] EWCA 1724, [2003] 1 WLR 684, held that a document could be filed in a court office, within the meaning of rule 2.3 (1), by the simple act of physical delivery at the office and did not involve any step required to be taken by office staff, with the result that filing could take place outside office hours. I should note, however, that in that case the relevant court was a County Court, which had a post-box through which a document could be delivered after the office had closed and which the Court treated as “the designated means of communicating with the court office out of hours” (see para. 47 of the judgment of Jonathan Parker LJ).
8. The rule providing for the time within which an Appellant’s Notice must be filed is CPR 52.12 (2). The default period is specified in sub-paragraph (2) (b) as “21 days after the decision of the lower court”, but there is provision under sub-paragraph (2) (a) for the lower court to direct a different period. The default period is defined in terms of days and says nothing about any time of day before which filing must occur – though it would be open to the lower Court to do so when exercising its power under sub-paragraph (2) (a).
9. Thus as regards the traditional methods of filing – that is, post or personal delivery – there is no provision in the Rules or the Practice Directions limiting the hours of the day during which an Appellant’s Notice may be filed – or, more specifically, requiring that filing take place in office hours. In the case of the Civil Appeals Office Registry, however, there is a practical limitation because the Registry has no post-box through which documents can be delivered out of office hours (quite apart from the fact that the RCJ itself is only open for limited hours): thus in practice documents can only be delivered by post, in which case they will reach the Registry in office hours, or by personal delivery in office hours. My understanding is that the same is true for other court offices within the RCJ. In this respect, the situation is different from that considered in *Van Aken*. (A similar distinction was made by this Court in *Yadly Marketing Co Ltd v Secretary of State for the Home Department* [2016] EWCA Civ 1143, [2017] 1 WLR 1041 – see per Beatson LJ at paras. 33-34.)
10. That position was modified when filing by fax and then by e-mail became permitted. At that point provisions were introduced the effect of which was to require documents filed by either method to be filed within office hours. Paragraph 4.2 of Practice Direction 5B (“PD 5B”) reads, so far as material:

“Where an e-mail ... is sent pursuant to this practice direction and the e-mail is recorded by HMCTS e-mail software as received by the court at or after 4.00pm and before or at 11.59pm

(a) the date of receipt of the e-mail will be deemed to be the next day the court office is open;

(b)–(c) ...”

Paragraph 5.3 (6) of Practice Direction 5A (“PD 5A”), which relates to filing by fax (though that is now in practice redundant), is to the same effect. I am not sure why 4 p.m. rather than 4.30 p.m. is specified, but I suspect that it reflects the fact that the

Practice Direction applies not only to the High Court but to the County Court, where the prescribed office hours end at 4 p.m.

11. There appears to be no reason why PD 5A and PD 5B needed to incorporate a provision requiring filing in office hours. Although when a document is received by post or delivered in person within office hours it is date-stamped to record receipt, that is unnecessary in the case of fax or e-mail since the date of receipt is automatically recorded (a point made in passing by Ward LJ in *Van Aken* – see para. 60 of his judgment). But, as I understand it, it was thought appropriate and in the interests of consistency that filing by fax or e-mail should be subject to the same limits as in practice applied to documents filed in the old-fashioned way.
12. The Electronic Working Pilot Scheme introduced by PD 51O operates from 16 November 2015 to 6 April 2023: see paragraph 1.1 (1). The scheme became operative in different court offices on different dates: paragraph 2.23 provides that as regards the Civil Division of the Court of Appeal electronic filing was mandatory (for parties who are legally represented) from 14 February 2022. Section 2 is headed “Usage and Operation of Electronic Working”. Paragraph 2.1 begins:

“Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays, except”

Some exceptions follow, but they are immaterial for our purposes. The Practice Direction contains no provision limiting the time of day during which a document can be filed.

