

Neutral Citation Number: [2023] EWHC 126 (Comm)

Claim No: CL-2022-000085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Tuesday, 24 January 2023

BEFORE:

HHJ PELLING KC

BETWEEN:

(1) F.G. FINANCING LIMITED
(2) NONOLET INC

Claimant

-and-

MR MYKOLA LAGUN

Defendant

MR GEORGE HAYMAN KC and CALEY WRIGHT (Instructed by Macfarlanes LLP)
appeared on behalf of the Claimants.

MR ANTHONY PETO KC (Instructed by Joseph Hage Aaronson LLP) appeared on behalf
of the Defendant.

APPROVED JUDGMENT

Daily Transcript by John Larking Verbatim Reporters
One Cow Lane, Church Farm, South Harting, West Sussex, GU31 5QG Phone: 01730 825 039

No of folios: 34

No of words: 0

JUDGE PELLING:

1. There are before me two applications, being an application to restore an application which I determined on its merits on 20 December last but then was forced to withdraw the judgment I delivered in relation to it and which is the subject of an order which was made on 20 December 2022 that was formalised and sealed on 28 December; and an application for an extension of time in which to appeal from that decision. Importantly for present purposes, the hearing on the 20th was not adjourned, other than perhaps in relation to the working out of the order to the 28th when I made a final determination as to the terms of the order that was to result.
2. The detailed background to these two applications is perhaps one I need not rehearse in what must necessarily be a relatively short judgment, beyond saying that this was originally an application to continue or set aside a worldwide freezing order (“WFO”) made originally without notice in aid of what were then contemplated arbitration proceedings. The application came before me and was argued over a period of two and a half days, ending with the delivery of the judgment in the way I have described. Following the delivery of the judgment, it became apparent, by reference to the decision of Stephen Phillips LJ sitting as a judge of first instance in VTB Commodities v. JSC Antipinsky Refinery [2020] EWHC 72 (Comm; [2020] 1 WLR 1227 that there was an issue as to whether or not the court had jurisdiction to determine the application to continue the freezing order without the prior permission of the arbitral tribunal that by then had been constituted, or alternatively the agreement in writing of the parties, applying s.44(4) of the Arbitration Act 1996.
3. Both parties accepted that those provisions had not been complied with. I suggested therefore that there was probably only one way forward, which was for me to withdraw the judgment that I had delivered over the previous two and a half hours-odd and direct that the application to continue the freezing order be adjourned pending an application to the arbitral tribunal for permission, with liberty to restore the application to continue or discharge the WFO once the application for permission had been determined by the arbitral tribunal. Both Mr Hayman KC and Mr Peto KC appearing respectively for the claimants and defendant agreed that this is the course that should be adopted.

4. Subsequently an application for permission was made by the claimants to the arbitral tribunal, which by then had been constituted. That was the subject of directions leading to a hearing planned for the back-end of February of this year before the tribunal.
5. A few days later, the claimants had a rethink as to where they wished to go in relation to these proceedings, and issued the two applications now before me, that is to say the application to restore the application to continue or discharge the WFO and the application for an extension of the time for lodging an application for permission to appeal against the decision I gave on the 20th and formalised on 28 December last, notwithstanding that both parties were in agreement with the order that was then made and no application had been made at that hearing either for permission to appeal or for an extension of time in which to do so. .
6. There are three issues which arise today being first, whether or not the court has jurisdiction to entertain the application to restore at all, with Mr Peto KC on behalf of the defendant submitting that there is no jurisdiction because it depends upon issues of construction of the arbitral agreement which must be determined by the arbitral tribunal, and also because the effect of the LCIA rules is that the court cannot now, as a matter of agreement between the parties, determine that issue, secondly, in relation to the application for an extension of time in which to apply for permission to appeal, whether that should be dismissed because (as Mr Peto submits) that application is made without jurisdiction and the application for an extension of time dismissed and thirdly (if the restoration application is not summarily dismissed today, what directions should be given for its determination.
7. Dealing, first, with the application for an extension of time, the relevant rule is CPR Rule 52.12 which provides at sub-paragraph (2) as follows:

"The appellant must file the appellant's notice at the appeal court within-

(a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing (which may be longer or shorter than the period referred to in sub-paragraph (b)); or

(b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after the date of the decision of the lower court which the appellant wishes to appeal."

8. There is a legitimate debate, which in my judgment is of no materiality to the issue I have to decide, as to whether the relevant order was made on 20 or 28 December. What is clear beyond peradventure, however, is that there was no adjournment of the hearing at which the relevant decision was made, the relevant decision for these purposes being to recall the judgment and adjourn the application for a continuation of the freezing order.
9. In those circumstances, and against that background, Mr Peto makes the entirely straightforward point that the first instance court, in this case me, has no jurisdiction to extend time for filing a notice of appeal with the Court of Appeal, because no application for such an order was made at the hearing ending on 20 December, nor was that hearing adjourned. Mr Hayman on behalf of the claimant maintains the court has ample jurisdiction to make such an order by reference to the decision of Christopher Clarke J (as he then was) in Dalkia Utility Services PLC v. Celtech International Limited (No.2), an unreported decision of 2 February 2006. Mr Hayman submits that that case is authority for the proposition that an application to the lower court to extend time pursuant to Rule 52.12(2)(a) may be made on any date after the judgment is given, although this course involves additional and avoidable expense.
10. Mr Peto suggests that that is simply wrong and I accept Mr Peto's submission in that regard. The reason why Mr Hayman's submission is wrong is because the rule that applied in 2007 when Christophe Clarke J decided the authority on which he relies was in materially different terms to CPR Rule 52.12(2)(a). The rule that then applied was Rule 52.4(2)(a) which provided, insofar as is material:

"The appellant must file the appellant's notice at the appeal court within

(a) such time as may be directed by the lower court; or

(b) where the court makes no such direction 14 days after the decision of the lower court that the appellant wishes to appeal..."

