Neutral Citation Number: [2020] EWHC 3181 (Ch)

Case No: BL-2018-002164

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PROPERTY & BUSINESS COURT

The Rolls Building
7 Rolls Buildings
Fetter lane
London EC4A 1NL

Date: 27/11/2020

Before :

THE HONOURABLE MR JUSTICE MEADE

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Between :

JOHN SYDNEY KIRBY & OTHERS	**Claimants**
- and -	
BAKER & METSON LIMITED	**Defendant**

- -
- -

Catherine Taskis (instructed by Loxley Solicitors) for the **Claimants**
Richard O'Sullivan (instructed by Irwin Mitchell Solicitors) for the **Defendant**

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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.

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Covid 19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 27th November, 2020.

The Honourable Mr Justice Meade :

1. This judgment deals with a point consequent on my judgment in this case in [2020] EWHC 2640 (Ch). That judgment gives the background and in particular explains that I was dealing with an appeal under section 69 of the Arbitration Act 1996.

2. My judgment was handed down remotely on 7 October 2020. At paragraph 77 I said this:

> "77. I allow the appeal and invite Counsel to try to agree the form of Order. I will direct written submissions within 7 days in the event that agreement is not possible."

3. It is not argued by either side that the hand down being done remotely is relevant to the point I now have to decide.

4. Prior to the handing down, the parties had, as usual, been given a draft of the judgment (early on 5 October). It only gave a short time for the provision of suggested corrections because the judgment was short.

5. Mr O'Sullivan for the Defendant (the unsuccessful Respondent to the appeal) provided a nil return the same day and late the same day Ms Taskis (for the Claimants, the successful Appellants) provided some helpful comments including pointing out one rather obvious slip on my part in identifying the right Act in paragraph 34. I made corrections accordingly and that led to the final version that was handed down on 7 October.

6. No application for permission to appeal to the Court of Appeal was made on 7 October and nor was any application made to adjourn the handing down to allow permission to appeal to be sought later.

7. On 14 October I made an Order disposing of the appeal to me. The form of the Order was agreed but, as Mr O'Sullivan rightly points out in the submissions to which I refer below, it was not a consent Order: the Defendant did not consent to the dismissal of its appeal, but was merely agreeing the procedural consequences of my conclusion. Still no application for permission to appeal to the Court of Appeal was made.

8. It has transpired that Mr O'Sullivan had been under the mistaken impression that permission to appeal from my decision could be sought from the Court of Appeal or from me. That is incorrect, as is now accepted on the part of the Defendant, because of section 69(8) of the Arbitration Act 1996 (and references to sections hereafter are to that Act), to which I have already referred, which provides:

> "*(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.*"

9. Here, "the court" means the High Court (section 105(1)). So if permission to appeal were to be sought, it would have to have been sought from me. Mr O'Sullivan candidly and very properly accepts that he simply overlooked this. However, I must say that even if permission could be sought from the Court of Appeal, it would not be entirely satisfactory to seek permission from it first, without seeking permission from me, which is the usual and recommended course. The reason, particularly applicable where the route to appeal depends on there;and being a question of general importance (or "some other special reason") is that the Judge in the lower Court may be able to provide information and context that would later be useful to the Court of Appeal.

10. On 27 October, the Defendant filed Grounds of Appeal and a skeleton argument with the Court of Appeal seeking permission to appeal. This would have been (just) within the 21 days stipulated by CPR 52.12, had the Court of Appeal been the right Court from which to seek permission.

11. The Claimants' solicitors immediately pointed out that the Court of Appeal had no power to give permission, and the Defendant, realising the mistake, sought permission from me by email of 29 October 2020, which would be just outside the 21 day period for filing an Appellant's Notice under CPR 52.12, were that to apply, were time to have been running from 7 October, and were it to be disregarded that the Grounds and skeleton were marked as being for the Court of Appeal. It also asked that I consider exercising a discretion to extend the time for seeking permission.

12. I then received several sets of written submissions on whether or not it was open to me to consider an application for permission to appeal.

13. The primary submission of Ms Taskis for the Claimants, relying on ***McDonald v. Rose*** [2019] EWCA Civ 4, particularly at [21(2)-(4)], was that under CPR 52.3(2)(a) permission to appeal had to be sought on 7 October, that being the "hearing at which the decision to be appealed was made", and that I had no power thereafter to consider the application, and no discretion to extend time.

14. Mr O'Sullivan's response is that CPR 52.1(4) provides that:

"*(4) This Part is subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal.*"

15. From that starting point he argues that the whole of CPR 52 is subject to the provisions of section 69, that being, he says, an enactment that sets out special provisions for a category of appeals.

16. Implicitly, I think, he contends that the relevant special provision of section 69 is that which requires permission to appeal to be sought only from the High Court.

17. He then contends that because CPR 52 is "subject to" section 69, the requirement in CPR 52.3(2)(a) to seek permission from the lower court (the High Court in this case)

"at the hearing at which the decision was made" has no application at all to appeals under section 69(8), and ***McDonald v. Rose*** is also irrelevant.

18. Further, he relies on the case of ***Midnight Marine Ltd v Thomas Miller*** [2018] EWHC 3431 (Comm) at [24] as an example of a case where, in the context of section 69, the application for permission was made at a later hearing after the judgment.

19. In the course of the filing of the various written arguments, I asked for submissions on two further/subsidiary points:

    a. Assuming that I had jurisdiction to consider an application for permission to appeal after 7 October, why would I still have jurisdiction after the making of the Order of 14 October? and

    b. What was the position in relation to the timing of the Appellant's Notice? Could or would it be in time under CPR 52.12 and if not, what principles should I apply and what decision should I reach? I had in mind the cases about quasi-relief from sanctions for late filing of Appellant's Notices.

