Neutral Citation Number: [2021] EWCA Civ 1373

Case No: B5/2020/0586

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOURNE AND POOLE COUNTY COURT AND FAMILY COURT
HIS HONOUR JUDGE BERKLEY
C00BH467

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 September 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BIRSS
and
SIR CHRISTOPHER FLOYD

- -

Between :

POULE SECURITIES LIMITED	**Appellant**
- and -	
HOWE & ORS	**Respondent**

- -
- -

Mr Clive Wolman for the **Appellant**
Mr Justin Shale for the **Respondent**

Hearing date : 20th July 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 21 September 2021.

Lord Justice Birss :

1. This appeal arises from an unless order made in proceedings in the County Court sitting in Bournemouth and Poole. The claim form was issued in March 2016. The case is a dispute about the terms on which a property in Christchurch was bought and is held. The house is occupied by the first and second defendants – Mr Howe and Ms Kempi. In the action the claimant Poule Securities Ltd ("Poule") claimed possession. Mr Howe's case was that the purchase took place pursuant to a joint enterprise between himself and Mr James Ingham, who is the sole shareholder and director of Poule. Mr Howe contended that the terms of the joint enterprise entitled the defendants to remain in the property and entitled him to 50% of the shares in Poule. The counterclaim included allegations of proprietary estoppel, breach of contract and a constructive trust. The third, fourth and fifth defendants have played no relevant part in this appeal. From now on "the defendants" refers to the first and second defendants.

2. The defendants contended that Poule should disclose the conveyancing file relating to the property. The file was being held by the conveyancing solicitors. Paragraph 6 of an order made on 27 September 2018 and sealed on 16 October 2018 by DDJ Lacey is in the following terms:

> 6 The claimant do disclose the conveyancing file of the solicitors who acted on the purchase of the property subject to these proceedings in the event the solicitors refuse to provide a copy of the file the claimant is to file and serve a copy of their letter requesting disclosure and a copy of the solicitors response. Such disclosure is to be made within 28 days of the date of this order.

3. Thus the order required Poule, within the time specified, to do one of two things. Poule either had to disclose the file or to provide copies of letters. In effect the letters would show what efforts Poule had made to get the file from the conveyancing solicitors and if it had not succeeded, what the problem was.

4. By 19 November 2018 neither alternative had been carried out by Poule and so Ms Kempi issued an application for an unless order. Part of the context was that at this stage there was a pre-trial review scheduled for 11 December 2018, and the trial was set for January 2019. DJ Powell dealt with that application without a hearing and made an unless order in the following terms:

> 1 Unless by 7 days of this order the claimant comply with paragraph 6 of the order of 27 September 2018, as ordered by DDJ Lacey on 27 September 2018 the claim and defence to counterclaim shall be struck out automatically without any further order of the court.
>
> 2 *[...]*
>
> 3 This order has been made without a hearing under the Court's Case Management powers contained in part 3 of the Civil Procedure Rules, and/or without notice to yourself. You may within 7 days of service of this Order upon yourself apply to the Court to set aside or vary the order under Part 3.3(5) Civil

> Procedure Rules. You must file with the Court (serve on the other party/ies) an application which sets out your reasons for objecting to the order. When your application including your reason(s) for objection to the order are received by the Court the application will be listed for a hearing unless the Court feels this is unnecessary or you request the Court to vary the Order without a hearing.

5. The order was made by DJ Powell on Wednesday 28 November 2018 and sealed on Thursday 29 November 2018. As is conventional for orders made in the County Court, it bears both dates. The 29 November 2018 date is on the front page as part of the formal heading of the order and the 28 November 2018 date appears after paragraph 3 of the order.

6. It is common ground that the deemed date of service of the order on Poule was Monday 3 December 2018. Mr Ingham asserts that he received the order on that date.

7. In any event on 3 December 2018, Poule issued an application that "the order dated 29 November 2018 be set aside". The application notice bears date of signature of 2 December 2018 (Sunday) which the defendants draw attention to. Mr Ingham said that was an error caused by not resetting his wristwatch appropriately when the month changed because November has 30 days. Nothing now turns on exactly when Poule received the order.

8. The matter came before DJ Williams at a hearing on the morning of Monday 10 December 2018. Poule was represented by counsel Mr Cook. The first and second defendants were in person.