As I have explained, that rule has now changed materially and thus Christopher Clarke's J judgment does not provide any assistance in resolving the issue I have to decide. I agree with Mr Peto that on materially similar wording in relation to applications for permission to appeal, the Court of Appeal has consistently made clear that the first instance court loses jurisdiction to grant permission to appeal if an application to that effect is not made to the court at the time the decision is made or at any adjourned hearing of the hearing at which the relevant decision was made. Those provisions are in materially similar terms to the position that now applies in relation to applications for extensions, and in my judgment that is really the end of that matter. Accordingly, I set aside the order I made on paper extending time for permission to appeal and dismiss that application.

11. The issue which remains is what I should do in relation to application to restore. There are, in my judgment, serious hurdles that stand in the way of the application which the claimant now seeks to advance. They are, as it seems to me, at least two in number. First, Mr Hayman relies upon the arbitration agreement between the parties contained in clause 15 of the relevant deeds of suretyship which is the foundation of the cause of action on which the claimant relies. Clause 15.1(a) sets out an entirely conventional arbitration agreement requiring disputes to be referred to arbitration in accordance with the rules of the London Court of International Arbitration. Sub-paragraph (b) of clause 15.1, however, provides:

"Notwithstanding this arbitration clause, the lender shall be at liberty at any moment to apply concurrently to any competent judicial authority in any number of jurisdictions for interim or conservatory measures and to take any proceedings where such action is deemed necessary to protect its interests in the event of a failure by the obligor to fulfil its obligations hereunder."

The argument that Mr Hayman advances is that there are two ways of looking at that provision. One is that it is an agreement which takes place entirely outside the arbitration agreement and/or the Arbitration Act and confers effectively absolute authority on the parties to apply to a court for conservatory or interim measures where

that court would have jurisdiction apart from the arbitration agreement or, alternatively, it constitutes an agreement within the meaning of section 44(4) of the 1996 Act.

12. That naturally begs the question of the meaning of the phrase "any competent judicial authority". On one view of the question, the word "competent" means a judicial authority with jurisdiction. Jurisdiction of the court in England hangs upon section 44(4), and thus, so the argument would go, to rely on this provision is entirely circular because it does not provide an answer to the question posed by section 44(4). Mr Hayman, on the other hand, argues that that would be to defeat the purpose of the provision and that it should properly be read as meaning any judicial authority which otherwise has jurisdiction to make the order sought, but for the existence of the arbitration agreement, and so construed, that means that the court would have jurisdiction by agreement between the parties because section 44 would, on proper construction, have been complied with.

13. The other problem which Mr Hayman will have to grapple with is Article 23.5 of the LCIA rules. Article 23.5 of the LCIA rules provides:

"By agreeing to arbitration under the Arbitration Agreement, after the formation of the Arbitral Tribunal the parties shall be treated as having agreed not to apply to any state court or other legal authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except (i) with the prior agreement in writing of all parties to the arbitration, or (ii) the prior authorisation of the Arbitral Tribunal, or (iii) following the latter's award on the objection to its jurisdiction or authority."

14. The centre of attention in relation to that provision which would otherwise apply as a matter of agreement between the parties will concern the scope and effect of the phrase "for any relief regarding the Arbitral Tribunal's jurisdiction or authority..." which engages broadly similar issues to those which arise under sub-paragraph (b) of clause 15.1 of the arbitration agreement.

15. Whilst I have real doubts about whether or not these issues ought to be the subject of further attention by the court, I have come to the conclusion in the end that the appropriate course is to direct a full hearing of the restoration application at which these

issues can be determined, and also the points made by Mr Peto to the effect that the court has no longer any jurisdiction to determine these issues of construction can also be considered.

16. The suggestion that those should be determined at a hearing lasting a day is one that I reject. These are issues which must be resolved quickly, and can and should be resolved within a period of half a day. To permit these issues to take up more than half a day of court time would be wasteful of public resources and wholly disproportionate.
17. Accordingly, what I propose to direct is that Mr Peto have permission to file evidence in response to the restoration application by no later than 4 p.m. seven days hence; Mr Hayman's clients will have liberty if so advised to file evidence in reply by no later than 4 p.m. seven days thereafter. I will hear the parties further in relation to skeleton arguments, but provisionally it strikes me that the skeleton arguments filed by the parties for this hearing can stand, subject to a right to supplement as necessary once the evidence is complete, and the hearing will then be listed on the first Friday after 21 days from today, which will allow compliance with the directions I have given concerning the filing of evidence in answer and reply and will allow this matter then to be disposed of in speedy course, as it must be having regard to the tribunal's decision to stand over the application for permission made to it by the claimant until after the application to restore has been determined.