IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION

NCN: [2024] EWHC 823 (KB)

Case No: QB-2021-003966

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 29th January 2024

Before
MASTER DAGNALL

B E T W E E N:

CCP GRADUATE SCHOOL LTD

and

THE SECRETARY OF STATE FOR EDUCATION

MR GILES appeared on behalf of the Claimant
MR MCGURK appeared on behalf of the Defendant

APPROVED JUDGMENT

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MASTER DAGNALL:

1. I now have to consider two questions; being whether I should grant permission to appeal, and whether I should grant an extension of time for appealing.
2. I delivered my judgment in this matter orally on 16 June 2023. The oral hearing finished very late in the afternoon at about six o'clock, and where I then had a relatively brief discussion with counsel about what was to happen next at a time when the court staff would very much be needing to leave, and in fact there would be questions about what routes were to still be open for the parties to physically exit the Royal Courts of Justice. I stated:

> "It is now six o'clock, or nearly six o'clock, it seems to me that it is too late to proceed with consequential matters unless someone is very persuasive indeed. What I am prepared to do is to adjourn consequential matters to a consequential hearing on the basis that I adjourn all matters, adjourn all matters including any questions of permission to appeal, and time seeking for filing and appealing notice, and in the meantime extend the time for filing an appeal notice generally, such matters to be considered at the next hearing.
> "The point to saying all that is to avoid the parties falling into the traps which otherwise exist under the Civil Procedure Rules. It also has the advantage that if a transcript is to be requested of this judgment it might be possible to obtain it and approve it before the consequential hearing. The disadvantage is that I essentially have no time in my diary until the autumn and so any adjournment might be until then. Does anyone want to say anything about that, bearing in mind that the court staff, let alone everyone else do need to leave".

3. The parties did not raise anything specific and certainly not by way of any objection, and in a further discussion I referred to my making my usual order and making certain directions about parties exchanging submissions and positions with regard to their proposed consequential orders before the next hearing. The hearing was originally listed before the end of the year; however, owing to difficulties with parties' availability it was moved to today, 29 January 2024.
4. Prior to this hearing, the claimant, for protective purposes, and appreciating that it had lost substantively in the light of my oral judgment, made a protective application for permission to appeal and extensions of time.
5. The defendant indicated, at least to some degree originally, that it would contend that I did not have jurisdiction to deal with the questions of permission to appeal and extension of time for appealing any further. Indeed, that position was further set out in a note provided for this hearing from the defendant's side dated 25 January 2024.

6. However, following my raising various case-law authorities and matters in correspondence between the parties in the interval between then and today, the Secretary of State has reassessed her position and through Mr McGurk, her counsel, has indicated that she no longer takes a jurisdictional point, although she would oppose, at least to some degree, the applications for permission to appeal and for a further extension of time for appealing on general discretionary grounds.

7. I do have to consider first, though, whether I have jurisdiction to make either type of order; since, even if the parties agree that the court has a jurisdiction, a court must nonetheless be satisfied in its own mind that it does have it before it purports to exercise it.

8. In relation to permission to appeal Civil Procedure Rule 52.3(2) provides that in circumstances where permission to appeal is required, as is the case here in relation to the claimant "An application for permission to appeal may be made(a) to the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing; or (b) to the appeal court in an appeal notice".

9. As far as extension of time is concerned, that is governed by CPR 52.12(2), which provides, "The appellant must file the appellant's notice at the appeal court within (a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing (which may be longer or shorter than the period referred to in sub-paragraph (b))". Sub-paragraph (b) provides for a default period of 21 days after the date of the decision of the lower court which the appellant wishes to appeal.

10. Prior to various amendments made recently to the Civil Procedure Rules a number of decisions, including the decision in *McDonald v Rose* [2019] 1 WLR 2828, had made it clear that, at least in relation to applications for permission to appeal, if they were to be made to the lower court, they had to be made at the hearing which the substantive decision was made or some adjournment of that hearing. The position with regards to extension of time was somewhat unclear, and the case law was conflicting. That eventually led the Civil Procedure Rules Committee, at the instigation of its Lacuna sub-committee which I then chaired, to decide that the Rules should be clarified, and as a result they were changed into their present form.

