



Neutral Citation Number: [2021] EWHC 1706 (Ch)

Case Nos: E00YE350, F00YE085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23/06/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

AND BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

Stewarts Law LLP for the Axnoller Events Ltd and The Chedington Court Estate Ltd
Mrs Nihal Brake on her own behalf and that of Mr Andrew Brake and Mr Tom D'Arcy

Decision on written submissions, without a hearing

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 12:30 pm.

HHJ Paul Matthews :

Introduction

1. This short judgment is concerned with an issue that has arisen in relation to the single trial bundle which has been prepared for both of two forthcoming trials between the parties, who are in substance the same in each case. In the first case, the claimant (which is a wholly owned subsidiary of the defendant in the second case) claims possession of a property called West Axnoller Farm from the defendants. This claim is conveniently referred to as 'the possession claim'. In the second case, the defendants in the first case are the claimants, together with the son of the first claimant, Mrs Brake, and they claim to have been unlawfully evicted from another property nearby called Axnoller Cottage. This claim is conveniently referred to as 'the eviction claim'.
2. The two claims will be tried sequentially before me, beginning in September 2021 with the possession claim. For convenience, I will refer to the claimant in the first case and the defendant in the second case as 'the Guy Parties', because Dr Geoffrey Guy owns and controls both of them. Without intending any disrespect to them, I will refer to the defendants in the first case and the claimants in the second as 'the Brakes'.

Background

3. In November 2020 I tried another case between essentially the same parties, known as 'the documents claim', and handed down two separate judgments on 25 March 2021: see [2021] EWHC 670 (Ch) and [2021] EWHC 671 (Ch). At that trial, the Brakes were represented by solicitors and junior counsel. At that stage it was anticipated that the trials of the possession claim and the eviction claim would take place in April and May 2021, and that the Brakes would be represented by the same team of lawyers, but including also leading counsel who had previously represented them.
4. However, in between the circulation of the draft judgment in the documents claim (on 19 March) and its formal handing down (on 25 March), the Brakes' leading and junior counsel withdrew from the case, leaving them represented only by solicitors. The formal hand down took place remotely, because of the Covid-19 pandemic, and the hearing of consequential matters was adjourned to a later date. For reasons with which I need not burden this judgment, the hearing of those consequential matters was dealt with by Marcus Smith J, on 31 March 2021. On that occasion, the Brakes appeared by newly instructed leading counsel, but only for the purpose of making an application by the Brakes to adjourn the consequential matters hearing. That application was refused by the judge for reasons which he gave at the time: see [2021] EWHC 828 (Ch).
5. Marcus Smith J went on to deal with a number of matters concerning the then shortly forthcoming two further trials. In particular, the judge directed as follows:

“17. There shall be a single combined bundle for the trial of the Possession Proceedings and the Eviction Proceedings (the Bundle). The parties shall liaise with each other and seek to agree the contents of the Bundle.

18. The Guy Parties shall be responsible for producing the Bundle. The Brakes shall provide comments on the draft index for the Bundle no later than 4 PM on 9 April 2021.

[...]

20. By 4 PM on 14 April 2021, the Guy Parties will provide the Brakes with an electronic copy of the Bundle (who shall be responsible for preparing their own hard copies, if so advised) and lodge a hard copy at Court.”

6. Marcus Smith J then referred the matter back to me. On 13 April 2021, I heard and decided further matters consequential on the two judgments I had earlier handed down in the documents claim. These included permission to appeal, costs, the question of potential contempt proceedings, and also an application that I recuse myself from the further trials. In each case I gave an oral decision immediately, and delivered written reasons for those decisions a few days later: see [2021] EWHC 949 (Ch).
7. I also directed that any application by the Brakes for an adjournment of the trials should be dealt with on written submissions only in accordance with a timetable which I laid down. Subsequently such an application was made. On 21 April 2021, I handed down a short written decision acceding to the application to adjourn: see [2021] EWHC 982 (Ch). At this stage, the Brakes continued to be represented by their solicitors, although it was contemplated that Mrs Brake herself would act as the advocate for the Brakes in the two trials. Directions were given in order to facilitate that. (As I say, the trials have now been relisted, to begin in September this year.)