13. I turn to the question which we have to decide. I would not in fact start with PD 51O itself but with the Rules and Practice Directions as they stood before its introduction. As we have seen, and as *Van Aken* confirms, the provisions governing the traditional methods of filing contained no requirement for filing in office hours: the only limitation (at least in the RCJ) was the practical one of effecting delivery. When it was thought desirable that there should be such a limitation in the case of filing by fax and e-mail, which were not subject to the same practical limitation, an explicit requirement had to be introduced. Against that background, when PD 51O introduced electronic filing any limitations on the permissible times of filing would require to be the subject of explicit provision; but there is none. I do not, therefore, believe that any Rule or Practice Direction requires filing in office hours in the case of electronic filing. I should say, for the avoidance of doubt, that such a requirement could be introduced by a specific order in the particular case: normally there would be no purpose in any such requirement, but there might be a reason for it in particular circumstances.
14. That is sufficient to establish that documents can be filed electronically out of office hours. But I think the same conclusion can be reached by reference to paragraph 2.1 of PD 51O: see para. 12 above. I acknowledge that that provision reads more like a general statement of the 24-hour availability of electronic filing than a specific rule, and it is not directed explicitly to the question of the time of day at which a time limit for filing expires. But the fact remains that it contains an unqualified statement that under the Scheme parties can “issue proceedings ... 24 hours a day ..., including out of normal Court office operating hours”. In my view, in the absence of any provision

to the contrary and subject to any different order in the particular case that would reasonably be understood by litigants as a statement that such filing would be effective for all purposes, including where time expired on the day in question.

15. That conclusion means that the makers of PD 51O adopted a different approach from the makers of PD 5A and 5B. But that is not particularly surprising. There is no reason why electronic filing should be treated in the same way as filing by e-mail or fax. There is indeed some reason why it should not be: the Scheme is intended not simply to supplement traditional methods of filing but, as paragraph 2.1 declares, to replace them (subject to some limited exceptions) with a wholly new method.
16. The principal counter-argument advanced by CF in their well-argued submissions for VL relies on paragraph D18.2 of the Commercial Court Guide (“the CCG”), which reads:

“If the Court orders that an act be done by a certain date without specifying a time for compliance, the latest time for compliance is 4.30 p.m. on the day in question.”

CF argue that since para. 3 of Picken J’s order of 14 April 2022 did not specify a time by which the Appellant’s Notice should be filed, paragraph D18.2 took effect to make 4.30 p.m. the latest time for doing so.

17. The Master held that a provision of the CCG could have no application in the Court of Appeal, and further that paragraph D18.2 is inconsistent with paragraph 2.1 of PD 51O. I am not, with respect, sure that either point is correct. As CF point out, the effect of CPR 52.12 (2) (a) is that the time for filing an Appellant’s Notice may depend on a direction made by the lower court, in which case there is nothing inherently objectionable about construing such an order in accordance with the practice prevailing in the court in question. And, as already noted, I do not think that paragraph 2.1 can be read as precluding the making of an order in a particular case requiring filing by a specified time short of midnight – which, on VL’s case, would be what paragraph D18.2 does in all Commercial Court cases. But I believe that there is a more straightforward answer to VL’s submission. Para. 3 of Picken J’s order does not, in the language of paragraph D18.2, “order that an act be done”: it merely extends time for Microsoft to file an Appellant’s Notice if it chooses.
18. I should deal briefly with three other points made on behalf of VL.
19. First, our attention was drawn to CPR 2.9 (1), which requires that where a court imposes a time limit for doing any act the last date for compliance should, whenever practicable, include the time of day by which the act must be done. But the short answer is that even if that rule applies to an extension such as was granted in this case Picken J’s order included no such time.
20. Second, reference is made to the obligation imposed on the court office by paragraph 2 (1) of PD 5A, read with para. 5 (4) of PD 51O, to record the date and time of filing. But, as was held in *Van Aken*, the existence of that obligation does not entail that documents must be filed within office hours, as long as there are means by which the date and time can be ascertained. That is plainly the case with electronic filing.

21. Thirdly, it was pointed out that paragraph 1.2 (1) of PD 51O makes clear that:

“Electronic Working works within and is subject to all statutory provisions and rules together with all procedural rules and practice directions applicable to the proceedings concerned, subject to any exclusion or revision within this Practice Direction”.

But, for the reasons which I have given, an entitlement to file outside office hours is not inconsistent with any rule or practice direction applying to the Civil Appeals Office.

22. I accordingly see no reason to alter the Master’s decision that the Appellants’ Notice was filed in time.

Lord Justice Stuart-Smith:

23. I agree.

Lord Justice Birss:

24. I also agree.