Neutral Citation Number: [2022] EWHC 2958 (Ch)

Claim No. CR-2022-MAN-000599

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF TARAY BROKERING LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 21 November 2022

Before:

His Honour Judge Pearce

- -

Between:

EDWARD AVERY-GEE **Claimant**
as Trustee in Bankruptcy of Lawrence Coppen

- and –

(1) LESLEY ANN COPPEN
(2) TARAY BROKERING LIMITED

Defendants

- -
- -

MS LISA FENG (instructed by **Brabners plc)** for the **Claimant**

The Defendants were not represented and did not attend

Hearing date: 14 November 2022
- -

JUDGMENT

NOTE: This judgment was handed down in writing on 21 November 2022 at 2pm.

INTRODUCTION

1. The judgment relates to a discrete point of practice that arose for consideration in the context of an application to commit for breach of a court order. The application itself was compromised and this judgment has no consequence for the ultimate order, which is as the parties agreed.

2. By way of background, the Claimant is the Trustee in Bankruptcy of Mr Lawrence Coppen. By a Part 8 Claim Form issued on 18 July 2022, he sought an order pursuant to section 125 of the Companies Act 2016 for rectification of the register of members of the Second Defendant so as show the Claimant as the owner of the entirety of its shares.

3. On 22 September 2022, Deputy District Judge Blakeborough heard the application. The First Defendant did not attend the hearing. The Judge made an order against the First Defendant (or other directors of the Second Defendant) requiring rectification of the order within 5 business days of the date of the order. The order, which did not contain a penal notice within the meaning of CPR Part 81.4, was served on the First Defendant by letter dated 23 September 2022.

4. The First Defendant did not comply with the order within the time allowed.

5. By letter dated 11 October 2022, the Claimant wrote to the First Defendant, enclosing a further copy of the order and requiring compliance within 24 hours. The copy of the order served was in identical terms to the order originally made, save that the Claimant appended to the front of it a notice in the following terms:

> ***"IMPORTANT – PLEASE READ***
>
> ***PENAL NOTICE***
>
> ***IF YOU, LESLEY ANN COPPEN, DO NOT COMPLY WITH THE TERMS OF THE ATTACHED ORDER YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE IMPRISONED OR FINED, OR YOUR ASSETS CONFISCATED OR INCUR ANOTHER PUNISHMENT UNDER THE LAW."***

   Again the First Defendant did not comply.

6. The Claimant then applied to commit the First Defendant for non-compliance with the order. That application was listed before me on 14 November 2022. The parties reached terms pursuant to which the application was withdrawn.

7. Counsel appeared in front of me at the hearing on 14 November 2022 because I had expressed concern that the second version of the order that had been sent to the Court had never directed that a penal notice be attached to the order, yet the second version of

the order served had such a penal notice attached. She made oral submissions on the issue and has subsequently added to those with written submission. I am grateful to her for her diligent research on the issue.

THE RELEVANT LAW

8. The following propositions are either clear from the terms of the Civil Procedure Rules or are well established in authority:

   8.1. CPR Part 81.4(2)(d) requires that any application for committal on the grounds of the alleged breach or disobeying of an order includes a statement that the order included a penal notice.

   8.2. There is no set form of words for a penal notice, though the White Book 2022 notes the wording in the previous version of CPR81: "*If you the within-named [ ] do not comply with this order you may be held to be in contempt of court and imprisoned or fined or your assets seized."*

   8.3. The absence of a penal notice is not necessarily fatal to the application to commit, but the non compliance with the rules can only be waived where the court is satisfied that no injustice is caused to the defendant thereby (see paragraph 81.4.4 of the White Book 2022, and in particular the judgments of Kenneth Parker J in Serious Organized Crime Agency v Hymans [2011] EWHC 3599 and Miles J in Business Mortgage Finance 4 plc v Hussain [2022] EWHC 449[1]).

THE ISSUE

9. The Claimant contends that, where the court itself has not appended a penal notice to an injunction, it is open to the party who sought the injunction to do so. He relies on the following in support of this proposition

   9.1. The decision of Park J in Anglo Eastern Trust v Kermanshahchi, 21 October 2002, reported at [2002] All ER (D) 296; [2002] 10 WLUK; (2002) (99) 45 LSG 35; The Times, 8 November 2002; [2002] CLY 454. Kermanshahchi is only conveniently available in a digested form. In the Westlaw report of the case, the following is stated:

   "Summary

   A penal notice included in the copy of a court order served on the claimant by the defendant was enforceable notwithstanding that the notice had not been brought to the judge's attention when the order was sealed.

