Neutral Citation Number: [2021] EWHC 2700 (Ch)

Case No: F00YE085

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: 08/10/2021

Before :

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

- -

BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

Stewarts Law LLP for **The Chedington Court Estate Ltd**
Mrs Nihal Brake appeared on her own behalf and that of **Mr Andrew Brake and Mr Tom D'Arcy**

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 version as handed down may be treated as authentic.

.....

HHJ Paul Matthews :

1. This is my ruling on another procedural issue that has arisen in this long-running litigation. On 5 August 2021, at the combined pre-trial reviews for the so-called 'Possession Trial', which was heard in September 2021, and the 'Eviction Trial', which is due to begin on 12 October 2021, I directed (at [10) of my order) that the Guy Parties have permission to engage an external transcriber to provide transcription services, which should be available both to the Court and, if they were willing to bear half the cost, to the Brakes.

2. In fact, for the Possession Trial, the Guy Parties made the daily transcript available to the Brakes at a far lower cost than the one half provided for by my order. This was a contribution of £1000 plus VAT to the total cost borne by the Guy Parties. However, it appears that the Guy Parties were unwilling to offer the same concessionary rate in relation to the current trial (Eviction). In an email dated 22 September 2021 to the Brakes, their solicitors, Stewarts, asked the Brakes if they wished to share the cost of the transcription service, paying half (as provided in my order). Mrs Brake's response on 24 September was to ask if they could "do the same deal again, ie £1000 plus VAT".

3. On 27 September Stewarts wrote:

> "Our clients were willing to compromise in respect to the Possession Proceedings brought by them but they are not willing to compromise in relation to the Eviction Proceedings commenced by you, your husband and your son in which our client has incurred very significant costs. Moreover you have recently accepted you have access to the very substantial funds in your pensions and so there is no good reason that you are unable to meet the costs of transcription on a 50/50 basis as provided for in the PTR order."

4. By email dated 30 September 2021 addressed to the court and sent to me, Mrs Brake said that

> "Over the past two months and certainly since the August order was made, you have ordered us to pay nearly £200,000 to Stewarts or into court. Clearly as advocate I need to be able to see the transcript."

Then she asked me whether I would "consider asking Stewarts to let me pay £1000 plus vat as before?" In essence, therefore, she is seeking a variation of the order I made at the pre-trial reviews.

5. CPR rule 39.9 deals with the transcription of proceedings. This relevantly provides:

> "(1) At any hearing, whether in the High Court or the County Court, the proceedings will be tape-recorded for digitally recorded unless the judge directs otherwise.

> (2) No party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court. …
>
> (3) Any party or person may require transcript or transcripts of the recording of any hearing to be supplied to them, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript. …
>
> […]
>
> (5) At any hearing, whether in public or in private, the judge may give appropriate directions to assist a party, in particular one who is or has been or may become unrepresented, for the compilation and sharing of any note or other informal record of the proceedings made by another party or by the court."

6. Where a party wishes (or the parties wish) to engage a transcriber for the purposes of making a live or daily transcript for its (or their) purposes, this will almost certainly involve the transcriber making a private recording as well, so that the transcript can be checked before release to the client(s). Under CPR rule 39.9(2) that requires the permission of the court. The relevant application form is Form EX107OFC (where "OFC" stands for "off framework consent"). Failure to obtain such consent before making the recording may involve a breach of section 9 of the Contempt of Court Act 1981 and amount to a contempt of court: see *eg JR & B Farming Ltd v Hewitt* [2021] EWHC 1704 (Ch).

7. In the present case the court by paragraph 10 of the order of 5 August 2021 directed that transcription services engaged by the Guy Parties be made available to the Brakes on certain terms. This was not contentious. Indeed, Mrs Brake agreed to it expressly (at internal pages 120-121 of the PDF transcript). The Brakes now wish this provision to be varied, on the basis that they are impecunious, need the transcript in order to be able properly to participate, and the Guy Parties allowed them a concessionary rate in the previous trial.

8. The Guy Parties say that there has been no material change since 5 August, and that Brakes have been able, when required to do so, to pay for other things, including the trial bundles and costs required to be paid under "unless" orders. Moreover, they distinguish the Possession Proceedings as proceedings brought by the Guy Parties against the Brakes, whereas the Eviction Proceedings are proceedings brought by the Brakes against the Guy Parties, in which the Guy Parties have been obliged to spend considerable costs in defending themselves.

9. I considered a somewhat similar issue in an earlier judgment of mine dated 23 June 2021, concerning the supply of the trial bundles (in both the Possession and the Eviction Trials) to the Brakes: see *Axnoller Events Ltd v Brake* [2021] EWHC 1706 (Ch). In that judgment, I referred to (amongst other things) the

overriding objective in CPR rule 1.1 (at [11]), the duty of the court under CPR rule 1.2 to seek to give effect to that objective (at [12]), the power of the court to vary its own orders under CPR rule 3.1(7) (at [13]), and the Human Rights Act 1998, ss 1(1), 6(1), and Schedule, article 6 (at [16]).