This application

8. However, on 11 June 2021 notices of change of solicitor were filed in all the matters in which the solicitors had been acting for the Brakes, confirming that the Brakes were now acting in person. On 16 June 2021 Mrs Brake sent an email to the court, but not in fact copied to the Guy Parties, setting out paragraph 20 of the order of 31 March 2021 (though she actually referred to it as paragraph 4). She said that, although the Guy Parties’ solicitors had supplied the electronic bundle ordered by the judge to her own solicitors, they had not provided her with a hard copy before they ceased to act. She had asked the Guy Parties for one, but they declined to supply it unless they were reimbursed for the copying and courier charges which would be made by external suppliers.
9. Accordingly, she asked the court to vary the direction of Mr Justice Marcus Smith in this respect. In her email she said that “we do not have enough money to pay for that and time is marching on without me being able to prepare”. She also submitted that there had been “a material change in circumstances since the order was made,” referring to the fact that she now had no representation at all. She said she was “already at a massive disadvantage as a litigant in person and need a physical bundle”.

10. On 17 June 2021, the Guy Parties' solicitors responded that they had now sent a hard copy of the trial bundle to the Brakes, and would be sending an invoice for reasonable copying and courier charges. Whilst that relieves the immediate pressure in enabling Mrs Brake to begin her preparations for the two trials, it does not of itself resolve the application made for a variation of the order of Marcus Smith J. In all the circumstances, and not least in order to deal with the matter as quickly as possible, I will not require Mrs Brake to issue a formal application notice. Instead, I will deal with the matter on the basis of the written submissions already made.

The law and practice

11. CPR rule 1.1 provides:

“(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence; there

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.”

12. CPR rule 1.2 provides:

“The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2.”

13. CPR Rule 3.1 relevantly provides:

“(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may –

[...]

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.

[...]

(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.”

14. CPR rule 39.5(1) provides that:

“Unless the court orders otherwise, the claimant must file a trial bundle containing documents required by –

(a) a relevant practice direction; and

(b) any court order.”

This is repeated in paragraph 27.3 of the Practice Direction to CPR part 32, which is the “relevant practice direction” for the purposes of rule 39.5.

15. Paragraph 27.7 of that Practice Direction further provides that:

“The preparation and production of the trial bundle, even where it is delegated to another person, is the responsibility of the legal representative who has conduct of the claim on behalf of the claimant. If the claimant is unrepresented, the court may direct that another party must prepare and produce the trial bundle.”

And paragraph 27.13 provides that

“The party filing the trial bundle should supply identical bundles to all the parties to the proceedings and for the use of the witnesses.”

16. Finally, the Human Rights Act 1998 relevantly provides:

“1(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in–

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

[...]

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

[...]

(3) In this section "public authority" includes—

(a) a court or tribunal ...

[...]

Schedule 1

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ... ”

Discussion

Practice directions

17. Practice directions are made under the inherent jurisdiction of the court, although pursuant to statutory procedures, such as those in section 5 of the Civil Procedure Act 1997 or Part 1 of Schedule 2 to the Constitutional Reform Act 2005. But they are statements of *practice*, and not legislation. In *KU v Liverpool City Council* [2005] 1 WLR 2657, CA, Brooke LJ (giving the judgment of the court) said:

“48. The status of a practice direction has been authoritatively delineated by Hale LJ in *Re C (Legal Aid: Preparation of Bill of Costs)* [2001] 1 FLR 602 at para 21, May LJ in *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 at [11], [2002] 1 WLR 997, and Dyson LJ in *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766 at [19]-[21], [2004] 1 WLR 846. It is sufficient for present purposes to say that a practice direction has no legislative force. Practice directions provide invaluable guidance to matters of practice in the civil courts, but in so far as they contain statements of the law which are wrong they carry no authority at all.”

