Neutral Citation Number: [2022] EWCA Civ 109

Appeal No: CA-2021-000564 (formerly C3/2021/0758)
Case Nos: GIA/918/2020 & GIA/920/2020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UT JUDGES JACOBS, WIKELEY AND GRAY
[2021] UKUT 26 (AAC)

Royal Courts of Justice, Strand
London WC2A 2LL

Date: 08/02/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ASPLIN

B E T W E E N

(1) LEAVE.EU GROUP LIMITED
(2) ELDON INSURANCE SERVICES LIMITED

Appellants

and

THE INFORMATION COMMISSIONER

Respondent

Leave.EU Group Limited (Leave.EU) did not appear and was not represented.

Christopher Knight (instructed by **The Information Commissioner's Office**) for the **respondent, the Information Commissioner**

Hearing date: 1 February 2022

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JUDGMENT

“Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties’ representatives by email, and release to BAILII.
The date and time for hand-down is deemed to be 10:30am, Tuesday 8 February 2022.”

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. The question before the court is what the court should do when a corporate appellant fails to appear before the Court of Appeal on the date listed for the hearing of the appeal.

2. In this case, the first appellant, Leave.EU, failed to attend the hearing, whether by counsel, solicitor or in person, at the time and place listed for the substantive hearing of the appeal, namely 10.30am on Tuesday 1 February 2022 in court 71 at the Royal Courts of Justice.

3. On 12 March 2021, the Upper Tribunal (Administrative Appeals Chamber) (the UT) gave Leave.EU (and the second appellant, Eldon Insurance Services Limited (Eldon)) permission to appeal the UT's decision dated 8 February 2021. It appears from what we were told by counsel for the Information Commissioner, Mr Christopher Knight, that after the UT's decision, Mr Arron Banks, who was apparently then the ultimate owner of both appellant companies, sold Eldon to a third party purchaser. Eldon consented to an order made on 31 January 2022 that its appeal should be dismissed.

4. The history of Leave.EU's non-attendance at the substantive appeal hearing is briefly as follows. (i) At all material stages of these proceedings until 26 January 2022, Leave.EU and Eldon have been represented by Kingsley Napley LLP and Mr Gerry Facenna QC. Substantive grounds of appeal and a skeleton argument in support of that appeal were duly filed. (ii) Kingsley Napley was, of course, fully aware of the date fixed for the substantive hearing of Leave.EU's appeal. It is to be inferred that Kingsley Napley informed Leave.EU of the date fixed for the substantive hearing of its appeal. (iii) On or about 26 January 2022, I ordered that Kingsley Napley should, on its application, come off the record as acting for Leave.EU. Submissions were first sought from Mr Jacobus Coetzee, who is registered at Companies House as the sole director of Leave.EU, in response to that application, but none was made. (iv) On 31 January 2022 at 14.54, the court notified Mr Jacobus Coetzee by email of the order and asked him who would be appearing for Leave.UK at the hearing listed for 1 February 2022. No response was received. Finally in this connection, the usher called Leave.EU outside court at the start of the hearing with no response, and the court adjourned at 11am for nearly half an hour, but still there was no attendance.

5. In these circumstances, the court asked Mr Knight for submissions as to what the court should do. Mr Knight submitted that the court should either dismiss the appeal for non-prosecution or proceed on the basis that Leave.EU relied upon its written skeleton argument and deal with the substance of the appeal having heard only Mr Knight's oral submissions. Mr Knight submitted that the Information Commissioner was neutral as to which course the court should adopt, though he emphasised the importance of the issues raised by the appeal.

6. Mr Knight drew our attention to CPR Part 52.20(1) which gives the Court of Appeal all the powers of the lower court (the UT in this case), and to Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (2008 Rules) which allows the UT to proceed with a hearing if a party fails to attend a hearing if it is satisfied that that party has been notified of it and it considers it to be in the interests of justice to proceed. It is to

be noted also that Rule 8(3)(b) of the 2008 Rules also enables the UT to strike out proceedings if an appellant has failed to cooperate with the UT to such an extent that the UT cannot deal with the proceedings fairly and justly (c.f. CPR Part 23.11 for the power in the courts).

