Neutral Citation Number: [2020] EWHC 1379 (Ch)

Case No: D30BS912

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

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

Date: 29/05/2020

Before :

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

- -

Between :

(1) Carmela De Sena	**Claimants**
(2) Meltor Developments Limited	
- and -	
(1) Joseph Notaro	**Defendants**
(2) S Notaro Group Limited	
(3) Bishop Fleming (a firm)	
(4) Davies and Partners Solicitors (a firm)	

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John Blackmore (instructed by **Tozers LLP**) for the **Claimants**
Dov Ohrenstein (instructed by **Ashfords LLP**) for the **First and Second Defendants**
Clare Dixon and Hannah Daly (instructed by **Kennedys Law LLP**) for the **Third Defendant**
Imran Benson (instructed by **DAC Beachcroft LLP**) for the **Fourth Defendant**

Application dealt with on paper

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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.

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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 noon.

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on an application made by notice dated (and lodged at court on) Friday 22 May 2020 by the claimants in this matter, which went to trial in November 2019, and in which I handed down my written judgment (previously circulated in draft) on 1 May 2020. By that judgment, I dismissed all the claims made by the claimants against all the defendants. The application notice asks for "An order for an extension of the claimants' time for applying for permission to appeal against the judgment of HHJ Matthews handed down on 1 May 2020". It is supported by a witness statement (which is in fact unsigned, but I have no reason to doubt was approved) by the first claimant dated the same date, 22 May 2020.

APPLICATION FOR PERMISSION TO APPEAL

2. On Tuesday, 26 May 2020, the claimants' solicitors sent an email to the court timed at 10:52 AM, referring to this application for an extension of time replying for permission to appeal, and asking whether I as the trial judge would

> "please consider granting permission to appeal. The claimants' application was intended to seek an extension of time for that as well as an extension of time for applying to the Court of Appeal for permission to appeal in the event that it is refused by the Trial Judge. The application itself did not make that very clear which is regrettable but we were under very considerable pressure of time and wished to make the application within the requisite 21 days."

3. No grounds of appeal were attached to or referred to in either the original application notice, or this further email. At my instance, court staff responded on the same day to the claimants' solicitors asking for such grounds of appeal to be put forward, and asking the other party's solicitors for their positions. Both the third and the fourth defendants' solicitors responded, objecting to the application for an extension of time. The third defendant's solicitors put this in the form of a letter dated 26 May 2020 (with which both the first and second defendants' solicitors and the fourth defendant's solicitors agreed by email).

4. That letter made the following points (in summary):

   1. The application notice was for an extension of time in which to seek permission to appeal, and not for permission to appeal itself.

   2. It was not clear whether the extension of time was sought in order to seek permission to appeal from me or from the Court of Appeal.

   3. But in any event, it was too late seek permission to appeal for me, because in accordance with *McDonald v Rose* [2019] EWCA Civ 4, I was no longer seised of the matter.

4. Since I was no longer seised of the matter I could not extend time for an application for permission to appeal to the Court of Appeal, and, as 21 days had now passed from the date when judgment was handed down, the claimants would have to obtain a retrospective extension of time, which would need to satisfy CPR rule 3.9.

5. On 27 May 2020, the claimants' solicitors informed the court by email that leading counsel had been retained to advise on the appeal. They sought an extension of time to 4 PM on 28 May 2020, in order to respond to the letter from the third defendant's solicitors (if so advised). Just before 4 PM on 28 May 2020, the court received an email, attaching a further witness statement from the first claimant (dated that day) and Grounds of Appeal settled by Leslie Blohm QC and John Blackmore. The witness statement sets out the impact on the first claimant and her husband (who are both elderly and have a number of health conditions) of the current coronavirus pandemic, and the difficulties it causes for them in considering their position. I will return to the Grounds of Appeal later. Today, 29 May 2020, the first and second defendants' solicitors wrote to the court to say that, although the Grounds of Appeal were directed to the first and second defendants alone, they continued to adopt the views of the third defendant in its solicitors' letter of 26 May 2020, and asking me to take these into account. The claimants' solicitors in a subsequent email accepted that adoption.

CHRONOLOGY

6. Before I go any further, it is necessary for me to set out the chronology of this matter. On 27 April 2020, I sent an email to all counsel informing them that my draft judgment was complete and that I was checking it, with the intention of circulating it the next day. On 28 April 2020 I sent the draft judgment to all counsel by email. The email informed them that I intended to hand down the judgment, without attendance, on 1 May 2020. No request or application was received by the court for me to adjourn the hand down hearing or to extend time for the purposes of any application for permission to appeal. I did indeed hand down the judgment on 1 May 2020, without any adjournment or extension of time, and sent a further email later on that day to all counsel attaching a copy of the finalised judgment as handed down. That judgment, in paragraph 264, gave a direction that the parties should submit submissions in writing in support of any application for consequential orders by 4 PM on 5 May 2020.

