Neutral Citation Number: [2023] EWCA Civ 1465

Case No: CA-2022-001457

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
HIS HONOUR JUDGE JARMAN KC (sitting as a Judge of the High Court)
[2022] EWHC 1717 (Ch)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 23 November 2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE NUGEE

Between:

LLOYD DORIAN WILLIAMS

Claimant/ Appellant

- and -

(1) GERWYN LLOYD WILLIAMS
(2) SUSAN ELIZABETH HAM
(3) SARA LLEWELLYN JONES and JOHN ALUN LLOYD
(as Executors and Administrators of LLOYD WILLIAMS deceased)

Defendants/ Respondents

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Guy Adams (instructed by **Red Kite Law LLP**) appeared on behalf of the **Appellant**

James Pearce-Smith (instructed by **Michelmores LLP**) appeared on behalf of the **1st and 2nd Respondents**

Approved Judgment

LORD JUSTICE NUGEE:

1. I will preface this judgment by saying what should be obvious to everybody in court, that it has not been considered at great length and will not come out as a polished judgment, but we thought it better that the parties should know where they stand straightaway given that the substantive appeal is due to be heard in under two weeks' time.

2. The question in this application is whether the Appellant, Mr Dorian Williams, already has, or can, and should, now be granted, permission to appeal on Ground 3 of his Grounds of Appeal. He undoubtedly does have permission from Lewison LJ on Ground 5 of his Grounds of Appeal, and his appeal is due to be heard shortly.

3. The underlying facts are not of central importance to today's application, but, briefly, the Appellant brought an action against two of his siblings, Mr Gerwyn Williams and Mrs Susan Ham, and the executors of his father's estate, asserting that he was entitled to ownership of two farms in Neath in Wales, which were farmed together as a single holding, one called Crythan of about 50 acres, and one called Cefn Coed of about 144 acres.

4. His claims were put forward on two alternative bases: firstly, that the farms had been contributed as assets to a partnership which was established between himself and his parents in 1985, with the result, so it was said, that on the death of his parents (his mother in 2013 and then his father in 2018) the entire interest in the farms passed or "enured" to him; and secondly, that he had a claim to both farms by proprietary estoppel on the basis that his parents encouraged him to believe that they would be his, and that he had acted in reliance on that.

5. The action was tried by HHJ Jarman KC, sitting as a judge of the High Court in Cardiff, in June 2022. He handed down judgment on 4 July 2022 at [2022] EWHC 1717 (Ch). In that judgment he dismissed both ways of putting Mr Dorian Williams' claims. He later also refused him permission to appeal.

6. The Appellant applied for permission to appeal in his Appellant's notice, relying initially on 6, and after an amendment on 7, grounds of appeal. Grounds 2 and 3 were directed at the partnership issues in relation to Crythan and Cefn Coed respectively. Ground 5 was directed at a subsidiary issue. Cefn Coed had been acquired in the joint names of the Appellant and both his parents. There was in the conveyance or transfer no express declaration of trust, and that gave rise to a question whether it was acquired by them as beneficial joint tenants or as beneficial tenants in common.

7. The Judge held that they were tenants in common in equal shares, with the result that the Appellant was entitled to a third share. By Ground 5 he contended that the Judge should have held that Cefn Coed was initially acquired by the three of them as joint tenants. That, as I understand it, would mean that on his mother's death Cefn Coed would be held by him and his father jointly, and since his father had severed the joint tenancy in 2014, the Appellant would now hold a half interest as tenant in common with his father's estate.

8. The permission for appeal application came before Lewison LJ. He dealt with it, as is very common with permission applications in this Court, on paper. His decision is dated 20 October 2022. It is headed after the title, "ORDER made by the Rt. Hon. Lord Justice Lewison." There is then a box marked "Decision" which reads: "Granted on Grounds 3 and 5. Refused on all other Grounds." Then he made provision for a partial stay of costs.