7. In addition, CPR Part 52.21.6 suggests that the Court of Appeal has no express jurisdiction to proceed with an appeal in the absence of one of the parties, but that Lewis J had held in *General Medical Council v. Theodoropolous* [2017] EWHC 1984 (Admin) that there was an inherent jurisdiction to do so (see also *Connelly v. Director of Public Prosecutions* [1964] AC 1254 per Lord Morris at page 1301, and *General Medical Council v. Adeogba* [2016] EWCA Civ 162 per Leveson P at [23] and [58]-[59].

8. At the end of the hearing, the court indicated its decision as follows: (i) that it did not consider that it would be just or appropriate to hear the substantive appeal in the absence of Leave.EU, (ii) that, in the circumstances, since the court was satisfied that Leave.EU was aware of the appeal hearing and had not attended, the appeal would be dismissed, and (iii) that we would give judgment giving reasons for those decisions (which I am now doing).

9. I shall first give a very brief summary of the issues in the substantive appeal, then I shall explain how Leave.EU was made aware of the substantive hearing, before explaining why we did not consider it just or appropriate either to proceed with the substantive hearing or to adjourn that hearing.

<u>Brief summary of the issues in the substantive appeal</u>

10. The UT upheld a decision of the First tier Tribunal (General Regulatory Chamber Information Rights) (the FTT) promulgated on 28 February 2020. So far as Leave UK was concerned, the FTT had upheld two decisions of the Information Commissioner dated 1 February 2019. The first was to issue a Monetary Penalty Notice against Leave.EU for £45,000 under section 55A of the Data Protection Act 1998, and the second was to issue an Assessment Notice against Leave.EU under section 146 of the Data Protection Act 2018.

11. The alleged contraventions in respect of which these notices were issued concerned sending some 21 email newsletters to some 51,000 supporters of Leave.EU which allegedly contained unsolicited marketing material relating to Eldon's insurance services. The facts were found by the FTT and are no longer contested. The FTT found that Leave.EU's activities had contravened article 13 (article 13) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), and paragraph 22 (paragraph 22) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR 2003).

12. Article 13(1) provided that: "[t]he use of … electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent". Paragraph 22(2) provided that "… a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has

previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender".

13. Leave.EU brought this appeal on three grounds. First it contended that paragraph 22 did not prohibit the inclusion of **any** direct marketing information in an email which was otherwise solicited and not sent for direct marketing purposes, such as the political newsletters in this case. Secondly, Leave.EU contended that the FTT was wrong to hold that the subscribers had not freely consented to receive marketing information from Eldon, since they had consented to receive such material as Leave.EU felt might interest its subscribers. Thirdly, Leave.EU contended that the Information Commissioner ought to be regarded as having been required to give reasons for her decision, despite the absence of a statutory requirement to do so.

14. The Information Commissioner argued, in essence, that the UT was right for the reasons it gave.

Was Leave.EU aware of the hearing?

15. Leave.EU was, of course, fully aware of the date and time of the hearing through its solicitors, Kingsley Napley, until they came off the record on 26 January 2022. By then, the date and time of the hearing had already been fixed for some time. The order allowing Kingsley Napley to come off the record as solicitors for Leave.EU was sent by first class post to Leave.EU's registered office at 13 Harnbury Road, Bristol BS9 4NP on 27 January 2022. It was also sent to Mr Jacobus Coetzee, who is, as I have said, the sole director of Leave.EU, by email at 11.44 on 31 January 2022. At 12.03 on 31 January 2022, Mr Giridhar Pathak, case progression officer, emailed Mr Coetzee under the heading "CA-2021-000564" (the appeal number) requesting him to confirm who was representing Leave.EU and to provide their contact details, including a phone number. Mr Alam Zaidi, the Listing Manager, emailed the parties, including Mr Coetzee, again at 12.35 on 31 January 2022 under the appeal name and number, saying that "now that the first appellant [Leave.EU] is acting in person", the appeal would not be live-streamed. A further email was sent by the court to Mr Coetzee at 14.54 on 31 January 2022 asking again who would be representing Leave.EU. The email address used by the court for Mr Coetzee was the same as that used by Kingsley Napley, as is shown in an exhibit to the solicitor's witness statement seeking an order that Kingsley Napley come off the record. Kingsley Napley was, however, unable to provide the court with a telephone number for either Leave.EU or Mr Coetzee.

