Neutral Citation Number: [2022] EWCA Civ 201

Case No: A2/2021/1112

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
(His Honour Judge Dight CBE)
G10CL052

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE BIRSS
and
MR JUSTICE ZACAROLI

- -

Between :

Mohammed Anwer	**Appellant**
- and -	
Central Bridging Loans Limited	**Respondent**

- -
- -

The Appellant appeared in person
The Respondent was represented by Mr John Clifford, a director of the Respondent company
Ms Rosemary Davidson (instructed by the **Attorney General**) as ***Amicus Curiae***

Hearing Date : 10 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10.30am on 25 February 2022

LORD JUSTICE COULSON :

1. Introduction

1. A non-lawyer would look at the procedural tangle that this case finds itself in, and be horrified at the muddle, and the time that it has taken to sort it out. Indeed, I doubt whether a lawyer would have a different reaction. When stripped of excess baggage, what Mr Anwer has asked for is a transcript of the judgment (given as long ago as November 2020) which rejected his claims against the respondent, so that he can work out whether or not he has any arguable grounds of appeal. Through inadvertence, confusion, and procedural rules which do not reflect the law, he has not been given a clear answer to that request.

2. As I made plain to Mr Anwer during the appeal hearing, this court is anxious to do all that it can in order to get this case back on track, by resolving as many of the outstanding points as possible. In that endeavour, we have been greatly assisted by Ms Davidson, the advocate appointed by the Attorney General, whose guidance has been invaluable.

2. The Factual Background

3. In June 2015, Mr Anwer agreed to bridging loans, provided by the respondent, Central Bridging Loans Limited ("CBL"). The loans were not repaid and CBL repossessed Mr Anwer's property. Mr Anwer complains about the length of time it took them to sell the property, which sale happened in January 2018.

4. In May 2018, CBL issued a statutory demand against Mr Anwer for £2.1m, and Mr Anwer sought to set aside that statutory demand ("the insolvency proceedings"). In March 2019, Mr Anwer commenced his own claim in the Central London County Court against CBL for breaches of s.140 of the Consumer Credit Act, alleging that his relationship with CBL was unfair. The insolvency proceedings were stayed pending the outcome of the county court claim. During 2020, that claim was managed by Her Honour Judge Backhouse, and the same judge also presided over the trial between 9-12 November 2020. In her judgment dated 17 November 2020, Judge Backhouse rejected Mr Anwer's claim.

5. Mr Anwer subsequently sought transcripts of:

    a) Three pre-trial hearings before Judge Backhouse, on 23 March, 15 May and 16 October 2020 respectively;

    b) The entirety of the trial between 9 and 12 November 2020;

    c) The judgment of 17 November 2020.

    Because of Mr Anwer's financial position, he had previously obtained help with fees. Accordingly, his request for transcripts was accompanied by a request that the cost of those transcripts be paid at public expense.

6. A complicating factor was that, in July 2020, Mr Anwer had been made the subject of an Extended Civil Restraint Order ("ECRO"). The order was in standard form. The two relevant parts were as follows:

> "The Order
>
> It is ordered that you be restrained from issuing claims or making applications in any court specified below concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made without first obtaining the permission of Mr Justice Marcus Smith, or if unavailable, Mr Justice Roth."
>
> The courts specified were the High Court and any County Court.
>
> "It is further ordered:
>
> For the avoidance of doubt, it is ordered that the Claimant [Mr Anwer] be restrained from issuing claims or making applications whether in the High Court or County Court generally, concerning any matter involving or relating to or touching upon or leading to (but not limited to):
>
> a)The following proceedings: i) Claim Number G10CL052 [these proceedings]…
>
> b)The following parties: i) The Defendant [CBL]; ii) Its Directors; iii) members or employees of Shakespeare Martineau LLP and/or iv) Counsel;
>
> without first obtaining the permission of Mr Justice Marcus Smith or Mr Justice Roth, as per Section 1 and Section 2 above."

7. The request for transcripts came before His Honour Judge Dight CBE, the designated civil judge at Central London County Court. On 15 December 2020, his clerk wrote to Mr Anwer in these terms:

> "The Designated Civil Judge had considered your request for a transcript at public expense and has refused permission, these four applications relate to a proposed appeal against orders made in G10CL052. The Claimant is subject to an ECRO (dated 2 July 2020) in respect of, among other cases, G10CL052 and needs permission from the nominated judge of the High Court before he can seek permission to appeal the orders made in G10CL052. Thereafter it will be a matter for the Appeal Court to determine whether the test in CPR 52.14(2) is made out so as to justify a transcript at public expense.
>
> If you still wish to obtain a transcript of the proceedings at your expense, please complete the EX107 from and return it to the court…so the we can process it (sic)."