7. After I had sent out the handed down judgment, at 2:41 PM on 1 May 2020 the claimants' solicitors emailed the court to ask for an extension of time for submitting written submissions from 5 May 2020 to 12 May 2020. Later the same day, at 4:24 PM, I agreed to extend time for written submissions by seven days. On 12 May 2020 the claimants' solicitors sent an email to the court attaching written submissions on consequential matters (costs, payment on account and payment date, rate of interest). These made no reference to permission to appeal or extending the time for making an application for permission to appeal. The next day, 13 May 2020, the claimants' solicitors sent a further email to the court, seeking a further seven days to make submissions in reply to the written submissions of the defendants. Again, no reference was made to permission to appeal or any extension of time for making an application for it. On 14 May 2020 I extended time for reply submissions by a further seven days.

8. On 21 May 2020 the claimants' solicitors emailed the court again, attaching their submissions in reply accompanied by a letter. On 22 May 2020 the claimants' solicitors sent a further email to the court attaching further submissions in reply (to a

further submission of the first and second defendants). In neither of these emails or the letter was there any reference to permission to appeal or extending time for making an application for such permission. Also on 22 May 2020, exactly 21 days after I handed down the substantive judgment, the claimants' solicitors by email timed at 3:59 PM, sent the application notice and other enclosures which I referred to in paragraph 1 above.

THE LAW

9. There are two main procedural rules which apply here. First, CPR rule 52.3 provides in part:

> "(2) An application for permission to appeal may be made—
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> (a) to the lower court at the hearing at which the decision to be appealed was made; or
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> (b) to the appeal court in an appeal notice."

Secondly, CPR rule 52.12 relevantly provides:

> "(1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant's notice.
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> (2) The appellant must file the appellant's notice at the appeal court within—
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> (a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
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> (b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after the date of the decision of the lower court which the appellant wishes to appeal."

10. In *McDonald v Rose* [2019] 1 WLR 2828, CA, the judge at first instance tried a case concerning the distribution of the parties' deceased parents' estates. He handed down his written judgment on 9 March 2018, having circulated a draft judgment beforehand. Attendance was not required at the hand down. Judgment went against the applicant. Before the hand down, the applicant's solicitors wrote to the court to say he was considering seeking permission to appeal, and asking the judge formally to adjourn the hand down hearing to enable him to apply for permission to appeal. But they did not ask for any extension of the 21-day default time limit provided for in rule 52,12 for filing an appellant's notice with the Court of Appeal. In the final version as handed down on 9 March 2018, the judge added a paragraph ordering written submissions on consequential matters within 14 days of the handing down (so by 23 March 2018). On 13 March 2018 the court informed the parties that the application for permission to appeal had been adjourned for 14 days from 9 March 2018 and was to be dealt with by way of written submissions. On 23 March 2018 the parties filed their written submissions. The application for permission to appeal was only one of a number of consequential matters. Having considered the written submissions, on 18 April 2018 the judge refused permission to appeal.

11. On 9 May 2018 the applicant filed his appellant's notice. This would be in time if the 21 days started on 18 April 2018, but out of time if it started on 9 March 2018. The question arose whether the judge had had jurisdiction to consider any application for permission to appeal, and whether the appellant's notice to the Court of Appeal had been in time. The Court of Appeal considered a number of authorities dealing with the procedure that the parties must adopt in respect of any application to the lower court for permission to appeal, and also dealing with the point in time when the 21 day period starts to run. These included *Sayers v Clarke Walker* [2002] 1 WLR 3095, CA, *Owusu v Jackson* [2002] EWCA Civ 877, *Jackson v Marina Homes Ltd* [2007] EWCA Civ 1404, *R (Hysaj) v Home Secretary* [2015] 1 WLR 2472, CA, and *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] 1 WLR 4766, CA.