This dictum has been repeated in many later cases, and approved in the Supreme Court: see *Re NY (A Child)* [2020] AC 665, [38]. Accordingly I do not doubt that it is open to the court, where the justice of the case requires, to direct that the party filing a hard copy bundle need supply only an *electronic* copy to another party, as Marcus Smith J did here.

18. The final sentence of paragraph 27.2 of CPR PD32, set out above, refers to the court directing another party supplying an unrepresented party with a copy of the bundle. In relation to that, I note the observations of Neuberger J (as he then was) in *Maltez v Lewis*, unreported, ChD, 27 April 1999. In that case the judge held that the court had no jurisdiction to order that the applicant's opponent not engage leading counsel in a forthcoming trial where the applicant was proposing to instruct junior counsel. The applicant had argued that, if counsel were of very different seniority, there would be no level playing field (within CPR rule 1.1(2)(a)) and it would be disproportionate (within rule 1.1(2)(c)).
19. Neuberger J refused the application, saying that the choice of legal representative was a fundamental right, even though it might not always be right to make an unsuccessful party pay increased costs of the successful party. Nevertheless, he said that, where one party was represented by a small firm, and the other by a larger, the overriding objective might make it appropriate "to direct the party instructing the larger firm to take on the duty of preparing and copying bundles".
20. In the present case, the Brakes are the claimants in the eviction claim. In fact, at the time of the order of 31 March 2021, they were not unrepresented, as they then still had solicitors. Nevertheless, Marcus Smith J directed that the Guy Parties' solicitors should prepare and produce the trial bundle for both claims, provide an electronic copy to the Brakes, and lodge a hard copy at court.
21. Paragraph 27.13 of CPR PD32 refers to the claimant's solicitors supplying all parties with identical copies of the bundle. However, the judge's order has departed from that, in expressly providing that the Guy Parties should supply only an *electronic* copy of the bundle to the Brakes, and the Brakes should arrange for their own hard copy, whilst the Guy Parties should nevertheless lodge a *hard* copy with the court. Whilst the text is identical, the format is not. Mrs Brake says that, now that they no longer have any solicitors, the judge's order should be varied so that a copy is provided to them without payment, at least at this stage. (I say "at this stage" because the costs involved in the copying and delivery of the bundle will be costs incurred by the claimant in the claim, and if the claimant is successful the claimant would normally expect an order for costs in its favour to include those costs.)
22. When I began practice as a solicitor, the usual course was for the parties' solicitors to agree on an index of documents to go in the trial bundle. In small cases it might be dealt with in correspondence. In larger cases there would be a round table meeting. Once the index was agreed, the claimant's solicitors prepared copies of the bundle for filing at court (under RSC Ord 34, rule 10(2)), and for themselves and their counsel, but generally left their opponents to prepare their own. There was no equivalent then to paragraph 27.13.
23. With the advent of very largescale litigation, however, the efficiency of the opponents asking the claimants' solicitors to make copies for them too became apparent. It was quick and easy, and above all it meant that all copies of the trial bundle (including, critically, the pagination) were identical. But if the claimants' solicitors did this, it was at the request of their opponents, and they charged their opponents for the copying accordingly. It appears from the emails from the Guy parties' solicitors that that practice continues. Paragraph 27.13 of the Practice Direction formalises this

practice. But there is nothing in it to require that the supply of copy trial bundles should be free of charge.

Variation of an order

24. The question now is whether it would be right to vary the order of Marcus Smith J. The court has power to do this under CPR rule 3.1(7), set out above. In the recent decision of the Court of Appeal in *Allsop v Banner Jones Solicitors* [2021] EWCA Civ 7, Marcus Smith J (with whom Lewison and Arnold LJ agreed) said:

“24. ... It is very clear that this provision cannot generally be used to vary or revoke final orders (that is, orders that give rise to a *res judicata* estoppel) and equally clear that even interlocutory decisions will generally only be varied or revoked where either (a) there has been a material change of circumstance since the original order was made or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated: *Tibbles v. SIG plc*, [2012] EWCA Civ 518, [2012] 1 WLR 2591.”