20. The parties agree that I can and should resolve all these points on paper; there has not been an oral hearing.

21. Before coming to the legal principles, I will say a little more about the facts and what I understand to be usual practice:

    a. There was amply enough time for the Defendant to decide whether or not to seek permission to appeal prior to the 7 October hand down. As can be seen from my main judgment, the point at issue was a single, narrow question of law and my judgment was not long. It was a binary issue and only two outcomes were possible. This was not a case where the losing party needed time to analyse the judgment and consider whether, for example, factual findings made an appeal impossibly difficult.

    b. I did not of my own motion suggest or make an Order on 7 October adjourning the question of permission to appeal. Sometimes circumstances suggest that one should do so, for example if it is obvious that permission to appeal is likely to be sought and also obvious that time to think about it is needed. In a sense doing so just pre-empts a highly likely request by the losing party for an adjournment of the kind indicated in ***McDonald v. Rose***. However, I do not think that there is an invariable practice of always suggesting or making such an Order, and indeed it might well be contrary to the principles of certainty and finality identified by the Court of Appeal in that case to do so; I note that the only situation where the Court of Appeal said there should be a practice of adjourning is where the lower court states its decision with reasons to follow (at [22]). Sometimes a losing party does not seek permission to appeal even if it could be obtained, because of the costs risk weighed against the merits, or because the litigation has lost its importance, or for some other reason. The Court cannot be aware of this.

c. It is said in Mr O'Sullivan's submissions that:

i. "Before the Judgment was handed down in the exchanges between counsel the [Claimants'] counsel was informed that the [Defendant] was considering an appeal." and

ii. "Upon the [Defendant] agreeing the terms of the [14 October] Order the [Claimants'] counsel was informed that it was 'subject to any appeal'."

However, I do not know if that is correct or complete – Ms Taskis has not commented - and in any event it was said merely in connection with whether the 14 October Order was a consent order or not. There has, rightly in my view, been no suggestion that the Claimants misled or tricked the Defendant in any way. Further, no argument has been addressed to how these matters could affect the question of my jurisdiction. If the first of those points was intended to suggest that the Defendant needed more time to think about whether or not to appeal, I reject that for reasons given above.

Analysis

22. In my view, section 69(8) in combination with CPR 52.1(4) cannot have the effect for which Mr O'Sullivan contends. My reasons are as follows:

a. On their natural meaning, their effect is simply that CPR 52 is modified to the extent necessary in the light of section 69(8).

b. That means in particular that in relation to CPR 52.3(2), part (b) is disapplied in the context of a further appeal following an arbitration under the Act because there is, by that very statute, no right to seek permission from the appeal court. But part (a) is unaffected and its application must be in line with ***McDonald v. Rose***.

c. There is nothing in the wording of those provisions to support the extensive or indeed total disapplication of CPR 52 for which Mr O'Sullivan contends.

d. The consequence of the Defendant's submissions would be that there is no rule at all within the CPR controlling the timing of an application for permission to appeal where section 69 applies, and permission could be sought at any time that is (Mr O'Sullivan submits) reasonable. This would be an irrational result, far too vague and uncertain.

e. The result would be particularly irrational, or at least illogical, given that in the arbitration context finality and certainty is regarded as especially important. That is, after all, why a further appeal requires permission of the High Court and a point of general importance or another special reason.

f. I agree with the Claimants' submissions that ***Midnight Marine Ltd v Thomas Miller*** is irrelevant and does not help the Defendant. It does not address the present point, it was prior to ***McDonald v. Rose***, and although it appears that permission to appeal was considered at a later hearing than the decision hearing there is nothing to indicate that objection was taken to that course, or that an appropriate adjournment was not directed.

23. Accordingly, I consider that I should apply ***McDonald v. Rose***. I agree with Ms Taskis that it establishes (at [20] and [21(4)]) that a retrospective application for permission to appeal, where the judgment has been handed down and the hearing has not been adjourned, cannot be considered by the lower court. So I do not have power to grant permission; I had no such power after 7 October. I have no discretion to extend time.

24. That makes it strictly unnecessary for me to consider any further effect of the Order of 14 October, but I will nonetheless say that it emphasises the extreme nature of the Defendant's submissions that it contends, as it must, that section 69 disapplies the effect of CPR 52 so thoroughly in circumstances such as the present that the High Court retains the power to grant permission to appeal for a long and undefined period, even after it would on normal principles be entirely *functus officio*.

25. I also find it unnecessary, for the same reason, to deal with whether the Defendant would have effectively to seek relief from sanctions in relation to any Appellant's Notice. It is a potentially complex point and it could also be necessary to consider prejudice to the Claimants (in the sense of loss of finality) much more fully.

26. I record that I am not deciding whether or not my decision in my main judgment involved a point of general importance. Neither side has made submissions about it to me (though it is touched on in the draft Grounds of Appeal of 27 October) and I think it implicit that they would like me to consider jurisdiction first. I do think it right to say that I believe from what I heard at the main hearing that it is possible that there is a point of general importance. So it is possible that the omission to seek permission to appeal on 7 October coupled with my present decision means that an appeal which otherwise could have proceeded, will be prevented. But that is consistent with the need for finality evident from CPR 52 and ***McDonald v. Rose***.

Permission to appeal

27. Mr O'Sullivan's written submissions ask for permission to appeal this decision in the event of my finding against him.

28. I have no doubt about the correctness of my decision. I recognise that I have to step back and ask myself if there is the necessary chance that the Court of Appeal could take a different view on what is a new point. However, not every new point is arguable and even stepping back in that way, I conclude this one is not. I refuse permission to appeal.