9. There is then a separate box marked "Reasons", which in this case set out in some detail his reasons for his decisions. Paragraph 2 of the reasons is headed "*Partnership asset*", and deals specifically with the claim in relation to Crythan. Paragraph 3 reads as follows:

> "Cefn Coed was bought in the names of Mr and Mrs Williams and Dorian; and there was no express declaration of beneficial ownership. In the light of *Stack v Dowden* it is arguable that the judge began from the wrong starting point. But if there was a beneficial joint tenancy at the outset it was severed by notice given on 4 March 2014. Permission to appeal on grounds 3 and 5 is granted, limited to the

> question whether Dorian is entitled to a beneficial interest in Cefn Coed."

10. The Respondents, with I think some justification, thought that the precise ambit of the permission that Lewison LJ had thereby granted was not entirely clear. On 25 October they wrote to the court, headed "Urgent" asking, quite simply, in relation to paragraph 3 of the order:

> "Could you please clarify whether permission has been granted to appeal the issue of whether or not Cefn Coed Farm is a partnership asset?"

The Response came by e-mail the next day:

> "Dear Sirs
>
> Thank you for your letter.
>
> Lewison, Lord Justice has confirmed that Permission to Appeal on the question whether Cefn Coed was a partnership asset has not been granted."

11. The Appellant sought to challenge that in a number of different ways, which it is not necessary in this brief judgment to go through, ultimately culminating in an application to the Supreme Court, which was refused by the Supreme Court.

12. After these various applications had failed, he asked for an extension of time (under the direction of the Court, because he needed one) to put in a replacement appeal skeleton. That replacement appeal skeleton sought to argue both Ground 3 and Ground 5. Indeed, its introduction reads as follows:

> "This appeal raises an important point of principle as to the proper approach of a court to the evidential value of partnership accounts, and, in particular, where the evidential burden lies in the face of partnership accounts, which are on the face of it conclusive as to an issue in proceedings."

13. It then elaborates under "Ground 3 – partnership property" from paragraphs 22 to 55 the questions of partnership property in relation to Cefn Coed; and for good measure paragraphs 56 to 65 sought to argue that if the Appellant was right on the impact of the partnership accounts in relation to Cefn Coed, the same should apply to Crythan, despite the fact that there was no doubt that Lewison LJ had refused permission for Ground 2 of the Grounds of Appeal which raised that question.

14. The application for an extension of time also came before Lewison LJ, who again decided it on paper. His order this time is dated 21 September 2023. I think since this is the order which we are asked to review, I should read most of it. In the box marked "Decision", he simply says, "See below". In the box marked "Reasons", he said as follows:

> "1. The reasons for the grant of limited permission to appeal made it clear that permission was limited to the question whether Dorian was entitled to a beneficial interest in Cefn Coed. That limitation meant that no permission was granted in relation to the question whether Cefn Coed was a partnership asset. I was asked to clarify whether permission had been granted on that question and confirmed that it had not been. The formal parts of the order must be read in the light of the reasons given for it. I also confirmed the limitation in my order of 25 November 2022 [he says 2021, but must mean 2022], when the Appellant asked for reconsideration of my grant of permission. Despite that, and despite the Appellant's many attempts to re-open my order, the proposed skeleton argument ignores that limitation.
>
> 2. To the extent that the formal parts of my order and para 3 of my reasons refer to ground 3, that may have created an ambiguity. If so, that was an accidental error which I correct under CPR 40.12."

Then he gives reasons why he does that, and concludes that paragraph:

> "… The order should therefore be read as if no permission were granted under ground 3."

Then he continues:

> "3. As foreshadowed in my order of 25 November 2022 [again he says 2021 but must mean 2022], an attempt to sidestep a refusal of permission to appeal is an abuse of process. The proposed skeleton argument also seeks to re-open the refusal of permission in relation to Crythan, despite the refusal of an application under CPR 52.30. Regrettably, therefore, I consider that in both respects paragraph 1 and 2 and 22 to 65 of the proposed Appellant's Notice does amount to an abuse of process.
>
> 4. In those circumstances, one possibility is simply to dismiss the application for an extension of time. But that would be a draconian step in view of the limited permission that has been given. I direct, therefore, that the Appellant must serve a replacement skeleton argument, limited to the issue on which permission has been given. For the avoidance of doubt that does not include the issue whether Cefn Coed was a partnership asset."