11. My own understanding is that the intention of the Rules Committee was to make it clear that both types of application had to be made to the lower court, if they were to be made to the lower court at all, at the hearing at which the substantive decision was made or at some adjournment of that hearing. However, whatever may or may not have been in the CPRC's

collective mind is not in point; the question is as to what is the true construction of the rules.

12. In the decision in *Chedington Events Ltd v Brake & Anor* [2023] EWHC 3094, delivered on 1 December 2023, His Honour Judge Paul Matthews, sitting as a judge of the High Court, determined, in effect, that the above was the true construction of the Rules, namely that any application for permission to appeal or for an extension of time for appealing did have to be made either at the hearing at which the lower court had reached its substantive decision or at an adjournment of that hearing.

13. The position before His Honour Judge Matthews was one where there had been an oral handing down of the relevant substantive judgment, and the judge at that point had directed that the parties should provide written submissions as to consequential matters. The relevant written submissions from the putative appellant did not refer to any matters relating to appeal, His Honour Judge Matthews had made consequential orders, and only then did the putative appellant seek permission to appeal and an extension of time for filing an appeal notice.

14. At paragraph 24 of his judgment His Honour Judge Matthews held:

"… The problem however is that the rule change in 2021 now requires that the lower court give any such directions… [He was there referring to directions with regards to granting permission and filing an appeal notice after the 21 days]… at the hearing at which the decision to be appealed was made or any adjournment of that hearing. The judgment sought to be appealed was handed down on 10 November 2023, when I directed written submissions on consequential matters. That direction was in effect the equivalent of an adjournment of the hand-down. The written submission were filed in accordance with the directions. Those submission took the place of the adjourned hearing. I have in effect reserved judgment on the consequential matters, which did not include any application for permission to appeal. In my judgment the hearing is over, and I no longer have any power to give a direction under rule 52.12(2)(a) about time within which to file an appellant's notice".

There was then a reference to the putative appellant needing to make any application to the appeal court.

15. It does seem to me that His Honour Judge Matthews' judgment is not only binding on me but is also clearly correct. The relevant applications have to be made at the hearing at which the substantive decision is given or at any adjournment of that hearing. The question effectively before me, when I consider whether I have jurisdiction, is as to whether today's hearing is an adjournment of the hearing at which I delivered oral judgment. It seems to me that it is for a number of reasons.

16. Firstly, it seems to me that that is the natural construction of the words which I used on 16 June 2023 when I talked of adjourning all matters and talked of adjourning consequential matters to a consequential hearing. Although the words used are, at first sight, possibly ambiguous as to whether I was adjourning the hearing before me and all matters which arose effectively within it, or whether I was creating a new hearing which was not simply an adjournment of the original hearing. it seems to me even just looking at the words themselves that they point to what I was doing as being simply adjourning the hearing before me.

17. I am reinforced in that analysis by the fact that the reason why I was adjourning the hearing was owing to considerations of time and an urgent need to finish what was happening on that day so that everybody could depart the Royal Courts of Justice speedily. It seems to me that in that factual situation and scenario the words which I used of adjournment should be construed widely to say that I was simply adjourning what was before me, that is to say the hearing itself, rather than in some way or other seeking to create a new hearing.

18. Further, the above is reinforced by the other words which were used later on with reference to my usual order. That reference to my usual order was intended by me to be a reference to the usual order which I make when handing down a reserved judgment, which order specifically states, repeating a statement made on the occasion of hand down itself, that I hand down my judgments with an adjournment of the hearing and with adjournment of all considerations of permission to appeal and time to appeal, and with an extension of time in the meantime. That can be seen to be my usual order and approach as it is set out in my published judgments in *Joe Macari Servicing Ltd v Checkered Flag International Inc* [2021] EWHC 3175; *Clifford v Slater* [2022] EWHC 428; and *Herring v Sandbrook* [2023] EWHC 1332, each of which judgment has in its final paragraph a statement to that effect, and which reflected what I actually said on each occasion.