[1] The argument was not pursued in the Court of Appeal, whose judgment is reported at [2022] EWCA Civ 1264.

Abstract

A applied for an order that a penal notice be deleted from an order served on it by K. The penal notice had not been drawn to the court's attention at the time that the order was sealed.

Held

Application refused.

The Rules of the Supreme Court 1965 Ord.45 r.7(4) appeared to suggest that the penal notice was not part of the order itself and that it could be added to a copy of an order served under the rule. To comply with Ord.45 r.7(4)[2] such that enforcement by committal would be possible, the party who had created a copy of the order for service had to attach the penal notice to it. As the penal notice had been properly included in the copy of the order served on A, it was valid and should not be deleted."

The summary of the judgment at [2002] 2 All ER (D) 296 states in similar terms:

"*The words used in RSC Ord 45, r 7(4) seemed to suggest that the penal notice was not part of the order itself, but might be added on to a copy of the order served under the rule. That interpretation was in line with Ord 45 r 2(a), and in the instant case, it assumed that a 'copy' of the order agreed to on 16 October had to be personally served on the claimants. In those circumstances, it was for the person who had created a copy of the order for service to put the penal notice on it, if r 7(4) was to be complied with in order to make enforcement of the order possible by the means described in Ord 45.5. In the instant case therefore, the addition by the defendant's solicitors of the penal notice, although objected to by the claimants, was an act that he was entitled to do, as the penal notice was properly included, not in the order, but in a 'copy of the order' which was served on the claimants as provided by r.7(4). Accordingly, the court would refuse to order that the penal notice be deleted from the order."*

9.2. The decision of Horner J in Deery v Deery [2016] NI Ch 11. The claim involved the enforcement of a consent order for possession of premises by an application for

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2 RSC O45 r7 (4) was headed "*Service of copy of judgment, etc., prerequisite to enforcement under r. 5*" and stated:

"There must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in the case of an order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible."

committal. As here, a penal notice had not been attached to the original court order. The plaintiff sought to re-serve a copy of the order with a penal notice attached. Horner J was concerned with the proper construction of the original agreement of the parties, with respect to the plaintiff's ability to enforce the terms of the agreement. He concluded that enforcement by committal was consistent with the agreement and stated that the plaintiff was at liberty to re-serve the order with a penal notice attached. In coming to this conclusion, he said:

"28. Some support for my conclusion is derived from Anglo-A-Eastern Trust v Kermanshahchi [2002] All ER (D) 296 where Park J had to consider an issue in relation to the deletion of a Penal Notice from an order. He held that Rule 7(4) of Order 45 (the equivalent of our Order 45 Rule 5(4)) seemed to suggest that the Penal Notice was not part of the Order itself but might be added onto the copy of the order served under the Rule. This interpretation was in line with Order 45 Rule 2(a) which provides for the enforcement of an order to pay money into court by the appointment of a receiver. I agree with the conclusion of Park J. In effect the service of a Penal Notice on a party under Order 45 Rule 5 is an administrative act which is a pre-condition for enforcement of an order under Order 25. The Penal Notice does not form part of the order. The agreement reached between the parties and which is embodied in the order impliedly permits the party seeking to enforce the order, to do so by whatever means are lawful.

29. The omission of the Penal Notice in the draft order agreed between the parties and which became an order of the court does not prevent the plaintiff from now serving the order with a Penal Notice attached. The Penal Notice is an administrative pre-condition which must be taken before any plaintiff can enforce such an order under Order 52."

9.3. Blackstone's Civil Practice (2022 Edition) at paragraph 81.15, which states of a penal notice:

"...This notice is not part of the court's order and does not require a judge's sanction: it may be added by the person who makes the copy which is to be served (Anglo-Eastern Trust Ltd v Kermanshahchi (2002) The Times, 8 November 2022)."

9.4. Gee on Commercial Injunctions)7th Edition), which at paragraph 19-041 cites Kermanshahchi for the proposition that:

"*The penal notice is not part of the order made by the court; it is a warning."*

10. During oral submissions, I drew Ms Feng's attention to a case under the Family Procedure Rules, CH v CT [2018] EWHC 1310 as authority for the proposition that a penal notice may not be included in an order unless directed by the court. On further consideration, I agree with Ms Feng's written submission that this case is specific to the context of the Family Procedure Rules and the Children Act 1989. It does not assist in the proper interpretation of the CPR.

