Neutral Citation Number: [2024] EWCA Civ 52

Appeal No: CA-2023-001556
Case No: CL-2021-000362

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE SNOWDEN

B E T W E E N:

(1) INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L.
(2) ENERGIA TERMOSOLAR B.V.

Claimants/Applicants

- and –

THE KINGDOM OF SPAIN

Defendant/Respondent

Patrick Green KC, **Andrew Stafford KC**, and **Richard Clarke** (instructed by Kobre & Kim (UK) LLP) for the Claimants (the Claimants)

Tariq Baloch and **Cameron Miles** (instructed by Simmons & Simmons LLP) for the Defendant, the Kingdom of Spain

Hearing date: 24 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 1 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. The single question in this application is whether this court should require the Kingdom of Spain (Spain) to provide security for the satisfaction of an arbitration award in the sum of €120,083,287.88 (the Award) as a condition of being permitted to pursue its appeal from the decision of Mr Justice Fraser (the judge). The judge decided on 24 May 2023 to dismiss Spain's application to set aside Mrs Justice Cockerill's order registering the Award as a judgment of the High Court under section 1(2) of the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act).

2. The Award was granted against Spain on 15 June 2018 in an International Centre for Settlement of Investment Disputes (ICSID) arbitration in respect of losses incurred by the Claimants on investments in Spanish solar power installations. It was alleged that Spain breached its obligations under the Energy Charter Treaty.

3. This application arose as follows. On 11 August 2023, Spain filed its Notice of Appeal seeking permission to appeal against the judge's order. On 28 August 2023, the Claimants filed their brief statement of reasons (the Statement) as to why permission should be refused under [19(1)] of CPR Practice Direction 52C (PD52C). At [13] of the Statement, the Claimants said:

> If the Court were minded to grant permission, in accordance with PD52C.19(1)(c) [the Claimants] identify the following condition to which they contend the appeal should be subject, namely that Spain should provide security for the Registration Order in the sum of EUR 120,083,287.88 or such sum as the Court may think fit, under CPR 52.6(2)(b), in accordance with and in service of the UK's international obligations under the ICSID Convention, as implemented in the 1966 Act, to register and enforce the Award, the authenticity of which is not in dispute (see: [*Micula v. Romania* [2020] UKSC 5 (*Micula SC*)] at [68]; and [*Micula v. Romania* [2018] EWCA Civ 1801 (*Micula CA*)] at [247]-[248] as to security).

4. The solicitors for both parties wrote letters to the court adducing further arguments concerning the imposition of conditions upon any permission to appeal that might be granted. Males LJ dealt with Spain's application for permission to appeal on paper on 5 October 2023. The order was headed: "On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal". Males LJ granted Spain permission to appeal on the grounds that there were important issues raised as to the enforcement of ICSID awards that merited consideration by the Court of Appeal. His order made no mention of whether or not conditions should attach to Spain's permission to appeal.

5. On 19 October 2023 (outside the 7-day period allowed for a request for reconsideration under CPR Part 52.24(7)), the Claimants filed a Respondents' Notice, including in "Section 9: Other Applications" an application for an order that:

> [Spain] should not be permitted to proceed further with the appeal without first paying into court security for the full judgment debt, as ordered by Cockerill J in the Registration Order, in the amount of EUR 120,083,287.88 (or its pound sterling

equivalent) [because] [p]ursuant to CPR 52.18(1)(c) there are compelling reasons to impose such a condition, for the reasons set out in [Saluzzo(4)].

6. On 8 November 2023, Males LJ gave directions on paper as to what he called the Claimants' "application for security for costs". It was not, of course, an application for security for **costs** under CPR Part 25.15. It was an application for a condition to be attached to the permission to appeal that Males LJ had already granted. Males LJ directed an expedited one-day hearing of the Claimants' application. His reasons included saying that: (a) he had, when granting permission to appeal, deliberately not imposed conditions, despite the Claimants' request that he do so, (b) he had not, at that time, been aware of the Luxembourg proceedings, in which Spain sought anti-suit injunctions "requiring [the Claimants] to terminate these proceedings and imposing a penalty for non-compliance" (the Luxembourg Proceedings), (c) at least arguably, knowledge of the Luxembourg Proceedings might have led to a different result, (d) the Luxembourg Proceedings were already in existence when he made his permission to appeal order, but the Claimants "may have a point in saying that it was not required to deploy its evidence in support of the application for permission at that stage", and (e) the hearing would, therefore, consider: (i) whether in these circumstances the court had jurisdiction now to impose conditions, and (ii) if so, whether it was appropriate to do so.

