Neutral Citation Number: [2023] EWHC 1270 (Ch)

Claim No BL-2022-000908

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 30 May 2023

Before :

HIS HONOUR JUDGE MONTY KC
Sitting as a Judge of the High Court

- -

Between :

KEVIN PAUL OSLER

Applicant

- and -
(1) MARLENE OSLER
(2) DALE OSLER
(3) JOLENE OSLER
(as personal representatives of the late Roger Osler)

Respondents

- -

Mr Mark Galtrey (instructed by **Ebery Williams**) for the **Applicant**
Mr Dov Ohrenstein (instructed by **Roythornes**) for the **Respondents**

Hearing date: 24 May 2023

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Approved Judgment

HHJ Monty KC:

1. This application raises the question of whether the court can entertain a renewed oral application for permission to appeal an arbitral award, under section 69 of the Arbitration Act 1996, where permission had been refused on paper, but where the order on its face went on to give the right to apply to set aside or vary that order.

2. It is of course necessary to look at the precise wording of the relevant order to see how that right to apply was worded.

3. By an order dated 17 October 2022 ("the Order"), Joanna Smith J refused to grant the Applicant permission to appeal part of an Interim Award ("the Award") made by an Arbitrator. Permission had been sought under section 69 of the Arbitration Act 1996 (all section references in this judgment are to the 1996 Act).

4. By a letter dated 21 October 2022, the Applicant applied to set aside or vary the Order, seeking to replace the refusal with a grant of permission to appeal.

5. The Respondent opposed the application on the ground that this court has no jurisdiction to have an oral hearing of a permission to appeal application under section 69 where there has been a determination of such an application on paper.

6. The Award was produced in its final form on 6 May 2022. It was an interim award in respect of three preliminary issues which the parties had identified in a farming partnership dispute which had been referred to arbitration. One of the issues decided in the Award has become known as "the valuation issue", in relation to which the Arbitrator found that market value, rather than historic value, was the correct basis for valuing the partnership assets.

7. The Applicant strongly disagreed with the Arbitrator's conclusion on the valuation issue, and on 31 May 2022 issued the present proceedings, seeking permission to appeal the Award in relation to the valuation issue under section 69 of the Act.

8. Section 69 deals with appeals by a party to arbitral proceedings on a point of law, in respect of which the leave of the court is required: section 69(1)-(2).

9. Section 69(3) provides:

> "(3) Leave to appeal shall be given only if the court is satisfied—
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award—
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

10. Section 69(4) provides:

> "An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted."

11. Section 69(5) provides:

> "The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required."

12. CPR PD62 says as follows:

> "10.1 Having regard to the overriding objective the court may decide particular issues without a hearing. …
>
> Applications for permission to Appeal …
>
> 12.2 … the skeleton argument … (3) must contain an estimate of how long the court is likely to need to deal with the application on the papers …
>
> 12.12 The court will normally determine applications for permission to appeal without an oral hearing but may direct otherwise, particularly with a view to saving time (including court time) or costs.
>
> 12.13 Where the court considers that an oral hearing is required, it may give such further directions as are necessary.
>
> 12.14 Where the court refuses an application for permission to appeal without an oral hearing, it will provide brief reasons."

13. The Applicant filed evidence in support of the application and a skeleton argument, but so far as I can see failed to give a time estimate as required by CPR PD62 12.2(3). The Respondents served a notice opposing the application and a skeleton argument.

14. The application was considered by Joanna Smith J on paper (that is, without a hearing) on 17 October 2022.

15. The Order (and I need to set it out in full, including the recitals) provides as follows:

> Before **the Honourable Mrs Justice Joanna Smith** sitting at the Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL on the 17 October 2022
>
> **UPON** considering the application for an order under section 69 of the Arbitration Act 1996 granting permission for the Appellant to appeal part of an Interim Award dated 6 May 2022 made by the Arbitrator, Ms Emily Windsor of counsel

AND UPON considering the witness statement of Mr PR Williams dated 31 May 2022 together with the exhibits thereto

AND UPON considering the Respondents' skeleton argument in opposition to the application for permission to appeal dated 30 June 2022

AND UPON perusing the court file

IT IS ORDERED THAT:

1. The application for permission to appeal is refused.
2. **This Order has been made by the court without a hearing pursuant to CPR PD 52B paragraph 7.1. Any party affected by the order may apply to have it set aside or varied within 7 days of the date of service upon that person. The application may be made by CE-filing a letter of request under the appeal reference number above, or alternatively by email to ChanceryJudgesListing@justice.gov.uk or by post to the Chancery Appeals Office, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL quoting the above appeals reference number. A copy of the application must be served on all other parties at the same time.**

REASONS:

1. There is no issue of public importance. The Arbitrator did not apply an inappropriate presumption in the context of construing the relevant provisions of the Partnership Agreement. On the contrary, she expressly identified that the correct approach was to ascertain what the parties intended by the words they actually used.
2. There is no basis whatever on which to determine that the Arbitrator's decision is "obviously wrong".
3. In all the circumstances it is not just and proper for the court to determine the questions raised (see section 69(3) of the Arbitration Act 1996).

