



Neutral Citation Number: [2024] EWHC 1524 (Comm)

Case No: LM-2023-000309

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 18 June 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

TERNA ENERGY TRADING doo

- and -

REVOLUT LTD

Claimant/
Respondent

Defendant/
Applicant

Anthony Pavlovich (instructed by **DLA Piper UK LLP**) for the **Applicant**
Daniel Burgess (instructed by **Payne Hicks Beach LLP**) for the **Respondent**

Consequential applications dealt with on paper

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 3.30 pm on 18 June 2024.

HHJ Paul Matthews :

Introduction

1. On 12 June 2024 I handed down judgment remotely on the defendant's application for reverse summary judgment or alternatively to strike out the claim. For the reasons given in that judgment (to be found under neutral citation number [2024] EWHC 1419 (Comm)), I dismissed the application.
2. In the email sending out the judgment to the parties I invited the parties to seek to agree the wording of the order "before the hearing". In default of such agreement, I invited written submissions on consequential matters in accordance with a stipulated timetable. Subsequently I received and have now considered those written submissions. This is my decision on those consequential matters. It covers four matters: (i) costs, (ii) permission to appeal, (iii) extending time for filing an appellant's notice and (iv) listing a CCMC.

Costs

3. First of all, the parties have agreed that the applicant should within 14 days pay the costs of and occasioned by the application, agreed in the sum of £50,000. I will make that order.

Permission to appeal

4. Second, the applicant seeks permission to appeal. The respondent opposes it on the merits. In addition, it submits that it is too late for me to entertain the application at all. This submission is based on CPR rule 52.3(2)(a), which restricts the power of the lower court to grant permission to applications made "at the hearing at which the decision to be appealed was made or any adjournment of that hearing" (emphasis supplied).

Jurisdiction

5. The respondent refers to the decision of HHJ Hacon in *Claydon Yield-O-Meter Ltd v Mzuri Ltd* [2021] EWHC 1322 (IPEC). There the judge had circulated a draft judgment to counsel in the usual way. He subsequently handed down judgment remotely, by sending a copy of the finalised judgment to the parties and to BAILII (in accordance with the then practice). The parties were not required to, and did not, attend. No application was made for any adjournment of the hand-down hearing, and none was ordered.
6. HHJ Hacon held that he had no jurisdiction to give permission to appeal. He said:

"19. Thus, the hearing at which the decision to be appealed was made, within the meaning of CPR 52.3(2)(a), is the hearing at which the judgment is handed down by the lower court. Where the handing down is a formality and the parties are not required to attend, it still constitutes a hearing, still the hearing referred to in CPR 52.3(2)(a). That hearing can

be adjourned for the purpose of hearing applications for permission to appeal, but it must be done formally by the court following an application by at least one of the parties. Where that happens, an application for permission to appeal will be treated as being made at the hearing referred to in CPR 52.3(2)(a). If there has been no such adjournment, the lower court has no jurisdiction to consider an application for permission to appeal at a subsequent hearing.”

7. The respondent says that in the present case there was no application by the applicant for an adjournment of the hand-down hearing, and no adjournment was ordered. In those circumstances, it submits, I have no jurisdiction to consider the application for permission to appeal.

8. The applicant refers to the judgment of Underhill LJ (for the court) in *McDonald v Rose* [2019] EWCA Civ 4, where he said:

“21. ... (3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so ... The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made ‘at’ it for the purpose of CPR 52.3 (2) (a).”

9. The applicant says that, by setting a timetable for written submissions, I was necessarily adjourning the hand-down hearing. He also refers to two of my own earlier decisions in the *Chedington Events Ltd v Brake* litigation, to be found at [2023] EWHC 3094 (Ch), [24], and [2024] EWHC 384 (Ch), [4]. In both of these cases, I proceeded on the basis that in setting a timetable for written submissions that was exactly what I was doing.

10. In the former decision, I referred to the judgment of Underhill LJ in *McDonald v Rose*, and then said:

“24. ... The judgment sought to be appealed was handed down on 10 November 2023, when I directed written submissions on consequential matters. That direction was in effect the equivalent of an adjournment of the hand-down. The written submission were filed in accordance with the directions. Those submission took the place of the adjourned hearing. I have in effect reserved judgment on the consequential matters, which did not include any application for permission to appeal. In my judgment the hearing is over, and I no longer have any power to give a direction under rule 52.12(2)(a) about time within which to file an appellant’s notice.”

I repeated that view in the latter decision.

11. The respondent says that my view as there expressed is wrong, or at least inapplicable to the present case. *McDonald v Rose* requires that the hand-down hearing be “formally adjourned”, and here there was, it says, no formal adjournment. I accept that I did not use any express words such as “I hereby

adjourn this hearing”. Nevertheless, that is what I meant by setting a timetable for written submissions on consequential matters (which were not restricted in any way). In my judgment, I *did* adjourn the hand-down hearing, although to a written procedure instead of to an oral one. Accordingly, I hold that I have jurisdiction to deal with an application by the applicant, contained in the written submissions for which I provided, for permission to appeal.