12. That court summarised the effect of these authorities (at [21]) as follows:

> "(1) The date of the decision for the purposes of CPR 52.12 is the date of the hearing at which the decision is given, which may be *ex tempore* or by the formal hand-down of a reserved judgment: see *Sayers v Clarke* and *Owusu v Jackson*. We call this the decision hearing.
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> (2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. In the case of a formal hand-down where counsel have been excused from attendance that can be done by applying in writing prior to the hearing. The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.
>
> (3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: *Jackson v Marina Homes*. The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made 'at' it for the purpose of CPR 52.3 (2) (a). We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand-down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an *ex tempore* judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.
>
> (4) If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: *Lisle-Mainwaring*.
>
> (5) Whenever a party seeks an adjournment of the decision hearing as per (3) above they should *also* seek an extension of time for filing the appellant's notice,

> otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically extend time: *Hysaj*. It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem.
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> (6) As to the length of any extension, Brooke LJ says in *Jackson v Marina Homes* (para. 8) that it should normally be until 21 days after the permission decision. However, the judge should consider whether a period of that length is really necessary in the particular case: it may be reasonable to expect the party to be able to file their notice more promptly once they know whether they have permission."

DISCUSSION

13. In the present case, the decision hearing was the formal hand down on 1 May 2020. No application was made to the court before that hearing that it should be adjourned in order to enable an application to be made to me for permission to appeal or for an extension of time in which to lodge any appellant's notice with the Court of Appeal. Obviously, the decision hearing being purely formal, without attendance, no such application was made at that hearing either. On the face of it, therefore, no further application can be made to me for permission to appeal: see CPR 52.3(2)(a), set out above. And, according to point (4) of the summary from *McDonald v Rose*, I am no longer seised of the matter, and the application must be dismissed. It is only the Court of Appeal that can deal with the matter, and it would appear, again from *McDonald v Rose*, that the claimants are now out of time, and must seek relief from sanctions before the question of permission to appeal can be considered.

14. As to that, in case I am wrong, and in fact I do have jurisdiction to consider the question of permission to appeal, I will deal briefly with the Grounds of Appeal, attached to the claimants' solicitors' email of 28 May 2020. From these documents, it appears that no application is made to appeal against my decision in relation to the third and fourth defendants. It is only in relation to the first and second defendants, and only in relation to the undue influence claim. So far as I can see, none of the grounds of appeal deals with the breach of fiduciary duty claim, or the third and fourth defendants at all.

15. In my summary, the Grounds of Appeal complain of the following:

> 1. Failing to find that the first claimants' entry into the demerger was caused by the first defendant's actual undue influence.
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> 2. Deciding that (in a case of actual undue influence) the test as between the first defendant and the first claimant was the same as between unconnected shareholders dealing at arms' length.

3. Failing to consider the factual personal relationship between the first defendant in the first claimant at the date of demerger as part of the relevant circumstances in considering whether the pressure applied by the first defendant was 'undue'.

4. Deciding that (in a case of actual undue influence) the test was the commission of overt acts of improper pressure or coercion such as unlawful threats, instead of whether viewed objectively the pressure applied by the first defendant on the first claimant was sufficient to overcome her free will.

5. Failing to consider that pressure applied for a long period could amount to undue influence.

6. Failing to recognise that the transaction was manifestly at an undervalue.

7. Failing to take into account that the transaction was manifestly disadvantageous to the first claimant.

8. Failing to consider that the first defendant's pleaded case and subsequent discussions between the parties were consistent with passing 31.25% of the assets of the holding company to the first claimant.

16. Six of these grounds, that is all of them except numbers 2 and 4, relate to questions of fact. As is well-known, it is significantly harder to obtain permission to appeal against a decision on a question of fact than on a question of law. The trial judge sees the witnesses and the evidence as a whole, and the Court of Appeal does not. So far as concerns this part of the claim against the first defendant, I found against the claimants not only on the law, but also on most of the facts. I found no conduct on the part of the first defendant which could properly be regarded as acts of improper or illegitimate pressure or coercion. I found there was no basis for saying that the first claimants' shares were disposed of by her in the demerger transaction at an undervalue, and therefore no loss had been caused. I also found that in any event the claimants had affirmed the demerger transaction, and could not now claim to rescind it, and that in addition laches barred any claim.

17. So far as concerns the two matters of law (Grounds (2) and (4)) I cannot see any real prospect of a successful appeal. I applied the relevant authorities, which were either binding on me or which I should follow unless I were convinced they were wrong (which I was not). Accordingly, at this stage at least I cannot see how there would be any real prospect of success on appeal, and I can see no other compelling reason for such an appeal. Accordingly, I would have dismissed the application for permission to appeal.

CONCLUSION

18. The third witness statement of the first claimant makes a strong moral case for extending time for permission to appeal. But, since I am no longer seised of the matter, I have no power to do so. Moreover, since, as I have said above, I cannot see how any appeal would have any real prospect of success, nor how there would be any other compelling reason for an appeal, there would be no point in my doing so. The application of 22 May 2020 is dismissed.