16. I have set out the Order as closely as I can to how it appears in the sealed version. Of particular note is paragraph 2 of the Order, which had it not been in bold type in the sealed version of the Order I would have drawn particular attention to at this point, because it is around paragraph 2 of the Order that the arguments as to jurisdiction have focussed at the hearing before me.

17. Paragraph 2 of the Order gives rise to three particular issues.

18. First, it states in terms that the Order was made "pursuant to CPR PD 52B paragraph 7.1." With great respect to Joanna Smith J, that was an error. CPR PD 52B applies to appeals (a) within the County Court, (b) appeals from the County Court to the High Court; and (c) appeals within the High Court. Where that practice direction ("PD") applies, prospective appellants who have been refused permission to appeal have (with some limited exceptions) the right to have the application for permission to be reconsidered at an oral hearing. However, CPR Part 52 and its associated PDs have no application to appeals under the Act, which are governed solely by section 69 of the Act and CPR Part 62: see *BLCT (13096) Limited v J Sainsbury Plc* [2003] EWCA Civ 884. There is no equivalent provision in CPR Part 62 or PD 62 granting an unsuccessful applicant the right to a renewed oral hearing.

19. Secondly, the decision of Calver J in *WSB v FOL* [2022] EWHC 586 (Comm) makes it clear that once an application for permission to appeal has been refused on paper, there can be no oral rehearing of that application: see Calver J's judgment at [9]. I will need to return to that judgment below.

20. Thirdly, despite the two issues I have just identified, it is nonetheless an order of the court which on its face gives a party affected by the order the ability to make an application to set aside or vary the order.

21. The Applicant's position is that this court should give effect to the Order, in particular to paragraph 2, in the following way:

    (1) Section 69(5) means that the court has the power to deal with an application for permission under that section either without a hearing or with a hearing.

    (2) This is not, however, a binary choice. The judge dealing with the application can (i) decide it on paper without a hearing, (ii) direct that there should be a permission hearing, (iii) direct that there should be a rolled-up hearing where the court would consider the application for permission and, if granted, the appeal itself at the same hearing, or (iv) there is a decision on paper but nevertheless the court gives any party affected the right to apply to have an oral hearing.

    (3) This is a case where the judge decided to take route (iv).

    (4) That must be right because paragraph 2 of the Order (even if wrong in its reference to PD 52) must be assumed to have been intended to have some effect, and this court should decide what that effect is.

    (5) The Order was not a final determinative order on the application for permission to appeal. Although it was not put this way in argument, I assume that this submission must mean that such an order would only become final and determinative once the 7-day period in paragraph 2 of the Order had expired without any application to set aside or vary having been made.

    (6) Thus, the effect of paragraph 2 of the Order was to give the Applicant the opportunity to apply for an oral hearing to vary or set aside the Order, which is what the Applicant has done, and thus the court should go on to determine whether or not to grant permission to appeal.

22. In my judgment, there are insurmountable hurdles for the Applicant in asking me to follow that course.

23. In *WSB*, Calver J was crystal clear about both procedure and jurisdiction on an application for permission to appeal an arbitral award under section 69.

24. I do not intend to set out all of paragraphs [1] to [14] of Calver J's judgment in *WSB* (although reading those paragraphs may well assist the reader of my judgment), and will simply set out what I think are the relevant principles which emerge:

    (1) In an application for permission to appeal under sections 67 and 68, a party has the right to an oral rehearing because the challenge is to the tribunal's

substantive jurisdiction or on the ground of a serious irregularity affecting the tribunal's process.

(2) However, an applicant for permission to appeal under section 69 has no such right.

(3) This is because under section 69(5) there is a threshold permission test which must be passed before this court will hear the appeal, namely the test in section 69(3).

(4) The threshold application is ordinarily determined without a hearing under section 69(5).

(5) Once that has been determined without a hearing, there is no right of renewal to an oral hearing, and the only further recourse is an appeal to the Court of Appeal.

25. I respectfully agree. Following the very clear reasoning and decision in *WSB* as well as in the other cases cited therein, particularly *BLCT* (*ante*) and *Midnight Marine v Thomas Miller* [2018] EWHC 3431, where an application for permission under section 69 has been dealt with on paper, there is no right to a renewed oral hearing.

26. I also reject the Applicant's submission that the Order was not a final determination of the application for permission. As Arden LJ (as she then was) said in *BLCT* at [35]:

> "I do not consider that there is any real prospect of success on the argument that an application determined on paper under section 69(5) can be reconsidered at an oral hearing. That proposition would require a provisional determination on paper before a final determination at a hearing. That is not the way in which section 69(5) is drafted. It is drafted on the basis that the court shall 'determine' the application on paper unless it makes the positive decision that a hearing is required. If an oral hearing is required by Convention jurisprudence, then it is surely 'required' for the purpose of section 65(5) on its true interpretation. But it is too late to ask for an oral hearing once the application has been determined on paper."