15. By this application the Appellant seeks a review of that order under a number of rules. As clarified in argument this morning, three questions arise. The first question is whether Mr Dorian Williams already has permission to appeal on Ground 3. Mr Guy Adams who appeared for him argued that he did, that it had been given by Lewison LJ in unambiguous terms in his original decision, and that that was that.

16. However, I take a different view. If Lewison LJ's decision had been left in its original form, I can see that there would have been room for argument about it, as indeed Lewison LJ recognised in the recent decision that I have read from. On the one hand, the Decision box said that permission was granted limited to Grounds 3 and 5, and Ground 3 did raise the partnership question in relation to Cefn Coed. On the other hand, paragraph 3 of the reasons limited the issue for which permission was granted to the question of beneficial ownership. And in the circumstances, in particular by reference to the Appellant's skeleton for permission to appeal, one can see why that might be thought to have been confined to the question whether the beneficial interests on acquisition were joint tenancy or tenancy in common.

17. But there is no need to grapple with these difficulties. Leaving aside the fact that Lewison LJ was almost immediately asked, and almost immediately answered, whether he had intended to grant permission for the partnership issue, more recently, as is apparent from the order I read, he corrected his original decision under the slip rule. The slip rule is found in CPR r 40.12. It reads as follows:

> "**Correction of errors in judgments and orders**
>
> 40.12 – (1) The court may at any time correct an accidental slip or omission in a judgment or order.
>
> (2) A party may apply for a correction without notice."

18. I think it clear that although a party may apply for a correction, the Court can also correct an order which contains an accidental slip of its own motion. Lewison LJ, as I read, said that the inclusion of Ground 3 was an accidental error, and he provided at the end of paragraph 2 of that order that his original order should be read as if no permission were granted under Ground 3.

19. I do not think we can go behind Lewison LJ's statement that his original decision contains an accidental error in including reference to Ground 3. So the only question that is left is whether the slip rule applied to his original decision. That, it seems to me, depends on whether it is an order within the meaning of CPR r 40.12. We have not been referred to, and it has not been suggested that the CPR contains, any definition of "order". But to my mind, the decision made by Lewison LJ when granting limited permission to appeal is quite plainly an order. It is called an order on its face. It is made by a judge. This is what is expressly envisaged by the CPR. CPR r 52.5 provides:

> "**Determination of applications for permission to appeal to the Court of Appeal**
>
> 52.5 – (1) Where an application for permission to appeal is made to the Court of Appeal, the Court of Appeal will determine the application on paper without an oral hearing, except as provided for under paragraph (2).
>
> (2) The judge considering the application on paper may direct that the application be determined at an oral hearing, and must so direct if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing.
>
> …"

20. That therefore envisages that the decision of the Court of Appeal on an application for permission, or as the wording in the rule suggests, the "determination" of that

application, will be dealt with on paper by a judge, and that is what, in the vast majority of cases, does happen.

21. What is more, CPR r 52.6 provides

> "P**ermission to appeal test – first appeals**
>
> 52.6 – (1) Except where rule 52.7 or rule 52.7A applies, permission to appeal may be given only where—
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard.
>
> (2) An order giving permission under this rule or under rule 52.7 may —
>
> (a) limit the issues to be heard; and
>
> (b) be made subject to conditions."

22. It can be seen that what the rules envisage is not only that the determination of the application for permission to appeal by the Court of Appeal will be made on paper by a judge, unless it is adjourned into court, but also that the question for that judge is whether the appeal would have a real prospect of success, or there is some other compelling reason for the appeal to be heard, and this decision is described in terms in CPR r 52.6(1)(a) as being whether "the court" considers that the appeal would have a real prospect of success, thereby envisaging that the judge deciding the application on paper is for these purposes the Court. And it can also be seen, for good measure, that CPR r 52.6(2) refers to "an *order* giving permission under this rule".