7. Against that background, we suggested, and the parties accepted, that (i) Spain should go first in oral submissions on jurisdiction, since it was making the case that the court did not have jurisdiction now to impose a condition on the grant of permission to appeal, and (ii) the Claimants should go first on whether it was appropriate to impose the condition sought.

8. On jurisdiction, Spain contended: (a) that the Claimants had made their application for a condition in the Statement, (b) that Males LJ had decided, when granting the Claimants permission to appeal, **not** to impose the condition, and (c) that the only way in which that decision could have been challenged was by an application for reconsideration under CPR Part 52.24(6), which the Claimants had not done in time or at all. Even if it were open to the Claimants to apply under CPR Part 52.18, they could only do so on the basis of new facts, and the Luxembourg Proceedings were not new, having been started and corresponded about before Males LJ determined permission to appeal. Spain said that the finality principle in *Henderson v. Henderson* (1843) 3 Hare 100 applied so as to prevent the Claimants raising the question of a condition again.

9. In response on jurisdiction, the Claimants submitted that they had not made any application to Males LJ for a condition to be imposed in their Statement. They had simply indicated that that was their position in accordance with [19(1)] of PD52C. Males LJ had, on the face of his order, not determined the condition question when he granted Spain permission to appeal. It was, in any event, not open to Claimants to apply to the court for a condition to be imposed under CPR Part 52.18(1)(c) until after permission to appeal was granted. The permission to appeal decision could not be challenged by way of reconsideration because of the express wording of CPR Part 52.24(6). Accordingly, the court did have jurisdiction to consider the Claimants' application for a condition to be imposed.

10. On the question of whether there was a compelling reason for the condition sought to be imposed, the Claimants relied on three matters: (i) the UK's ICSID obligations, (ii)

Spain's conduct in commencing and prosecuting the Luxembourg Proceedings seeking both anti-suit relief and orders against the directors of the Claimants, and (iii) Spain's conduct in seeking to secure an adverse state aid finding from the European Commission. Spain's answer was to say that it had offered to stay the Luxembourg Proceedings until the determination of the appeal (even if it went to the UK Supreme Court). Indeed, it offered in oral argument to give an undertaking in these terms to the court. Spain argued that it had been given permission to appeal and should be allowed to pursue that appeal without securing the judgment. The imposition of conditions is "unusual, and perhaps rare" (see *Dumford Trading AG v. OAO Atlantrybflot* [2004] EWCA Civ 1265 at [9]). Spain is a sovereign state, and regard must be had to its rights and obligations under international law.

11. Against that background, this court has to decide the two issues referred to it by Males LJ. For the reasons that I shall now give, I have decided that, whilst the court does have jurisdiction under CPR Part 52.18 to impose the condition that the Claimants seek, there is no compelling reason to do so in this case.

12. I shall first set out the relevant provisions of the CPR and PD52C before turning to each of the issues in turn.

The relevant provisions of the CPR and PD52C

13. CPR Part 52.6(2)(b) provides, in relation to first appeals, that an order giving permission may be made subject to conditions.

14. CPR Part 52.18 provides as follows:

> (1) The appeal court may—
> (a) strike out the whole or part of an appeal notice;
> (b) set aside permission to appeal in whole or in part;
> (c) impose or vary conditions upon which an appeal may be brought.
>
> (2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.
>
> (3) Where a party was present at the hearing at which permission was given, that party may not subsequently apply for an order that the court exercise its powers under sub-paragraphs (1)(b) or (1)(c).

15. CPR Part 52.24 provides as follows under the heading: "[w]ho may exercise the powers of the Court of Appeal":

> … (6) A party may request a decision of a single judge made without a hearing (other than a decision made on a review under paragraph (5) and a decision determining an application for permission to appeal) to be reconsidered, and—
> (a) the reconsideration will be determined by the same or another judge on paper without an oral hearing; except that
> (b) the judge determining the reconsideration on paper may direct that the reconsideration be determined at an oral hearing, and must so direct if the judge is

of the opinion that the reconsideration cannot be fairly determined on paper without an oral hearing.