8. Mr Anwer sought to appeal Judge Dight's refusal of his requests for transcripts at public expense. For reasons which are obscure and do not now matter, the appeal was routed to the Court of Appeal ("CoA"), not the High Court. By reference to Practice Direction 52C, paragraph 3(3)(a), the CoA office asked Mr Anwer for the sealed order being

appealed. Of course, he did not have a sealed order; he could only provide the letter of 15 December 2020, which he did. In the absence of a sealed order, the CoA office refused to issue an Appellant's Notice.

9. Eventually, that decision was referred to Andrews LJ, for review pursuant to CPR 52.24(5). By an order dated 23 June 2021, Andrews LJ directed:

> "1. I direct that the appellant's notice be issued in order that the important question of principle and practice whether an appeal court has jurisdiction to entertain an appeal against a decision made by a judge on an application which is conveyed to the applicant informally in a letter can be determined as a preliminary issue.
>
> 2. If permission is needed to raise that issue of jurisdiction before this Court, without arguing it first in the High Court, for the avoidance of doubt I constitute myself a judge of the High Court for the purpose of granting permission, hereby grant permission to transfer the matter to the Court of Appeal pursuant to CPR 52.23(1)(a)..."

She also ordered a rolled-up hearing, with the appeal to follow if permission was granted.

10. Amongst the written reasons for her order, Andrews LJ considered that it was arguable that the CoA office had been wrong, and that a sealed order was not required. She also addressed the separate issue of whether the request for transcripts at public expense could only be made with the permission of Marcus Smith J or Roth J, in accordance with the ECRO. She noted that Marcus Smith J had said in writing that Mr Anwer did *not* need his permission to ask the county court for the transcripts and, at paragraph 4 of her reasons, Andrews LJ said, without elaboration, that "he was right about that".

3. The Issues On Appeal

11. There are three issues raised, in one way or another, by this appeal. The first issue, as identified by Andrews LJ, is whether a sealed order is required before a party can seek permission to appeal. I deal with that in Section 4 below. If the answer to that question is in the negative, and the letter from the judge's clerk of 15 December 2020 was sufficient then, logically, the next issue is whether Judge Dight was right to say that the request for transcripts at public expense required prior permission under the ECRO.

12. At the appeal hearing, we recognised that this issue fell outside the strict terms of the permission granted by Andrews LJ. However, adopting a pragmatic way round that issue, as explained below, this judgment goes on in Section 5 below to deal with that point of principle – does the request for transcripts at the public expense require permission under the ECRO?

13. The final point, namely whether Mr Anwer's request for transcripts at the public expense should be granted, is touched on at Section 6 below. That is not a matter for this court, but we have been able to identify a solution so that no further time is lost. I deal with other outstanding matters in Section 7 below.

4. Issue 1: Is A Sealed Order Required Before A Party Can Seek Permission To Appeal?

4.1 The Law

14. Section 77(1) of the County Courts Act 1984 provides:

> "1 Subject to the provisions of this section and the following provisions of this Part of this Act… if any party to any proceedings in the county court is dissatisfied with the determination of a judge or jury, he may appeal from it to the Court of Appeal in such manner and subject to such conditions as may be provided by Civil Procedure Rules."

The precise form of any such "determination" is not prescribed.

Subsequently, it was a statutory requirement that permission to appeal had to be obtained before any substantive appeal could be heard[1].

15. Although s.77 of the 1984 Act refers to "the determination of a judge", there is no statutory definition of "determination". The table at paragraph 3.5 of Practice Direction 52A[2] instead uses the word "decision", and provides that the destination of an appeal against any decision of a County Court Circuit Judge lies to the High Court. "Decision" is elsewhere defined[3] as including "any judgment, order or direction of the High Court or the County Court". The House of Lords treated "decision" as being synonymous with "determination" in *Barder v Barder* [1988] AC 20. In addition, the White Book 2021 at 9A-59.3 correctly suggests that "determination" has the same meaning as "judgment or order".