9. By the time of the hearing before DJ Williams the position was as follows. Poule had not done what was required by the unless order made by DJ Powell. Poule was making an application to set aside the unless order. There was no application by Poule for an extension of time for compliance with the unless order nor was there an application for relief from sanction.

10. DJ Williams made an order in the following terms (numbers have been added to the recitals for ease of reference):

> (i) UPON hearing counsel for the claimant and the 1st and 2nd defendants in person.
>
> (ii) And Upon the claimants confirming that they have obtained the conveyancing file but have not yet disclosed it to the defendants.
>
> (iii) And Upon the court finding that the claimant remains in breach of Paragraph 6 of the order of 27 September 2018
>
> (iv) and in breach of the order of 29 November 2018.
>
> (v) And Upon the court noting that pursuant to the order of 29 November 2018 the claim stands struck out and the defence to the counter claim stands struck out.

> IT IS ORDERED THAT
>
> 1. The claimants application to set aside the court order of 29 November 2018 is refused
>
> 2. Pursuant to the order of 29 November 2018 the claim stands struck out.
>
> 3. Pursuant to the order of 29 November 2018 the defence to the counterclaim is struck out and judgment is entered in favour of the Part 20 Claimant on the counterclaim with damages to be assessed.
>
> 4. By 4pm on 7 January 2019 the Part 20 Claimant's shall notify the court and the parties whether they intend to continue with the counterclaim. In the event the counterclaim is being pursued the parties shall file and serve draft proposed directions by 4pm on 21 January 2019.
>
> 5. The claimant shall pay the defendants costs of the claim to be subject to detailed assessment in default of agreement.
>
> 6 *[...]*

11. Recitals (ii), (iii), and (iv) reflect the judge's understanding of what counsel on behalf of Poule had accepted before him, i.e. that Poule was by then in breach of the unless order. Recital (v) reflects the terms of the unless order which provided for an automatic strike out of the Claim and the Defence to Counterclaim. By paragraph 1, the application to set aside is dismissed. Paragraphs 2 and 3 provide that the Claim and the Defence to Counterclaim are struck out and paragraph 5 requires the claimant to pay the costs of the claim to the defendants.

12. Poule sought permission to appeal to the circuit judge. HHJ Berkley gave permission on 19 March 2019. Considering the grounds of appeal before HHJ Berkley:

    i) the first ground was a point on the meaning of paragraph 6 of the order of DJ Lacey;

    ii) the second ground challenged the making of the unless order;

    iii) the third took points on the unless order itself, arguing that its true meaning was that the time compliance ran from the date of service whereby Poule was not out of time before DJ Williams, and also that the order was drafted in breach of the rules; and

    iv) the fourth ground was a submission that the judge had been wrong to refuse an extension of time as well as a point on privilege relating to the documents.

13. The appeal was heard in August 2019 with judgment handed down on 17 January 2020. The appeal was dismissed on all grounds.

14. On the third ground the judge held that Poule's point on the meaning of the unless order was arguable, but that since breach of the order had been conceded before DJ Williams, that was no basis for allowing the appeal.

15. Poule sought permission to appeal HHJ Berkley's order on four grounds. Permission was refused on paper on two of them (the argument about the meaning of DJ Lacey's order and a point on alleged procedural irregularity before HHJ Berkley). Permission was given on two grounds. Ground 1 challenges the finding that a concession had been made, and ground 2 challenges the interpretation of the words "by 7 days of this order".

16. Thus before this court there is not now any appeal from paragraph 1 of the order, dismissing Poule's application to set aside the order of DJ Powell. We asked whether there had been any application for relief from sanction. We were told that no such application was made within the days or weeks following DJ Williams order, but an application for relief from sanction was made, much later, in May 2020. It awaits the outcome of this appeal.

17. At the conclusion of the submissions made by Counsel for Poule we decided to dismiss the appeal, with reasons to follow. These are those reasons. It is convenient to address ground 2 first and then ground 1.

Ground 2

18. The question on ground 2 of the appeal is the true interpretation of the order. Counsel for Poule contends that the time for compliance with the unless order, so as to avoid its sanction, was 7 days from the date of service of the order. That would have been 7 days from 3 December 2018. Therefore Poule was not yet in fact in breach at the hearing on the morning of 10 December. Counsel contends that is what the order means, particularly when read in the context of the provisions of the Civil Procedure Rules. The argument also draws attention to paragraph 3 of the order, in which the 7 day period within which an application to set aside may be made is expressly provided for as running from the date of service.