27. It is in my view impossible to read the Order as being anything other than a final determination of the section 69 application.

28. Take a permission to appeal application governed by CPR Part 52 (say, on a proposed appeal from a Circuit Judge to this court). If a judge gives a decision on the permission application without a hearing and includes in their order the same wording as paragraph 2 of the Order, I venture to suggest that as a matter of construction and common sense, their order is a final determinative order rather than some sort of conditional order (conditional upon a party not applying to set aside or vary it).

29. The same applies here, by direct analogy.

30. The determination on paper as set out in the Order clearly complied with the requirements of section 69, including the provision of brief reasons. It is plain that it was a determination – in my view, a final determination – of the application for permission to appeal.

31. In my judgment, the position under section 69(5) is indeed binary – the application is to be determined on paper (which is the usual practice) or it is to be determined at a hearing (which might be a rolled-up hearing). An order which refuses permission on paper but gives the right to apply for an oral rehearing would be contrary to section 69(5) as a matter of construction, and contrary to the principles set out so clearly by Calver J.

32. Where does that leave paragraph 2 of the Order?

33. I have been urged to give at least some effect to paragraph 2 of the Order, and to allow the Applicant to have an oral hearing of the application for permission, as the alternative would be to ignore paragraph 2 in its entirety; it must (it is said) be assumed that Joanna Smith J intended paragraph 2 to mean something and to have some effect.

34. With the greatest respect to Joanna Smith J, I find myself unable to take that course. It seems to me completely clear that had the decision of Calver J in *WSB* been considered, it would have been appreciated that there was in fact no right to a renewed oral hearing once there had been a determination on paper under section 69(5); that this was not an application to which the provisions of CPR Part 52 or PD 52B applied at all; that it would not have been right to have included the words set out at paragraph 2 of the Order; and that the refusal of permission on paper with reasons was the end of the road for this application, because there was no right to any further hearing.

35. It is equally completely clear to me (again, with great respect to Joanna Smith J) that paragraph 2 of the Order was included in error.

36. I do not see how, in the light of *WSB*, the Applicant can be entitled to an oral rehearing.

37. It was said on behalf of the Applicant that I have no jurisdiction to do anything about paragraph 2 of the Order. That submission was on three grounds:

    (1) The error, if there was one, in paragraph 2 of the Order cannot be corrected under the slip rule set out in CPR 40.12 because it was not apparent that this was, in the wording of that rule, "an accidental slip or omission".

    (2) CPR 3.1(7) gives the court the power to vary or revoke an order, but the Order is a final order and the scope for varying or revoking it is limited, and this is not a case where the court should vary or revoke it (see the examples in the White Book at paragraph 3.1.17.2).

    (3) To vary or revoke paragraph 2 of the Order by virtue of the present application which seeks variation or revocation would be akin to saying that paragraph 2 was the gateway to this hearing, and then using it to destroy the gateway.

38. Leaving aside the fact that point (2) relies on this being a final order, whereas earlier - as I have set out - the Applicant's case was that it was not a final order, it seems to me the position is clear.

39. I am satisfied that I have the jurisdiction to dismiss the present application, irrespective of whether I can set aside paragraph 2 of the Order.

40. In fact, in my judgment I do have the power to set aside paragraph 2 of the Order, as it seems to me completely clear that it was included in error, for the reasons I have set out above. This seems to me a case where the slip rule applies, and or alternatively that in the unusual circumstances of such an error having been made, I could exercise the court's case management powers to set it aside under CPR 3.1(7) even though it was a final order. Since there is no right to a renewed oral hearing, it follows that the application should be dismissed.

41. Even if I am wrong about that, and I should in fact be dealing with the application for permission today because I cannot set aside paragraph 2 of the judgment, I have no hesitation in dismissing the application on the basis that there is no jurisdiction to entertain it, for the reasons set out in *WSB*.

42. I would encapsulate the position by saying that this court should not, and cannot, permit a jurisdiction to have an oral rehearing to be conferred by an order where it is clear on the authorities and under the Act that such jurisdiction does not exist.

43. I was pressed to go on and determine the application for permission to appeal in any event, on the basis that I might be wrong about jurisdiction, but I decline to do so. The position in relation to jurisdiction is to my mind so clear that it would not be an appropriate use of court time or resources, nor would it be in accordance with the over-riding objective, to do so where the Applicant will now in any event need success in the Court of Appeal to challenge my decision on jurisdiction.

44. In that regard, I refuse permission to appeal as the position is so clear-cut. Any application for permission must be made to the Court of Appeal.

45. In my judgment, the right order is simply to dismiss the application to set aside or vary the Order, and I do so.

46. Finally, I thank Mr Galtrey for the Applicant and Mr Ohrenstein for the Respondents for their most helpful written and oral submissions.

(End of judgment)