16. In my view, the use of these different words in statute and statutory instruments may once have had an historic significance, but since the introduction of the CPR, those differences no longer matter: see, for example, the discussion in the White Book 2021 under r.40.1.1. Save in an exceptional case, there can be no practical difference between any of the possible formulations (namely "determination", "judgment", "order", or "direction"). If I was forced at gunpoint to say, I would venture the suggestion that "determination" is possibly the widest of them all.

17. What is much more important is that, however it may be labelled, an appeal can only lie against something which has been decided: a result, a conclusion, an outcome. It does not lie against any observation or comment by the judge along the way to that result. In this way, the winner cannot appeal against a finding or a reason for the judge's decision. A defendant whose defence is upheld by the judge cannot seek to appeal against a finding that he or she did not always tell the truth: see by analogy *Lake v Lake* [1955] P.336 CA, where the wife who had obtained an order entirely in her favour was not allowed to appeal the judge's finding that she had committed adultery. It is only the result that matters for the purposes of an appeal. That is why, although it is technically inaccurate (as this case demonstrates), judges are so fond of saying that "an appeal lies against an order, not a judgment".

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[1] Access to Justice Act 1999, s.54
[2] Introduced by the Access to Justice Act 1999 (Destination of Appeals) Order 2016/917, article 5.
[3] Access to Justice Act 1999 (Destination of Appeals) Order 2016/917, article 2.

18. In *In Re B (A Minor) (Split Hearings: Jurisdiction)* [2000] 1WLR 790, a county court judge gave a reasoned judgment on a preliminary issue, but did not issue a specific order encapsulating his conclusions. Although there was no formal order, this court concluded that his judgment amounted to a determination of a preliminary issue on questions of causation, in respect of which an appeal could then be raised. In his concurring judgment, Schiemann LJ said:

> "I add a few words in relation to jurisdiction. This is a case where the parties wished the judge to determine a number of issues prior to going on to hear the rest of the case at a later date. The judge did so and gave a full judgment on the points which he had been asked to determine. He then adjourned the proceedings. For reasons I can well understand, he did not, and was not asked to, incorporate his determinations in a formal order. If those determinations had been so incorporated in a formal order, there would have been a right of appeal quite clearly under section 77 of the County Court Act 1984. I do not consider that the absence of this formal step deprives the court of jurisdiction to consider the appeal. To hold otherwise would merely mean that the parties, of necessity, would have to take various formal steps and then come back to the court, or alternatively, to leave them to conclude a further estimated three days of hearing and then come back to court in order to argue precisely the same points that have been argued in the case."

19. In *Compagnie Noga SA v Australia and New Zealand Banking Group Limited and Ors,* [2002] EWCA Civ 1142; [2003] 1WLR 307, Waller LJ said at [27]:

> "*27…*It is difficult to think that there simply could be no appeal without a formal order. Many appeals are brought on the basis of an order made by a judge prior to the formal document being drawn up, and *In re B* demonstrates that the correct reading of *Lake v Lake* is not that some formal document recording the order must exist. *Lake v Lake* properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal. That is in my view consistent with *In re B*. That this is so is not simply by virtue of interpretation of the words "judgment" or "order", but as much to do with the fact that the court only has jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is [not] one he or she does not like."

Although Tuckey and Hale LJJ disagreed in the result, both judges expressly agreed with Waller LJ's analysis of the law set out above.

20. The relevant principle and practice was summarised by Baroness Hale of Richmond in *In Re L & Anr (Children) (Preliminary Finding: Power To Reverse)* [2013] UK SC 8; [2013] 1WLR 634 where she said, in relation to *In Re B,* "the absence of an order is no

bar to an appeal" She went on to note that "nevertheless, it would be very surprising these days if there were no order."

21. In the present day, it is almost inevitable that the determination/decision/order of the judge will be encapsulated in a formal order. It is doubtless for that reason that Practice Direction 52C at paragraph 3(3)(a) requires an appellant to provide (along with the appellant's notice) a copy of "the sealed order or tribunal determination being appealed". But it cannot have been the intention of the CPRC when drafting the PD to make the provision of a sealed order some sort of condition precedent: not only would there have been no legal basis for that, but it would have been contrary to CPR 40.3(1)(c), which allows the court to dispense with the need to draw up an order in certain situations; and PD 52C itself which, at paragraph (6) states that, if the appellant cannot provide all the necessary documents in time, the appeal notice must be completed on the basis of the available documents.