16. Accordingly, whilst Mr Coetzee has at no time responded to any emails sent by the court, I am satisfied that Leave.EU was, by its sole director, aware of the date of the hearing before the Court of Appeal. Mr Coetzee must also have been aware that Kingsley Napley had sought to come off the record as a matter or urgency in the days leading up to the hearing, and that Kingsley Napley had indeed come off the record.

Is it just and appropriate to hear the appeal in the absence of Leave.EU?

17. I have considered carefully the proper course that the court should adopt in the above circumstances.

18. First, in my judgment, the Court of Appeal has the same powers as the UT under the provisions of Rules 8 and 38 of the 2008 Rules that I have mentioned. Secondly, I am satisfied that the Court of Appeal has an inherent jurisdiction either to hear an appeal in the absence of one party or to dismiss an appeal when the appellant fails to appear for a substantive hearing. It would make the operation of the Court of Appeal impossible if no such jurisdiction existed, and the Court must be in control of its own procedures in order to give effect to the overriding objective of enabling the court to deal with cases justly and at proportionate cost (CPR Part 1.1). Rule 8(3)(b) is in point here, because Leave.EU has failed to cooperate with the Court of Appeal to such an extent that it cannot deal with the proceedings fairly and justly. That rule is applied to the Court of Appeal, as I have said, by CPR Part 52.20(1). I shall now explain why the proceedings cannot be dealt with fairly and justly and cannot be adjourned.

19. The issues in this appeal are, as I have explained, important and in some respects novel. A one-day hearing had been fixed before an appropriately qualified panel of the Court of Appeal for many months. Leave.EU was given permission to argue its three grounds of appeal by the expert members of the UT, who had themselves decided the appeal from the FTT.

20. I do not think it would be either desirable or appropriate to comment on the substantive matters that would have been before the court. Suffice it to say that I take the view that it would have been undesirable in the circumstances of this case to try to decide such important questions at the level of the Court of Appeal without full oral argument. We have had the benefit of high quality skeleton arguments but it is extremely useful for the court in an appeal of this complexity to hear oral argument from both sides. That is particularly so when important legal issues are in play which may affect many others in society. We should take notice of the fact that cases of this kind do not reach the Court of Appeal often. That might in itself make it attractive for us to reach a substantive decision. But in my view, it means that we should be astute only to do so after hearing full argument. Hearing only from the respondent would not be sufficient, particularly where the decisions of the FTT and the UT reached the same conclusions as those for which the Information Commissioner advocated.

21. I considered whether an adjournment would have been appropriate. In my judgment, it would not. First, Leave.EU made no such application. Secondly, the time of the Court of Appeal is at a premium and we have to consider the interests of other court users. Parties cannot simply fail to show up for a hearing and then submit, after the event, that they should have been allowed an adjournment. Thirdly, there must be finality in litigation and this case is no exception to that principle. Fourthly, Leave.EU remains in existence, even if we were told that its activities have reduced since the appeal was heard in the UT. I have no reason to suppose that Mr Jacobus Coetzee would not have been capable of attending or instructing lawyers to do so, had they wanted Leave.EU to proceed with its appeal. In the circumstances, it is only reasonable for the court to take non-attendance as an indication that Leave.EU does not wish to proceed or intend to proceed with its appeal.

22. For the reasons I have given, I would exercise the inherent jurisdiction of the court and rule 8(3)(b) and CPR part 52.20 to dismiss Leave.EU's appeal.

Lord Justice Lewison:

23. I agree.

Lady Justice Asplin:

24. I also agree.