Neutral Citation Number: [2023] EWHC 3094 (Ch)

Case No: PT-2023-BRS-000017

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: 1 December 2023

Before :

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

- -

Between :

CHEDINGTON EVENTS LIMITED	**Claimant**
- and -	
1. NIHAL MOHAMMED KAMAL BRAKE	**Defendants**
2. ANDREW YOUNG BRAKE	

- -
- -

Stewarts LLP for the **Claimant**
The defendants in person

Application dealt with on paper

- -

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 revised version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 1 December 2023.

HHJ Paul Matthews :

1. On 10 November 2023, in the absence of the parties, I formally handed down my judgment on quantum (mesne profits) in this case. It was emailed to the parties and released to The National Archives on that day. The neutral citation for that judgment is [2023] EWHC 2804 (Ch). The original judgment on liability was handed down on 25 February 2022, under neutral citation number [2022] EWHC 365 (Ch). I held that the claimant was entitled to possession of a property known as West Axnoller Farm in Dorset, and also to mesne profits for the lengthy period of trespass by the defendants. Permission to appeal against my judgment on liability was refused by the Court of Appeal on 7 April 2022.

2. In accordance with the usual practice, I circulated a draft of the quantum judgment before handing it down. On 9 November 2023, the day before I handed down the judgment, I received an email from Mrs Brake, on behalf of the defendants, making a number of comments (and incidentally enabling me to correct a mistake in the draft) but also telling me that "As for appeals I will be applying to appeal your decision regarding ignoring the offers but will do so directly to the Court of Appeal." The reference to "ignoring the offers" is to a complaint by the defendants that I had not sufficiently taken into account offers which they made to settle the litigation.

3. In the email under cover of which I sent out the final version of my judgment as handed down, I gave directions for consequential matters to be dealt with initially by way of written submissions. Given the terms of Mrs Brake's email of the day before, I was not surprised to find that, when the written submissions were filed and served, these largely concerned the form of order to be made, and the question of costs. There was no application for permission to appeal among them. Nor was there any application for a direction under CPR rule 52.12(2)(a) for a direction at the time within which any appellant's notice should be filed at the appeal court. Although the submissions on consequential matters have been filed and served, I have not yet had time to reach a decision on them, because of pressure of other work (including a lengthy trial which I am currently in the middle of). In effect, I have reserved my judgment.

4. On 27 November 2023, at 11:01, Mrs Brake emailed me directly on behalf of the defendants "to ask for an extension of time to file my application for permission to appeal to the Court of Appeal." She also explained that she thought she needed a copy of the transcript of the evidence given at the quantum trial in order both to refer to it in her grounds of appeal and skeleton argument and also to provide a copy to the appeal court. She said she had written to court staff at Bristol and at the Court of Appeal to ask how she could obtain a copy of the transcript at public expense. She concluded her email by saying "Please would you let me know what I should do and how I get hold of the transcript?" Almost an hour later on the same day, at 11:56, Mrs Brake emailed the Court of Appeal to explain why she needed the transcript. She said she "would like an extension of time to file my Appellant's notice to one week after I can get a hold of the transcript".

5. About five minutes later, at 12:01, she emailed me to say that she now realised "that I do not need to provide a copy of the transcript for the permission to appeal but … I will need to put it in my evidence to make my case…" So, she said, she needed extra time to obtain the transcript, and thereafter to put in her appellant's notice. That

evening, at 19:06, Mrs Brake emailed transcribers as to how long it would take to transcribe the parts of the evidence which Mrs Brake considered that she needed, adding that these transcribers had "already transcribed this for the other side". The transcribers' response, sent at 10:15 on Tuesday, 28 November 2023 was that they did not provide a 24-hour service, as they did not have the capacity, but currently only a 12 business days service. They would only process the order once they received the approved EX 107 form together with the audio recording.

6. At 11:38 on 28 November 2023 Mrs Brake wrote to me by email again, forwarding the email from the transcribers to me. She asked me again to confirm that she could have an extension of time to enable her to obtain the transcript, whether from these transcribers or others. I responded at 13:06 on that day (in the lunch adjournment of my trial) to say that I would try to deal with the matter she had raised after court that day. Mrs Brake emailed me again at 14:02 to say that she had requested a shortened version of the transcript concerned. She also explained some of her financial and personal circumstances.

7. As it happened, I had the opportunity to consider the matter after I had risen on that day. I therefore composed and sent an email timed at 19:26 that evening. In that email I set out my reasons for concluding that I had no jurisdiction to entertain the Brakes' application for a period longer than 21 days in which to file their appellant's notice. In this connection, I referred to the decision of the Court of Appeal in *McDonald v Rose* [2019] EWCA Civ 4, and to CPR rule 52.15(1). I said that in my opinion only the appeal court (therefore, in the present case, the Court of Appeal) could grant the extension which she sought. I then went on to deal with a different question about the possibility of the provision of a transcript at the public expense. Within 9 minutes, at 19:35, Mrs Brake replied by email, to say that the Court of Appeal had told her that she should apply to the court below for an extension of time. I do not think that she had previously mentioned this. She accepted however that this was a "direction from their administrative section", and said that she would take up the matter again with them, now "armed" with my decision.