(7) A request under paragraph (5) or (6) must be filed within 7 days after the party is served with notice of the decision.

16. PD52C provides as follows at [19] under the heading "[r]espondent's actions when served with the appellant's notice":

(1) (a) If the appellant seeks permission to appeal a respondent is permitted, and is encouraged, within 14 days of service of the appellant's notice or skeleton argument if later to file and serve upon the appellant and any other respondent a brief statement of any reasons why permission should be refused, in whole or in part.
(b) The statement should be not more than 3 pages long, and should be directed to the relevant threshold test for the grant of permission to appeal. The statement must also comply with paragraph 31(1)(b).
(c) The statement should identify issues to which the appeal should be limited, and any conditions to which the appeal should be subject (see Rule 52.6(2)).

(2) (a) If the appellant makes any application in addition to an application for permission to appeal (such as a stay of execution, an injunction pending appeal or an extension of time for appeal) a respondent should include in its written statement under paragraph 19(1)(a) any reasons why that application should be refused or granted only on terms.
(b) If, exceptionally, a respondent wishes to rely upon evidence for that purpose its evidence should be included in its written statement, supported by a statement of truth, or filed and served upon the appellant and any other respondent at the same time as its written statement under paragraph 19(1)(a).

(3) Unless the court directs otherwise, a respondent need take no further steps when served with an appellant's notice prior to being notified that permission to appeal has been granted.

17. CPR Part 25.15(1) provides that the court may order security for costs of an appeal against an appellant on the same grounds as it may order security for costs against a claimant under Part 25. No application has been made under CPR Part 25.

Does this court have jurisdiction to impose the condition sought by the Claimants?

18. As both parties agreed, many of the rules in issue in this case originate from before 2016. At that time, of course, an appellant's right to renew an application for permission to appeal dealt with on paper at an oral hearing was withdrawn. Whatever the impact of that change, we have to construe the rules as they are today.

19. Spain's primary propositions are that: (a) the Claimants made their first application for an order that any permission to appeal granted to Spain should be subject to a condition in its Statement, and (b) Males LJ decided that question when he granted permission to appeal on paper. In my judgment, both those propositions are wrong.

20. As to whether or not the Claimants made a formal application for a condition to be imposed in their Statement, it is clear they did not. First, there are several indications in [19] of PD52C that point clearly towards a respondent's statement not being a proper vehicle for an application for conditions to be imposed upon the grant of permission to appeal. [19(1)(a)] is only an encouragement, not a requirement, that such a statement should be served. The respondent's statement envisaged is short and to be directed to the relevant threshold test for the grant of permission to appeal. Insofar as conditions are concerned, [19(1)(c)] provides that it "should **identify** … any conditions to which the appeal should be subject" (emphasis added), cross-referencing CPR Part 52.6(2) (see [13] above). The reference to the exceptional filing of evidence by the respondent in [19(2)(b)] concerns any additional applications in addition to the application for permission to appeal made by the appellant. The words "for that purpose" in [19(2)(b)] refer to [19(2)(a)]. [19(2)(b)] does not envisage respondents filing evidence at large, let alone evidence in support of an application for conditions to be imposed. Finally, in this regard, and perhaps most significantly, [19(3)] expressly provides that "[u]nless the court directs otherwise, a respondent need take no further steps when served with an appellant's notice prior to being notified that permission to appeal has been granted". Following that instruction and **identifying** in a respondent's statement a condition that a respondent might later apply to be imposed on a permission to appeal later granted, cannot deprive the respondent of the right to apply formally for such a condition under CPR Part 52.18. Secondly, identifying a condition that might be imposed (which is what the Claimants did in the Statement – see its terms at [3] above) is not the same as making an application to the court for that condition to be imposed. Thirdly, Males LJ, when he dealt with Spain's application for permission to appeal, plainly did not understand that he had a separate application for a condition to be imposed before him, since he made no mention of it. I conclude that the Claimants did not make a formal application for a condition to be imposed in their Statement.