19. In all those circumstances it seems to me that the natural construction of my reference to my usual order, is that I was referring to what I have set out above, especially where there are, in effect, published statements as to what my usual order actually is. I further bear in mind, as set out in paragraph four of Practice Direction 40B, that the Court always has an inherent power to makes its meaning and intention clear; and I am fully satisfied in my own mind, that that was my actual intention on the relevant day, being 16 June 2023.

20. It therefore does seem to me that this is an adjournment of that previous hearing, and that I do have jurisdiction to proceed with the question of whether I should grant permission to appeal

and whether I should grant an extension, or rather further extension of time, for appealing by way of filing an appeal notice. I have spent some time on this aspect since the question of jurisdiction is an important one and needed to be properly considered; and that notwithstanding the Secretary of State had eventually taken the decision not to contend otherwise.

21. The second question, though, is as to whether I should grant permission to appeal. Under Civil Procedure Rule 52.6(1), "Except where rule 52.7 applies", which is not the case here, "permission to appeal may be given only where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard". Mr Giles, counsel for the claimant, has submitted in his written submissions that there are a number of attacks which he would wish to make on various elements of my judgment, in particular as a matter of law, such that the claimant would have a real prospect of success.

22. It does not seem to me that it is necessary for the purposes of this judgment, to go into any of the matters in any detail except for one. In fact, it does seem to me that there may be particular prospects of success in relation to the 1999 Act and the student contract argument, and possibly in relation to some of my considerations as to limitation. However, I also decided against the claimant in relation to the abuse of process, *Henderson v Henderson* [1843] 3 Hare 100/*Aldi v WAP Group Plc* [2008] 1 WLR 748 argument. I have held that, because of what had happened in the previous proceedings with regards to the then defendant (now claimant) seeking to raise a counterclaim at a late stage and being prevented from doing so with the attempted counterclaim being struck out as a result, it was an abuse of process for the previous defendant, now claimant, to seek to bring the counterclaim by these proceedings, and that the abuse was such that in all the circumstances these proceedings should be struck out.

23. It seems to me that if that decision of mine is not successfully impugned then it does not matter as to whether I was right or wrong with regards to my various other grounds for either striking out the claim or for granting reverse summary judgment; the claim would simply be struck out and come to an end for the *Henderson v Henderson/Aldi* abuse of process reason. Mr Giles, although not so as to bind him in any way for the future, did not, I think, take any particular issue with that matter of analysis; rather he contended that his side had a real prospect of success in impugning my decision on that abuse of process argument.

24. I bear in mind that the threshold for an appeal having a real prospect of success is a low one;

the prospects of success must be greater than merely fanciful, but no more than that. I do, however, have to bear in mind that questions of abuse of process are evaluative in nature and in particular the second stage of abuse of process analysis; where the first question is whether or not there is an abuse of process, which is somewhat a matter of pure law, although to a limited degree evaluative in nature; but the second question, being whether in all the circumstances applying a broad merits-based test it is appropriate to strike out the second claim, is clearly evaluative.

25. Mr Giles, it seems to me, has to accept (although this is not so as to bind him in the future) that my statements in paragraphs 53 onwards of the transcript of my judgment as to what had happened in the first claim - in terms of there being a late application to introduce a counterclaim which had been effectively dismissed and with a partial strike out on grounds of lateness - are effectively correctly stated; and that I had fully analysed the question of abuse of process in paragraph 244 and following [I note that I have, during the course of this hearing, been able to clarify certain precise dates of events, but they are only a day or so different from the dates identified in my judgment and nothing turns on them.]