DISCUSSION

11. A convenient starting point is to note the changes between CPR Part 81 in its previous incarnation and the substantially redrafted version of the rule that came into force on 1 October 2020 as a result of the Civil Procedure Amendment (No. 3) Rules 2020, SI 2020/747.

12. The previous version of CPR Part 81, dealing with the issue of penal notice stated:

"Requirement for a penal notice on judgments and order

81.9

(1) Subject to paragraph (2), a judgment or order to do or not to do an act may not be enforced under rule 81.4[3] unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or no to do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

(2) The following may be enforced under rule 81.4 notwithstanding that they do not contain the warning prescribed in paragraph (1) –

(a) An undertaking to do or not to do an act which is contained in a judgment or order; and

(b) An incoming protection measure[4]."

13. With effect from 1 October 2020, CPR Part 81 provides:

*"**Requirements of a contempt application***

81.4

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3 In the previous incarnation of the rule, CPR81.4 set out the court's power to enforce a judgment, order or undertaking by committal. It has no exact replacement in the new version of the Rule.

4 A reference to a measure referred to in CPR 74.34, designed to protect interests pursuant to Regulation (EU) No 606/2013 of the European Parliament – it has no relevance here.

> *(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.*
>
> *(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—*
>
> *...*
>
> *(e) confirmation that any order allegedly breached or disobeyed included a penal notice..."*

14. A penal notice is defined by CPR 81 as meaning:

> "*A prominent notice on the front of an order warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law*."

15. It is immediately striking that, whilst the description of a penal notice as a warning on the front of an order or judgment remains the same as between the previous and current versions of CPR 81, the wording of the new CPR 81.4 goes further in referring to confirmation that the "*order ... included a penal notice"* (my emphasis). Thus it contemplates that the penal notice is part of the order itself. This distinguishes the position from that both in Kermanshahchi and Deery v Deery, in both of which the central point was that the penal notice was appended to a copy of the order, rather than that forming part of the order itself. Indeed, this is the basis for the authors of Blackstone and Gee considering that the court's authority was not required to add the penal notice.

16. I note in passing that, whilst the 2022 Edition of Blackstone refers to the new version of CPR Part 81, the Seventh Edition of Gee pre-dates the revision and refers to the former version.

17. There can be no doubt that a court order is the document which the court authorises rather than the parties' interpretation of what the court has ordered. That is implicit in the whole structure of CPR 40 dealing with judgment and orders. For example, there would be no need for a "*slip rule*" in the terms of CPR 40.12 if the parties were at liberty to correct errors in orders. Further, the very description of the document as a "*court order*", as well as its status as an expression of the coercive power of the court, must mean that it is the court and not the parties that determine its content.

18. It follows that, on the wording of the current version of CPR 81, I am satisfied that a party is not at liberty to add a penal notice to an order of its own volition.

19. I should add that I have some doubt as to whether the practice of adding a penal notice after the order was drawn up could have amounted to proper compliance with the pre-requisite of enforcement under CPR 81.9 in its previous form as set out above. Such a notice would itself arguably form part of the judgment or order. So, for example, the practice adopted here of adding an extra sheet of paper to the order (albeit at the front of a series of pages containing a copy of the order), is arguably not a display "*on the front of the copy of the judgment or order"* (the wording of the former CPR 81.9) or "*on the front of the copy of an order served under this rule"* (the wording of RSC 45.7(4)).

20. Thus I consider it arguable that Kermanshahchi was wrongly decided. However, it is unnecessary for the determination of this issue to consider that further, in light of the changes that appear in the new version of CPR Part 81.

CONCLUSION

21. For these reasons, I am satisfied that the passage in Blackstone's Civil Practice cited above it no longer good law (if it ever was). A party to litigation is not at liberty to add a penal notice to an order of the court of its own motion; rather, that party must apply to the court to vary the order if it wishes a penal notice to be added.

22. I should make clear that nothing in this judgment deals with the position where a party seeks to enforce by way of committal a court order that does not contain a penal notice. A court order is binding on the party to whom it is addressed regardless of whether it contains a penal notice. The court has in other cases considered whether the failure to attach a penal notice is fatal to a committal application or whether it is a defect that can be waived. In my judgment, the statement in paragraph 81.4.4 of the White Book 2022 on this issue remains good law. It must also follow that that, even where the order does not contain a penal notice, it is open to the party seeking to enforce it to point out to the party who is disobeying it that their breach of the order may have penal consequences.