19. The defendants contend the correct meaning is that the period runs for 7 days from the date the order was made. That was 28 November 2018. Even if one uses instead the date the order was sealed, 29 November 2018, that makes no difference. Either way by 3 December 2018 Poule was in breach.

20. Taking the order at face value, I would hold that the words "by 7 days of this order" mean that the 7 day period runs from the date of the order, in other words the date the order was made. That date appears on the document itself. There is a possible ambiguity between the 28th November (date of making) and 29th November (date of sealing) but in this case that makes no difference.

21. Nevertheless all documents must be read in context and in this case the relevant context is the CPR. There are two important provisions about orders which specify a time by which something must be done. The first is rule 2.9, which provides as follows:

> **2.9 Dates for compliance to be calendar dates and to include time of day**

> (1) Where the court gives a judgment, order or direction which imposes a time limit for doing any act, the last date for compliance must, wherever practicable –
>
> (a) be expressed as a calendar date; and
>
> (b) include the time of day by which the act must be done.
>
> (2) Where the date by which an act must be done is inserted in any document, the date must, wherever practicable, be expressed as a calendar date.

22. The rule speaks for itself. An order imposing a time limit ought to be expressed as a calendar date with the time for compliance as well as the date, and the only exception the rule permits is if that is not practicable.

23. The second set of provisions is in Practice Direction 40B at paragraphs 8.1 and 8.2. These provide:

> **Orders requiring an act to be done**
>
> **8.1** An order which requires an act to be done (other than a judgment or order for the payment of an amount of money) must specify the time within which the act should be done.
>
> **8.2** The consequences of failure to do an act within the time specified may be set out in the order. In this case the wording of the following examples suitably adapted must be used:
>
> > (1) Unless the [claimant][defendant] serves his list of documents by 4.00 p.m. on Friday, January 22, 1999 his [claim][defence] will be struck out and judgment entered for the [defendant][claimant], or
> >
> > (2) Unless the [claimant][defendant] serves his list of documents within 14 days of service of this order his [claim][defence] will be struck out and judgment entered for the [defendant][claimant].
>
> Example (1) should be used wherever possible.

24. Thus paragraph 8.1 more or less repeats rule 2.9(1)(b) concerning the requirement to specify a time for compliance as well as a date. It does not apply to orders for the payment of money. Although the paragraph does not include a reference to the practicality exception in rule 2.9(1), it cannot be read as suggesting there is no such exception.

25. Paragraph 8.2 applies to unless orders. The difference between the two examples in the paragraph is that in Example (1) a particular date and time for compliance is specified whereas in Example (2) the period is defined by reference to the date of service of the order. These are the only examples given.

26. The alternatives in PD40B make obvious sense. Given that the consequence of failure to comply with an unless order can be the failure of the underlying claim (or defence) it makes obvious sense that the options ought to be either to specify a period for compliance which runs after the date the order has been served or else to express the required date unambiguously as a calendar date, and it also makes obvious sense that a calendar date (and time) is to be preferred. Nevertheless the court will always have the power to make an order which does not fall within either example.

27. In my judgment, taking these provisions in account does not lead to a different conclusion as to the meaning of the unless order in this case. Neither the rule nor the provisions of the practice direction demand that an order drafted in a manner different from their provisions is to be interpreted in a particular way. As far as PD 40B is concerned, the order made is not in the form of either example. Assuming the judge had taken the view that specifying a calendar date was not practical, to be in accordance with PD 40B the order ought to have specified at least a date for compliance referable to the date of service. However the fact the order is outside either example does not justify altering its clear meaning to attempt to bring it within one of them. Counsel for Poule submits that one should assume that the order was intended to comply with PD 40B and, armed with that assumption, interpret the order as meaning that the 7 day period ran from service. I cannot read the order that way. It is just not what the words would be understood to mean.

28. The fact that one is left to speculate why the unless order was made in terms which must be seen as exceptions to the clear provisions of the rule and practice direction taken together, would be of potential relevance on an application to vary the order or to seek an extension of time, but that is a different point.