26. Mr Giles in his written submissions submitted that I had failed to take account at all of the fact that the present claimant, then defendant, had made clear in the first claim that if they were not permitted to pursue their counterclaim in the first claim, they would then intend to bring it in a second claim. However, he did not pursue that particular element of his argument in oral submissions, in my view rightly, since, in particular at paragraph 279 of my judgment, I made very clear that I had weighed that matter very much in the balancing exercise. He did, however, submit that I had placed insufficient weight, if any, on the fact that the present defendant, the then claimant, the Secretary of State, had opposed the introduction of the counterclaim, saying that the Secretary of State had thereby effectively set up the situation which had arisen.

27. Mr McGurk responded to say that the Secretary of State had merely been seeking to defend themselves, and effectively put forward a substantive defence which had been accepted by Master Cook. Mr Giles also submitted that, in the light of all that, I had given insufficient weight to the fact that the defendant had made clear that it was intending to pursue the subject matter of the counterclaim in any event.

28. I do not necessarily accept Mr McGurk's submission that the Secretary of State had, by opposing the introduction of the counterclaim, effectively advanced a substantive defence to

it. These matters are, it seems to me, all procedural.

29. The question of whether or not a particular course is an abuse of process or results in an abuse of process, is very much a matter which, although it can be termed case management, is integral to the ability to a party to bring forward claims and have them adjudicated upon. What I was doing was I was carrying out an evaluative exercise; and it seems to me that I fully took into account all the various factors; and, as I have stated in my judgment, that this was something of a standard case. Each case will have its own features, and in some cases a person may in a second claim seek to raise something which is wholly new. However, what the court has to do in every case is to carry out an evaluation, taking into account what it should take into account, and not taking into account what it should not take into account. It seems to me that I simply took into account all that I should and carried out a careful evaluation.

30. In those circumstances it seems to me that an appeal court will simply approach my conclusion, even if they say that another judge might have reached a different decision, as one which came within the permissible range of reasonable traditional evaluations and conclusion. That is something which is a very usual course adopted by the appellate courts and I do not see any real prospect of an appeal court holding that my evaluation and conclusion was outside the permissible range.

31. For all those reasons I conclude that as this ground of appeal has no real prospect of success, and in consequence that an appeal has no real prospect of success, since if the claimant as appellant was to fail on that ground, this (new) claim would necessarily remain struck out. For all those reasons I am going to refuse permission to appeal.

32. As far as time for appealing is concerned, the Secretary of State's position is that the claimant has known my reasoning for a long period of time and has had the transcript of the judgment for something like two weeks. The Secretary of State says as a result the time for appealing should be limited to seven days from today, I am persuaded eby Mr Giles that I should grant the 21 days which is sought. My previous adjournment order, although it has never been drawn up and sealed, was effectively to provide for a time extension to today with further time to then be considered. It seems to me that to impose seven days or a very short time limit on the claimant would be somewhat inconsistent with the scheme which I was intending to lay down, and that I should be considering a realistic period from today.

33. Secondly, it seems to me that it would be invidious, in these circumstances, for the claimant only to learn what was going to be the position as far as costs was concerned, and which may

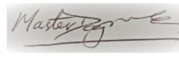
well influence the questions both whether there should be appeal at all, and only to have a seven-day period to produce and file the appeal documentation.

34. Thirdly, and following on from all that, since the decision as to costs would only be made today ordinarily the claimant could expect 21 days period in relation to that; and for the claimant to have to produce a substantive appeal notice within seven days, and a further appeal notice in relation to costs within a further 14 days after that, would seem to me to be likely to result in a waste of time, cost and expense, and be quite contrary to the overriding objective in CPR1.1.

35. I also bear in mind that it is usual in handing-down orders, where there is a set time for appeal following a non-attendance hand down with provision for a consequential hearing, for the order to be for the appeal notice to be filed within 21 days of that consequential hearing. Although I adopt a somewhat different practice (see above), it seems to me that that is a standard judicial practice which is followed by many judges and that I should afford it respect.

36. For all those reasons, the time for filing an appeal notice is to be 21 days from today.

End of Judgment

Approved  24.4.2024

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