21. I would leave open the question whether a respondent can apply formally for conditions to be imposed either in its statement or at all before permission to appeal has been granted. We heard limited argument on the point and I do not think we need to decide it in this case. Plainly, however, CPR Part 52.18 does not have a temporal limitation on its face, but it does inhibit a repeat application for conditions if they have been argued for at a "hearing". It may be that the terms of that inhibition are left over from the days of oral renewals and could perhaps benefit from the attention of the Civil Procedure Rules Committee.

22. On Spain's second point, it is clear to me that Males LJ is not to be taken as having decided, when he granted Spain permission to appeal, the question of whether the condition sought by the Claimants should be imposed. First, the order he made refers on its face to deciding only the question of permission to appeal. Secondly, orders with reasons are made to inform the parties of what has been decided and why. It is not open to the court to interpret an order by reference to what the judge may later say he had intended. The order is to be interpreted on the basis of the words it uses and the submissions received. Thirdly, the correspondence put before Males LJ suggested that the Claimants, at least, might want to file evidence and further argument on the question of the suggested condition: (a) the Statement only identified the condition suggested, as PD52C required; and (b) the Claimants' solicitors letter to the Court of 7 September 2023 said expressly that: (i) neither the CPR nor PD52C required "the arguments or evidence relied upon to be developed" in the Statement, and (ii) it was open to the

Claimants to apply for "the imposition of any conditions not already imposed by the Court, following the grant of permission". Fourthly, in the circumstances, Males LJ was not obliged to decide the question of whether a condition should be imposed, and did not, as I have said, say in his order that he had done so.

23. In the light of what I have decided about the nature of the Statement and the permission to appeal order, Spain's other points do not arise. First, Spain is wrong to suggest that Males LJ's permission to appeal decision could only be challenged by an application for reconsideration under CPR Part 52.24(6). Indeed, that rule makes clear that a party may **not** request reconsideration of the determination of a permission to appeal application. In any event, in this case, as I have said, Males LJ had not decided the question of whether a condition was to be imposed. That is fatal to Spain's argument on CPR Part 52.24(6). It was open to the Claimants to apply after permission to appeal had been granted for the imposition of a condition under CPR Part 52.18(1)(c). They did so in their Respondents' Notice as I have explained at [5] above.

Is there a compelling reason to impose a condition on Spain's permission to appeal that it pays the amount of the Award into court?

24. I have set out the competing arguments on this issue briefly at [10] above. We have been referred to several authorities giving guidance on the meaning of "a compelling reason". I confess that I do not find any of those authorities of particular help in this unusual case. The words speak for themselves.

25. As to the facts, it is noteworthy that, despite many pages of evidence and argument, the Claimants never suggest that, when all the various pieces of litigation are concluded, if Spain finally loses, it either does not have the means to pay or will not pay. The Claimants' main point is to suggest bad conduct by Spain in commencing and prosecuting the Luxembourg Proceedings. That point is deprived of practical content for present purposes by Spain's offer of an undertaking to stay the Luxembourg Proceedings until final determination of these proceedings, even if they go to the UK Supreme Court. I would accept the undertaking offered by Spain.

26. The Claimants make much of the position already advanced by Spain in the Luxembourg Proceedings and before the European Commission on the subject of whether payment of the Award would amount to state aid in violation of article 108(3) of the Treaty on the Functioning of the European Union. They say correctly that Spain has asked the Commission to hold that it should not pay this and other ICSID awards. The problem, as I see it, is that the state aid issues are complex and will, in part, be before this court when Spain's appeal (for which I repeat it has been given permission) is heard. In these circumstances, I think the Claimants are a long way away from showing a compelling reason why Spain, as a sovereign state and a member of the European Union, should be required to pay the Award into court here in England and Wales, as a condition of pursuing its appeal. There was some discussion about whether or not the Claimants already had security in the form of a charging order over a property owned by Spain. I do not think the competing arguments on this aspect took the matter very much further.

27. I would not be prepared to impose any condition on Spain's permission to appeal.

Conclusion

28. For the reasons I have given, I would dismiss the Claimants' application. Spain's undertaking to stay the Luxembourg Proceedings until the final determination of its appeal from the judge, whether they terminate in this court or in the UK Supreme Court, should be recited in this court's order in terms to be agreed between the parties.

Sir Julian Flaux, Chancellor of the High Court:

29. I agree.

Lord Justice Snowden:

30. I also agree.