4.2 The Answer to Issue 1

22. The answer to Issue 1 is in the negative: a sealed order is not required.

23. The decision of Judge Dight, as recorded in the letter of 15 December 2020, was plainly a "determination" under s.77. It determined that Mr Anwer could not have a copy of the transcripts at public expense. That determination was adverse to Mr Anwer and he is therefore entitled to seek permission to appeal it under s.77. I note in this context that appeals against refusals to order transcripts at public expense are not uncommon and have never before been seen to raise any jurisdictional issue: see by way of example *Ismail v Genesis Housing Association* [2012] EWHC 1592 (QB), and *Bryce v Family Court at Stoke-On-Trent* [2019] EWHC 3786 (Admin).

24. The authorities to which I have referred in paragraphs 17-20 above make it clear that a formal order is not a condition precedent to any appeal. There is no doubt that, in the present day, there will almost always be a sealed order and, if there is, a copy must be provided by the proposed appellant. But the authorities are clear that, in circumstances where there is no sealed order, but there is a determination under s.77 (or a decision or a direction or a judgment), the absence of a sealed order will not itself be a bar to an application for permission to appeal.

25. Paragraph 3(3)(a) of PD 52C may therefore accurately reflect the practice in the vast majority of cases, but if it was intended to provide that no appeal can be pursued unless there is such an order, it is not in accordance with the law. As I have noted in paragraph 21 above, such an approach would also be contrary to other parts of the CPR.

26. Accordingly, I conclude that a sealed order was not required before the application for permission to appeal against Judge Dight's order could be dealt with. The CoA office understandably relied on the words of the PD , but was wrong so to do. The preliminary issue identified by Andrews LJ must therefore be answered in Mr Anwer's favour.

5. Issue 2: Do The Requests For Transcripts Require Permission Under The ECRO?

5.1 The Procedural Bind

27. Having answered the preliminary issue in the negative, it follows that Mr Anwer can pursue his appeal. But Judge Dight also concluded that this was a matter in respect of which Mr Anwer required permission under the ECRO, so Mr Anwer needs to be able to appeal against that finding too, otherwise he is no further forward. That is a particularly acute difficulty here, because Marcus Smith J made plain that, in his view, permission is *not* required under the ECRO. Although it appears that Mr Anwer immediately passed that response back to Judge Dight, and resubmitted his requests, he has not received a substantive response.

28. The procedural bind that arises is that an appeal from Judge Dight's determination would lie to the High Court. Although the High Court could refer that appeal to this court, it could only do so if it first grants permission to appeal. There is no extant permission in respect of this aspect of the case.

29. However, with the agreement of the parties and the approval of Ms Davidson, we concluded that the answer to this Kafkaesque tangle was for this court to do what Andrews LJ did in relation to the original preliminary issue. I therefore constitute myself a judge of the High Court for the purposes of granting permission; I hereby grant permission and transfer this aspect of the appeal to the Court of Appeal pursuant to CPR 52.23(1)(a). It seems to me that that is the only course that accords with the spirit of Andrews LJ's order. It is only if both of the points of principle are answered in the negative that Mr Anwer can make any substantive progress.

5.2 The Law

30. Ms Davidson was unable to find any authorities which dealt with whether a request for transcripts requires permission under an ECRO. That is perhaps unsurprising, because the answer to the question should be dictated by the terms of the ECRO itself (which are in standard form, and are set out at paragraph 6 above) and a consideration of the policy behind ECROs generally.

5.3 The Answer To Issue 2

31. In my view the answer to Issue 2 is also in the negative: Mr Anwer did not need prior permission under the ECRO to request copies of the transcripts at public expense. There are a number of reasons for that conclusion.

32. First, if the requesting party is prepared to pay for the transcript of a judgment or hearing, he or she is entitled to it as of right. If the requesting party cannot pay, so seeks the transcript at public expense, that will only be permitted if it is in "the interests of justice". That hurdle is to ensure the proper use of public funds. It would be contrary to public policy for an ECRO to impose a second merits-based hurdle on an impecunious litigant's ability to obtain a transcript which does not apply to a paying party. In general, an ECRO provides a filter to prevent wholly unmeritorious applications, but in this instance that filter is already provided by the requirement that the party seeking the transcript at public expense shows that it is in the interests of justice.