23. In all those circumstances it seems to me that the decision made by Lewison LJ was an order and could be amended under the slip rule. The suggestion that it is not an order depends partly on some passing remarks by Lord Halsbury in *Lane & Ors v Esdaile & Ors* [1891] AC 210, which were not actually the grounds of decision, and in any event were concerned with the construction of different statutory provisions in what must be admitted were very different times procedurally; and partly on an argument which was, to my mind, quite convoluted and difficult to follow, to the effect that decisions made

on paper by a judge do not count as real decisions of a Court. That just seems to me to be wrong. What the rules envisage is that decisions of the Court can be made on paper, and in particular, as we have seen under CPR r 52.5, that these decisions, decisions by the Court of Appeal whether permission to appeal should be granted, will usually be made on paper by a single Lord or Lady Justice. That, contrary to a submission of Mr Adams, seems to me to be plainly an exercise of judicial decision making and not an administrative or executive decision in any sense at all.

24. It is true that in many cases decisions made on paper by Courts are subject to the right by the person affected to have them reviewed, often at an oral hearing. But that does not mean that the decision on paper was not a judicial decision, and to my mind a decision made by a judge exercising judicial power, reached on paper and stamped with the Court's seal, is an "order", which indeed is how it is described on its face. Any alternative view would mean that there was no power to correct accidental slips in orders made without a hearing, which I think would cause serious inconvenience.

25. Orders on paper are constantly being made at every level of judicial hierarchy up and down the land, and I have no doubt that accidental slips, such as a date (as indeed it appears Lewison LJ himself made in his most recent order) or a decimal point being put in the wrong place, or an order putting Claimant for Defendant and vice versa (a very common error), are frequently made, and no doubt frequently corrected. No sensible purpose would be served by construing CPR r 40.12 as not extending to such decisions.

26. I therefore conclude that Lewison LJ had the power to correct his original order, and exercised that power. We cannot go behind his statement that his original order contained an accidental slip, and we have been given, in my judgement, no reason at all to revisit that aspect of his order.

27. The consequence is the answer to the first question, whether Mr Dorian Williams already has permission to appeal on Ground 3, should in my judgement be answered No.

28. That leads to the second question, which is whether the Court hearing the substantive appeal can grant leave for a ground of appeal which has already been refused by a single member of the Court on paper. My answer to that is also No, save in the very narrow and exceptional circumstances where the Appellant can bring himself within CPR r 52.30.

29. Mr Adams accepted that there were a number of decisions to that effect before 2016. It is not necessary to refer to them all. They were in fact referred to by Newey LJ at an earlier stage of this saga, the most recent one being *McHugh v McHugh* [2014] EWCA Civ 1671 where Lewison LJ at [14] said:

> "Where permission to appeal is given on limited grounds it is not open to an appellant to broaden the grounds on the hearing of the appeal itself."

30. Mr Adams had two submissions. One was that decisions of this Court on merely procedural matters cannot bind this Court in subsequent hearings, something for which he cited no authority that came anywhere near persuading me that it was correct, and which as a matter of principle I think must be wrong.

31. The second and more far-reaching submission was that whatever the position before 2016 when a disappointed appellant who had been refused permission for certain grounds on paper could renew his application at an oral hearing, the same was not true now when the right of renewal at an oral hearing has been removed. I do not see why that affects the principle. I was wholly unpersuaded by Mr Adams, as I have already touched on, that the decision of a single Lord or Lady Justice on behalf of the Court on paper is in some way not a decision of the Court, or not a judicial decision, or not carefully considered, or was in some way an exercise of delegated or administrative or executive power. As I have already referred to, by CPR r 52.5, the decision of a single Lord or Lady Justice on paper *is* the determination of the Court of Appeal on the question of permission.

32. As I have already said, unlike other decisions, the disappointed appellant cannot as of right require that to be reconsidered at a hearing. That is the effect of CPR r 52.24(6), which reads:

> "(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."