10. In that case an earlier order of Marcus Smith J had made provision for the costs of the trial bundles, and the Brakes sought to vary it. I then said this:

> "24. The question now is whether it would be right to vary the order of Marcus Smith J. The court has power to do this under CPR rule 3.1(7), set out above. In the recent decision of the Court of Appeal in *Allsop v Banner Jones Solicitors* [2021] EWCA Civ 7, Marcus Smith J (with whom Lewison and Arnold LJJ agreed) said:
>
> > '24. … It is very clear that this provision cannot generally be used to vary or revoke final orders (that is, orders that give rise to a *res judicata* estoppel) and equally clear that even interlocutory decisions will generally only be varied or revoked where either *(a)* there has been a material change of circumstance since the original order was made or *(b)* where the facts on which the original decision was made were (innocently or otherwise) misstated: *Tibbles v. SIG plc*, [2012] EWCA Civ 518, [2012] 1 WLR 2591'."

11. I also reminded myself that, absent specific provision made in the rules, the position of a litigant in person was the same as that of a represented litigant, and that it was generally not right to give advantages to litigants in person which were not given to represented litigants. In this connection I referred to the decision of the Supreme Court in *Barton v Wright Hassall* [2018] 1 WLR 1119. I might also have added a reference to *R v Brown (Milton)* [1998] 2 Cr App R 364, 371, a decision of the Criminal Division of the Court of Appeal, where Lord Bingham CJ said:

> "Furthermore, a trial is not fair if a defendant. by choosing to represent himself, gains the advantage he would not have had if represented of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned."

12. In relation to human rights, I said this:

> "29. In her submissions, Mrs Brake did not in fact refer to Article 6 of the European Convention on Human Rights (made justiciable in English law by section 1 of the Human Rights Act 1998). Nevertheless, I should mention it for completeness. That article provides for the right to a fair trial. This will generally include disclosure of relevant documents, the opportunity to know and comment on all the evidence adduced and legal submissions made, and the opportunity to present a case, including to adduce evidence and make submissions.
>
> 30. But so far as I am aware Article 6 does not require that a copy of the trial bundle be supplied free of charge to one party by the other, even if the requesting party is impecunious. … "

13. I am equally unaware of any authority for saying that the non-supply of a daily transcript of the proceedings during a trial by a party who has commissioned and paid for that transcript to a party who does not wish to, or cannot afford to, pay for it is an infringement of that party's rights to a fair trial under Article 6. The transcript is obviously a useful thing, but it is not a necessity. Indeed, it is far less necessary than a copy of the trial bundle. Article 6 implies the principle of 'equality of arms' (which also appears in CPR rule 1.1(2)(a) as part of the overriding objective), but this does not mean equality of resources. In the civil context it really means equality of opportunity in an adversarial process, for example to adduce evidence, comment on evidence and cross-examine witnesses in appropriate cases. For a recent example, see *MacDonald v Animal Plant and Health Agency* [2021] EWHC 2325 (QB), [46].

14. That leaves me with CPR rule 39.9(5), set out above. First of all, there is some lack of clarity in the use of the phrase "any note or other informal record of the proceedings". The transcript of proceedings is not simply a "note". It is a lot more than that. It purports to be a complete, verbatim record of the proceedings. And I think most laypeople would regard it as a rather *formal*, rather than *informal*, record. But I rather tend to the view that, in this context, "informal" refers to a record which is made by someone other than the court, so that it is not an *official* record, but an *unofficial* one. I will therefore proceed on the basis that this is what the phrase means, and that therefore a transcript made by a transcriber under a private arrangement is within the scope of this rule.

15. The position in the present case is that a decision was made by me on 5 August 2021 as to how the costs of the transcript were to be borne. The only relevant changes in circumstances of which I am aware are, first, that the Guy Parties made a concession to the Brakes for the purposes of the Possession Trial, and, second, it has become apparent that, despite their protestations of impecuniosity, the Brakes have been able to pay costs going forward when they really needed to.

16. The second of these changes, indeed, if anything tends to count against the Brakes. It certainly is not a reason for varying the order in the Brakes' favour. Nor, in my judgment, is the first. I do not think that the generosity of the Guy Parties in offering a concessionary rate in relation to the first trial requires them to do so in relation to the second, where the roles are reversed, and it is not the Guy Parties who want something from the Brakes, but vice versa.

17. In these circumstances, and even taking into account CPR rule 39.9(5), I see no justification for varying the direction which I gave on 5 August 2021. Accordingly, I dismiss this informal application.