8. The next morning at 10:05, before going into court, I replied to Mrs Brake. I told her that I had simply set out what I understood to be my own jurisdiction. I also pointed out what I thought was an inconsistency in what Mrs Brake had told me about the need for the transcript in seeking permission to appeal from the Court of Appeal. At 12:26, while I was in court, the claimant's solicitors, Stewarts, sent me an email submitting that I did in fact have jurisdiction to deal with the Brakes' application for an extension of time. They referred to a number of authorities not previously mentioned. These were *Aujla v Sanghera* [2004] EWCA Civ 121, *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2004] BLR 409, and *Dalkia Utilities Services plc v Celtech International Ltd,* unreported, 2 February 2006. I shall come back to these.

9. It is therefore necessary that I review this matter in the light of the authorities cited and otherwise known to me, in order to be clear what jurisdiction I in fact have. I begin with the rules. At the date on which the question on these facts fall for decision, the relevant rules are as follows, though (I emphasise) they were not the same at the dates of some of the earlier decisions:

> "52.3(2) 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.
>
> […]
>
> 52.12—(1) Where the appellant seeks permission [to appeal] from the appeal court, it must be requested in the appellant's notice.
>
> (2) 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)); or
>
> (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.
>
> […]
>
> 52.15—(1) An application to vary the time limit for filing an appeal notice must be made to the appeal court.
>
> (2) The parties may not agree to extend any date or time set by—
>
> (a) these Rules;
>
> (b) Practice Directions 52A to 52E; or
>
> (c) an order of the appeal court or the lower court.
>
> […]"

10. It will be seen that these three rules are dealing with different but interlinked matters. Rule 52.3(2) deals with *which courts* can give permission to appeal, rule 52.12 deals with the *mode of applying* for permission from the appeal court and also (in the case of applying to the appellate court by appellant's notice) deals with the *date for filing that notice*. You can apply to the *lower* court for permission to appeal without formality, but, under rule 52.12(1), to apply to the *appeal* court for such permission you must use an appellant's notice. Then, rule 52.15 makes clear that the time limit for filing an appellant's notice (which may have been fixed by the lower court under rule 52.12(2)(a), or may be the default under rule 52.12(2)(b)) can be varied only by the appeal court.

11. When I was younger, the old practice was that judgment was either given *ex tempore* at the end of the argument, and you asked for leave to appeal (where it was needed, which was not always) , or judgment was reserved, and you attended to take judgment without knowing what it would be, so you prepared your submissions either way, and

(if you lost and those were your instructions) asked for leave to appeal if necessary. (In those days, some decisions required leave and some not. It was common for counsel not to bother to argue that leave was not necessary, but to ask anyway "if leave be necessary"). Applying direct to the Court of Appeal was rare.

12. It is now otherwise. Draft judgments are usually circulated in writing beforehand, so you know whether you are going to win or lose. Judgments are now frequently handed down without attendance, and consequential matters dealt with in writing rather than orally at the hand-down. The rules have had to adapt to changed circumstances. In order to understand the context of the three decisions cited to me by Stewarts, it is necessary to look at how they have changed.

13. Until 2016, two of the relevant rules were not numbered 52.12 and 52.15, but instead 52.4 and 52.6. Moreover, the substance of the then rule 52.4 (now rule 52.12) was rather wider. The decisions in *Aujla v Sanghera* [2004] EWCA Civ 121, *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2004] BLR 409, and *Dalkia Utilities Services plc v Celtech International Ltd,* unreported, 2 February 2006, were all made on the basis of facts which occurred at a time when the rule (52.4) read simply as follows:

> "(2) The appellant must file the appellant's notice at the appeal court within—
>
> (a) such period as may be directed by the lower court …"

14. There was no requirement (as there is now) that that direction of the lower court be given at any particular time or any particular hearing. So, in *Aujla v Sanghera* [2004] EWCA Civ 121, on 14 June 2002 the judge in the lower court had dismissed the claimant's claim and made a declaration on the defendant's counterclaim. The defendant sought permission to appeal. The judge directed that the defendant file his notice by 12 July 2002 and make his application for permission to appeal to the appeal court. The defendant sought and obtained permission to appeal from the appeal court. On the appeal itself, the respondent (claimant) took the point before that court that the judge had had no power to grant an extension. The appellant accordingly sought such an extension.

15. Arden LJ (with whom Thorpe LJ and Park J agreed) examined the rules as they then were, and said:

> "14. These two rules [*ie*, rules 52.4 and 52.6, now rules 52.12 and 52.15] must be read together. If one were to read CPR 52.6 alone, one would have the impression that only the appeal court can extend the time over 14 days for lodging an appeal. However when one goes back to 52.4(2) it is clear that power is given to a lower court to extend time and, moreover, that power given to the lower court is not limited so as to be exercisable only within the 14 days in which, in default of a direction, an appellant's notice must be lodged.
>
> 15. For my part, I do not think that that a reference to 14 days has to be read in to 54.4(2)(a). The words of that paragraph should be given their meaning as drafted, namely, that the lower court has power to extend the period for appealing from a decision and that that power is, subject to what I next say, exercisable outside the 14-day period.