29. I am not persuaded that paragraph 3 of the order assists the appellant. It is simply a different provision, no doubt drafted to reflect CPR rule 23.10 which provides that applications to set aside or vary orders made without notice must be made with 7 days of the date of service on the person applying to set aside or vary. If anything the contrast in wording cuts in the other direction. There is no reason why latest date before which an application to set aside has to be made must necessarily be before the date required for compliance with the order. The fact that applications to set aside an order should, if possible, be brought before the date for compliance, does not alter the position.

30. ***Kinsley v Commissioner of Police for the Metropolis*** [2010] EWCA Civ 953 emphasises the importance of clarity in unless orders. Given their potential consequences the need for clarity in orders of that kind is plain. However I am not persuaded by the submission in this case that the order should be characterised as ambiguous in its own terms and then, as a result, open to the interpretation advanced by the appellant.

31. I would dismiss the appeal on this ground.

32. It follows that Poule was in breach of the unless order by the time the matter came before DJ Williams on 10 December 2018 and therefore there is nothing wrong with the order made by the judge on that occasion. The judge was right and entitled to include recitals (ii) to (v), and paragraphs 2 and 3 of the order, which together recorded the breaches and the automatic consequences of the operation of the unless order. The judge was also entitled to make the costs order (paragraph 5) in those circumstances.

33. It also follows that there is no need to consider ground 1 of the appeal, which relates to whether a concession was made at that hearing that Poule was in breach. However I will do so briefly in any event.

Ground 1

34. Counsel referred to ***Segor v Goodrich Actuation Systems Ltd*** [2012] UKAET0145/11 in which the EAT including Langstaff J as President, held at paragraph 11 that a concession made in litigation by a party or on their behalf "cannot properly be accepted as such unless it is clear, unequivocal and unambiguous". I agree.

35. Paragraph 11 of ***Segor*** also addresses the care which must be taken when concessions are or appear to be made by litigants in person or lay representatives, however that particular aspect is not relevant in the present case since Poule was represented by counsel at the hearing on 10 December 2018 (albeit not Mr Wolman who now represents Poule).

36. Counsel also referred to the recent judgment of Chamberlain J in ***Murphy & Linnett v HMRC*** [2014] EWHC 1914 (Admin). That case relates to the interpretation of extra-statutory concession made by the Inland Revenue and is not relevant to the present appeal.

37. We were taken through the relevant parts of transcript before DJ Williams. Having done that I am wholly unpersuaded that there was anything unclear, equivocal or ambiguous about the concession being (rightly) made by counsel for Poule that his client was, as at 10 December 2018, in breach of the unless order. I will refer only one part. In the passage the judge summarises with counsel for Poule what he, the judge, understands the position to be, which is that Poule was now in a position in which an application for relief from sanction had to be made, because it had failed to comply with the unless order, as well as failing to comply with both the order made by DDJ Lacey on 27th September and the original disclosure order made before that. Counsel clearly agrees with the judge and accepts that that is the position.

38. The transcript (at p13-14) is:

> "District Judge Williams *[...]* Now, I don't know who drafted the application [*to set aside*] and it's not for me to, to get involved in that, but the reality is that, based on that application, it doesn't get anywhere close to giving me sufficient information, justification or reasoning as to why the Claimant has failed to comply with, a) the first order, whenever that was, b) the order that I do know about which is 27 September, what steps it took to try to comply with 27 September, I don't even yet know the full picture of that, and why, therefore, it has failed to comply with the Unless Order. I, I simply can't see how the application can succeed. And conceivably the result of the 29 November order is that the 7 days have come and gone and the Claimant hasn't complied with an Unless Order which means, as the order says, the claim and defence to counterclaim is automatically struck out. So, I think the Claimant's in the territory of making an application for relief from sanctions.

> Mr Cook: Yes, Sir.
>
> District Judge Williams: But I don't think you're in a position to do that today.
>
> Mr Cook: Not in a position to do that today, no, Sir, for the simple reason there'd be a lack of evidence --
>
> District Judge Williams: Yeah, yeah.
>
> Mr Cook: To support that, available to support that application.
>
> District Judge Williams: Well, I'm not sure that we can take it any further than that, can we?
>
> Mr Cook: No, Sir."

39. In those circumstances ground 1 of the appeal before us should be dismissed.

Sir Christopher Floyd:

40. I agree.

Lord Justice Lewison:

41. I also agree.