Merits

12. I turn now to the merits of the application. The grounds of appeal are:
 - i) The judgment is wrong in law in declining to grant summary judgment or to strike out the claim on the basis that the applicant was not enriched.
 - ii) The judgment is wrong in law in declining to grant summary judgment or to strike out the claim on the basis that any enrichment of the applicant was not at the respondent’s expense.
13. Under CPR rule 52.6, in a first appeal (such as this is) the court may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means a prospect which is 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA; *Re R (A Child)* [2019] EWCA Civ 895, [31]. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.
14. The applicant here says that both grounds of appeal have real prospects of success. As to the first ground, there is a conflict of authority, because I have concluded that the decision of the High Court in *Tecnimont Arabia Ltd v National Westminster Bank plc* [2023] Bus LR 106, [2023] 1 All ER Comm 57, is wrong and that I should not follow it. But (says the applicant) the fact that another judge after full argument has taken a different view in itself demonstrates a real prospect of success at appellant level. The applicant also points to potential difficulties which are said to arise with the view that I have taken.
15. As to the second ground, there is a similar conflict of judicial opinion, between the view expressed by Marcus Smith J in *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2020] Ch 421, based on earlier authorities, and the views expressed, mostly *obiter*, in more recent cases such as *Jeremy D Stone Consultants Ltd v National Westminster Bank plc* [2013] EWHC 208 (Ch). The applicant says that the result of my decision is counterintuitive, It also says that the position of an electronic money institution such as the applicant is to be distinguished from that of a bank.
16. For good measure, the applicant also says that there is a compelling reason for an appeal on both grounds. The law relating both to enrichment and to “at the

expense of’ requires clarification. The question of the receiving bank’s liability in cases like this has obvious importance in the industry.

17. The respondent in answer says simply that “The grounds of appeal proposed do not have a real prospect of success for all the reasons set out in the judgment”. It also says that the fact that there is conflicting first instance authority does not without more justify an appeal. But these are assertions, rather than arguments. They are very difficult to evaluate.
18. Taking everything into account, I am quite satisfied that, for the purposes of the rule, there is a “real prospect of success” on both grounds of appeal. These are points of law, not of fact or evaluation, and the judicial authorities are divided. Appellate judges may well take a different view from me. Given the vast numbers of transfers of funds which take place through the banking system every day, and the need for clarity as to their legal effect, these are issues which will arise again and again, and must sooner or later be resolved at appellate level.
19. There may be cases where it is appropriate for the judge of the lower court to find that the application for permission for the appeal passes the threshold test, but that it is nevertheless better that the Court of Appeal itself should decide whether to hear the appeal. In my judgment, however, this is not one of them. The nettle needs to be grasped now. I will therefore give permission to appeal on both grounds.
20. It is not therefore necessary for me to decide whether, if there were no such real prospect, there would nevertheless be a compelling reason for an appeal. I simply record that, given that the foundation of the second argument (the need for clarity amid a conflict of authority) is also the foundation of the first, it is not obvious that the second argument adds anything to the first.

Extension of time for appellant’s notice

21. The applicant also seeks an extension of time for filing its appellant’s notice. CPR rule 52.12(2) provides:

“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.”

22. By my calculation, the period of 21 days from the making of the decision (rather than the making of the order) expires on 3 July 2024. The applicant

points out that the skeleton argument will need to be filed with that notice. The applicant however says that for this purpose it will be necessary to engage in detail with the lengthy and “closely reasoned” judgment at first instance. Moreover, the appeal will require the involvement of leading counsel. Unfortunately, however, both leading and junior counsel already instructed have commitments in the next three weeks, including (in the case of the former) an appeal to the Court of Appeal this week. The applicant therefore seeks an extension of a further three weeks, making six weeks in all.

23. The respondent opposes the application for an extension of time, and refers to paragraph 52.12.3 of volume 1 of the White Book. This suggests that there is a “clear policy decision in favour of finality”. It gives, as examples of good reasons for seeking a (modest) extension of time, where the putative appellant has an unwieldy decision-making process, where a national holiday period is about to begin, and where an approved transcript of a judgment may reasonably be required before the notice can be prepared. None of those applies here. The White Book also says that desiring to delay filing a notice of appeal until the full consequences of the judgment are apparent is not a good reason.
24. In my judgment, the mere fact that counsel already or previously instructed in a matter is wholly or partly unavailable in the next 21 days to prepare and appellant’s notice is not of itself a good reason for extending time, let alone for extending it by a *further* 21 days after the period of unavailability has come to an end. And, as the respondent points out, the court commitments of junior counsel are not specified, and there is nothing to show that he would not be in a position to prepare drafts for review by leading counsel after he has completed his appeal in the Court of Appeal this week. In these circumstances, I decline to extend time for service of the appellant’s notice.

Listing a CCMC

25. Lastly, the respondent seeks the listing of a half-day CCMC. It says that these proceedings have already been substantially delayed, and there is no reason to delay it further merely because an appellant’s notice has been filed. The applicant submits that “it would be a waste of costs to have the CCMC proceeding in parallel with an appeal”. As to this, I agree with the applicant. The applicant also asks that, if there is to be a CCMC, at least 42 days should elapse before it can take place, citing the preparatory work needed for such a hearing. I am not however persuaded that such a lengthy period is needed. The respondent’s suggestion of 28 days seems workable to me. In practice, the listing is unlikely to be exactly 28 days after the order.
26. I will therefore direct that:

“The parties shall within 7 days of the date of this Order provide dates to avoid for a CCMC with a time estimate of half a day to be listed on the first available date after 28 days from the date of this Order, save that, if an appellant’s notice is filed by 3 July 2024, then any such listing be vacated”.

Conclusion

27. In the result, I make the agreed costs order, give permission to appeal on both grounds, refuse an extension of time for service of the appellant's notice, and direct the conditional listing of a CCMC not earlier than 28 days after the order.