> 16. There is nothing in CPR 52.6 to indicate that this is not the correct construction of CPR 52.4. The opening words of section 52.6 refer to a variation of the time limit for appealing, and the words "the time limit" are appropriate to refer to either the expiry of the 14 days or the expiry of the further date fixed by the lower court. That construction is supported further by the reference to the lower court in CPR 52.6(2)(c). There is nothing in CPR 52.6 to indicate that the order of the lower court must have been made within 14 days of the decision against which the appellant wishes to appeal.
>
> 17. In those circumstances my conclusion is that it is open to the lower court to grant an extension of time even if the application is made to it after the expiry of 14 days. …"

16. In *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd*, Forbes J on 23 July 2004 dealt with an application "for a further extension of time in which to apply for permission to appeal [his] judgment in the matter, and for an appropriate direction as to the time for filing the notice of appeal". The judge handed down judgment on 8 July 2004. The judge granted an extension of time for applying for permission to appeal until 30 July 2004. However, he was not asked to, and did not, extend time for filing the notice of appeal. Time for filing the notice expired 14 days (as it was then) after 8 July, that is, on 22 July. This application took place the next day. The judge pointed to what is now CPR rule 52.15(1), that an application to extend time for filing an appeal notice must be made to the appeal court. Accordingly, the judge (reluctantly) held that he had no jurisdiction to extend time for filing the appeal notice. However, the judge had not been referred to the decision of the Court of Appeal in the *Aujla* case.

17. In *Dalkia Utilities Services plc v Celtech International Ltd,* Christopher Clarke J had to deal with a similar point. On 27 February 2006 he had formally delivered his judgment in the absence of the parties, having informed them that he would deal with consequential matters on 17 February 2006. On 27 January 2006 the defendant by letter sought an extension of time to file an appellant's notice to run from 17 February and, if necessary, an extension of time for making an oral application for permission to appeal. The claimant (respondent) drew attention to the decision of Forbes J in *Yorkshire Water*. Although it was not cited to him, Christopher Clarke J found a reference to the *Aujla* decision in the White Book.

18. He said:

> "5. … That decision makes plain that it is open to the trial judge to extend the time for filing a notice of appeal even though he has made no such order at the time when he gives his decision and even if the 14 day time limit from the date of that decision prescribed by CPR 52.4 (2) (b) has expired.
>
> 6. I am, I am glad to say, bound by that decision. It would be most unfortunate if the course taken in this case of publishing the judgement but postponing for a short while the argument on costs and permission to appeal had the result that only the Court of Appeal could extend the time limit for filing a notice of appeal, whatever the circumstances."

19. There have been further decisions since on this question, but I can jump straight to *McDonald v Rose* [2019] 1 WLR 2828, CA. In that case, the judge below handed down judgment on 9 March 2018, in the absence of the parties, having circulated a draft to them two days earlier. On 8 March the applicant wrote to the court that he was considering seeking permission to appeal, and asked the judge "formally to adjourn the hearing to enable [the applicant] to apply for permission to appeal". But they did not seek an extension of the default 21 day time limit (as by then it had become) for filing an appellant's notice with the Court of Appeal. On 13 March, the court notified the parties that the application for permission to appeal had been adjourned for 14 days from 9 March and was to be dealt with by way of written submissions. On 23 March the parties filed their written submissions, including for permission to appeal. The respondents opposed that, but also opposed any extension of time for the filing of an appellant's notice beyond 30 March (*ie* 21 days after the date of the hand down). The applicant did not file an appellant's notice by 30 March. The judge refused permission to appeal. On 9 May the applicant filed an appellant's notice.

20. Underhill LJ, giving the judgment of the court, considered the relevant rules and various judicial decisions upon them, though (so far as I can see) not the three to which I have been referred. He said this:

> "21. … (1) The date of the decision for the purposes of CPR r 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 …
>
> (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. …
>
> (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 … 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 r 52.3(2)(a). …
>
> (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 …
>
> (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 … "

21. On the facts of that case, the applicant had sought an adjournment of the hearing in advance of the hand-down. But he failed to ask for an extension of time to file the appellant's notice. This was therefore filed out of time. The Court of Appeal briefly considered the *Denton v White* criteria, but decided that it did not need to decide

whether to grant relief from sanction, because the appeal had no real prospect of success anyway.

22. Since that decision, there has been a further rule change, in 2021, so that rule 52.12 now relevantly reads:

> "52.12(2) 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 … "

23. In the present case, Mrs Brake made clear that she would not be making an application to me for permission to appeal, but would apply directly to the Court of Appeal. For that purpose she would need to file an appellant's notice. She could have asked me to give a direction under rule 52.12(2)(a) that the appellant's notice be filed within a period longer than the usual 21 days. But she did not, and I made no such direction. The three cases to which I have been referred by Stewarts bear on the power of the lower court to give that direction. Two of them say that the court can give the direction even though the time has run out.

24. The problem however is that the rule change in 2021 now requires that the lower court give any such direction "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. The Brakes must therefore ask the Court of Appeal, which still has that power.