25. Here the order is an interlocutory order. The Brakes argue that ceasing to be represented by solicitors amounts to a material change in circumstances and justifies a variation of the order. I do not agree. The Brakes’ application to adjourn the trials was made to me in April on the basis that Mrs Brake would be acting as the advocate, albeit with the assistance of solicitors. She would therefore need to prepare for the trials as such advocate, and not merely as a party or a witness. There was no suggestion then that the order of Marcus Smith J of 31 March 2021 should be revisited. The absence of solicitors now will undoubtedly increase the burden on Mrs Brake, but it will make no difference to her role during the trials. She will be the advocate, as has been intended since April. I fail to see that the solicitors ceasing to act means that the Brakes now have a need for supply of a hard copy of the bundle without payment which they did not have before.

Litigants in person

26. I remind myself that, absent specific provision made in the rules, the position of a litigant in person is the same as that of a represented litigant, and it is generally not right to give advantages to litigants in person which are not given to represented litigants. In *Barton v Wright Hassall* [2018] 1 WLR 1119, SC, Lord Sumption (with whom Lord Wilson and Carnwath agreed) said:

“18. ... At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties.”

And Lord Briggs (with whom Lady Hale agreed) said:

“42. ... If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences.”

So ceasing to be represented is not of itself a sufficient reason to revisit orders made earlier.

Impecuniosity

27. Mrs Brake also says that she is unable to afford the cost of a hard copy of the bundle. That may be true, but it cannot justify a variation of the order. The Brakes are the claimants in one of the two trials, and cannot complain that they are being brought to court against their will. Some expenditure by each of the parties is unavoidable. Equipping yourself with the necessary papers for the trial process is part of that. The reference in CPR rule 1.1(2)(a) to “equal footing” does not mean that litigation cannot take place unless all parties have equal resources. But in any event, the “equal footing” is only one of several (potentially competing) matters which the court must take into account in dealing with litigation justly and at proportionate cost.
28. Moreover, it is not as if the Brakes do not have access to the trial bundle. They have an electronic copy. I know that originally Mrs Brake complained that her home internet speed was so slow that she could not download the files. Whilst it appears that that problem has now been got over in some way, it would not have been an answer. Electronic files can be delivered on memory sticks and CDs as well as by email. Or she could have gone to an internet café or the home of a friend with better internet access and downloaded the files there.

Human rights

29. In her submissions, Mrs Brake did not in fact refer to Article 6 of the European Convention on Human Rights (made justiciable in English law by section 1 of the Human Rights Act 1998). Nevertheless, I should mention it for completeness. That article provides for the right to a fair trial. This will generally include disclosure of relevant documents, the opportunity to know and comment on all the evidence adduced and legal submissions made, and the opportunity to present a case, including to adduce evidence and make submissions.
30. But so far as I am aware article 6 does not require that a copy of the trial bundle be supplied free of charge to one party by the other, even if the requesting party is impecunious. As it happens, in the present case an electronic copy was supplied without charge to the Brakes’ solicitors, and a further electronic copy was made available to Mrs Brake after her solicitors ceased to act. The Brakes therefore have access to the whole bundle. They can print it out or not, as they wish. I see no basis here for varying the order of Marcus Smith J.

Professional and lay advocates

31. Finally, although strictly speaking I do not need to decide this, I do not think that the assumption of the advocate’s role by Mrs Brake in April would have justified a

variation of the order of 31 March 2021 either. For one thing, given the upheaval created by the withdrawal of leading and junior counsel, it must have been obvious that there was serious question mark over whether the Brakes would be represented by an advocate at trial. It was against that background that the judge made his order. But, in any event, even if there were a professional advocate at trial, that advocate might still need a hard copy bundle for some purposes. There is no sufficient difference between a professional and a lay advocate in this respect.

Conclusion

32. In my judgment, therefore, this is not an appropriate case in which a to vary the order of Marcus Smith J. The Brakes were supplied with and still have an electronic copy of the bundle, which they can print out if they wish or can arrange to be printed out by a third party. If they request and receive a hard copy from the Guy Parties' solicitors, there is no reason in this case why those solicitors should not charge for it in accordance with their usual practice.