33. That was, as is well known, a deliberate change introduced in 2016 to limit the rights of would-be appellants to renew their applications for permission. Incidentally it seems to me that there is not the slightest doubt that a decision granting permission limited to certain grounds is both a decision granting permission on those grounds, and a decision refusing permission on all other grounds, and is within the meaning of CPR r 52.24(6). A decision determining an application for permission to appeal is therefore caught by that paragraph.

34. But none of that, to my mind, undermines or affects the principle of the cases which I have referred to, as exemplified by *McHugh*. Once the Court has made a decision refusing permission on a particular ground, that cannot be re-opened at the hearing of a substantive appeal, nor indeed can it be appealed. It is intended to be a final decision.

35. That is subject to CPR r 52.30, which does allow decisions on applications for permission to appeal to be re-opened in exceptional circumstances. The rule provides:

> "**Reopening of final appeals**
>
> 52.30 – (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless:
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
>
> …"

36. Mr Adams suggests that that meant that only where an application for permission to appeal was refused in its entirety so that there would be no appeal was r 52.30 applicable. That is not how I read it, nor is it to my mind the natural reading. The natural reading of (1) and (2) is that the Court of Appeal will not re-open a final determination of any application for permission to appeal unless the three conditions are satisfied.

37. I, in my mind, have no doubt that Lewison LJ's decision was the final determination of Mr Dorian Williams' application for permission to appeal. It finally determined that permission should be granted on some grounds and not others. Once corrected under the slip rule it finally determined that he had permission to appeal on Ground 5 but no permission to appeal on any of the other grounds, and in particular not on Ground 3. In order to re-open that question, it is necessary for him to come within CPR r 52.30, because r 52.30(1), as I have read, provides that the Court of Appeal will not otherwise re-open a final determination of the application for permission to appeal.

38. Mr Adams had not previously on this application suggested that Lewison LJ's determination should be re-opened under r 52.30, but in the course of his submissions this morning he made an oral application under that rule. By r 52.30(4) he needs permission to make such an application. Normally permission is applied for on paper and determined on paper, but I will accept that he can apply for permission orally in the course of his submissions as he did. But I would not grant him such permission.

39. As Mr Adams himself accepted, r 52.30 is a codification of the jurisprudence of this Court starting with *Taylor v Lawrence* [2002] EWCA Civ 90, in which the Court held that in exceptional circumstances the Court can re-open an appeal that has been determined. But as numerous decisions of this Court confirm, the *Taylor v Lawrence* jurisdiction now encapsulated in r 52.30 is confined to some serious error of process in which the prior decision can be seen to be not a proper decision at all, examples in the cases being cases of where judges have read the wrong papers or there is bias or fraud or the like, cases where no real judicial decision has been made.

40. That seems to me very far removed from the facts of this case where Mr Adams sought to persuade us there was some merit in Ground 3, and therefore the Court, that is the Court hearing the appeal in two weeks' time, ought to allow him to run Ground 3 in order to avoid injustice. That is not what CPR r 52.30 is designed for, and, in my judgement, would completely undermine the intended finality of decisions on applications for permission.

41. In those circumstances my conclusion is that the pre-2016 decisions continue to apply. If permission has been granted limited to certain grounds, permission on other grounds has necessarily been refused, and the full Court hearing the appeal will not, whatever its theoretical jurisdiction, save in the exceptional circumstances covered by CPR r 52.30, re-open the question.

42. I would refuse therefore the application by the Appellant to rely on Ground 3, and I would go further, and for the avoidance of doubt, direct that he may not renew this or any similar application, or indeed any of the other grounds in his Grounds of Appeal, at the hearing of the substantive appeal in two weeks' time.

43. The third question which was raised this morning was what, if our conclusions were as I have suggested they should be, should be done about the application to extend time for service of the Appellant's skeleton. It is not however necessary to consider that in any detail because Mr Adams accepted that he would in those circumstances be content to rely on his original skeleton, as indeed the Practice Direction envisages appellants may well choose to do. That will of course, in the light of what I have said, not enable him to argue the points there deployed in relation to Ground 3 or Ground 2, or any of the other grounds other than Ground 5, when the appeal comes to be heard.

LORD JUSTICE NEWEY:

I agree and there is nothing that I wish to add.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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