33. Secondly, the principal purpose of the ECRO is to protect CBL from the time and expense of dealing with unmeritorious applications by Mr Anwer. Instead of such applications being served willy-nilly on CBL, they are first referred to the judge under the terms of the ECRO, and it is the judge who decides whether or not there is any merit

in them. Only if there is merit in the application will permission to make it be granted, and only then may CBL have to incur costs. It is a filter exercise to protect the other party in the litigation, in this case CBL.

34. Mr Anwer's requests for transcripts at public expense have nothing whatsoever to do with CBL. They are not requests that directly concern CBL at all. So there would be no policy reason to refer the requests, which do not affect CBL, to the judge named in the ECRO. The filter exercise is not required.

35. Thirdly, insofar as the ECRO is intended to serve a subsidiary purpose of protecting the court from unmeritorious applications, that purpose would not be achieved if permission for transcripts was required under the ECRO. Instead it would mean that there would almost certainly have to be two applications: the first to one of the named judges in the ECRO and then, if permission is granted under the ECRO (since that judge is unlikely to know anything about the underlying proceedings, and therefore whether or not a transcript at public expense is in the interests of justice) a second application to the lower court or appeal court who would be more likely to be familiar with the underlying litigation.

36. Fourthly, although CPR 52.14 talks of the court directing a transcript at public expense "on the application of a party", Form EX105 is headed "Request that the costs of transcripts be paid at public expense" and Form EX107 is headed "Request for transcription of Court or Tribunal proceedings". Both Forms deliberately use the word "request" not "application", and they do not require the separate application form N244 to be issued to accompany them. This supports my conclusion that they are not covered by the ECRO, which prohibits "claims" or "applications" without permission. It says nothing about requests like these.

37. Accordingly, for all these reasons, I respectfully agree with both Andrews LJ and Marcus Smith J that the request for transcripts made by Mr Anwer was not a matter that required permission under the ECRO.

6. Issue 3: Is Mr Anwer Entitled To One Or More Of The Transcripts That He Seeks?

38. The merits of Mr Anwer's request for transcripts has never been considered by a judge. We said to Ms Davidson that it did not seem appropriate for that matter to be dealt with for the first time by this court. We said that we were minded to remit the remaining tangle in this case back to the High Court, in order that Mr Justice Zacaroli (as the appropriate appellate tribunal in respect of the determination of Judge Dight on 15 December 2020) could address the issue. Ms Davidson agreed that that was an appropriate course.

39. Accordingly, we remit Issue 3 to the High Court. Mr Justice Zacaroli's judgment on that issue is being handed down at the same time as this one.

7. Other Matters

40. Mr Anwer has suggested that, in the events which have occurred, he has a claim for damages against Judge Dight and the/or the CoA office. He does not: no such claim exists as a matter of law. There is no applicable cause of action. Judges and court officials cannot be liable in law to litigants, in either damages or costs. CBL were not

responsible for any aspect of the history related above, and are therefore not liable to pay any of the costs thereof. Mr Anwer will therefore have to bear his own costs of this appeal.

8. Conclusions

41. In summary therefore, we conclude that:

    a) A sealed order is not required before a party can appeal against the determination or decision of a county court judge although, in the vast majority of cases, there should be no difficulty about the provision of such an order;

    b) A request for transcripts is not "an application" within the meaning of the standard ECRO and therefore does not require permission under the ECRO before it is made.

42. Our consideration of these issues has identified a number of improvements that can be made on the face of some of the relevant forms, and a potential amendment to Practice Direction 52C 3(3). Those points have already been taken away by my lord, Lord Justice Birss, to the Civil Procedure Rule Committee.

43. Mr Clifford, the director of CBL who attended the hearing, was understandably concerned about the procedural complexities, and the attendant costs, that have bedevilled this case. We can only agree. The making of an ECRO is designed to provide protection to the other parties, and to the court and the court staff, from a litigant such as Mr Anwer. For the reasons that I have identified, it is regrettable that the existence of the ECRO in this case has only served to make matters more, rather than less, complicated.

44. But I should stress that, at least on this occasion, that was not Mr Anwer's fault. Indeed, on the contrary, Mr Anwer's original request was itself legitimate in principle (I say nothing about its scope), and it should have been dealt with on its merits at Central London County Court. The position was then made worse by the understandable but incorrect assumption by the CoA office that a sealed order was required before the appeal could be progressed. On this occasion, none of that was Mr Anwer's responsibility.

LORD JUSTICE BIRSS:

45. I agree.

MR JUSTICE ZACAROLI

46. I also agree.