

Neutral Citation Number: [2024] EWHC 1718 (KB)

Case No: QB-2022-002405

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 17 June 2024

Before :

Mrs Justice Cockerill

Between :

Pan NOx Emissions Litigations

Claimant

Adam Kramer KC and Simon Teasdale (instructed by **PGMBM LAW LTD t/a Pogust Goodhead, Leigh Day**) for the **Claimant**
Toby Riley-Smith KC, David Myhill and Nicholas Bacon KC (instructed by **Signature Litigation LLP, Cleary Gottlieb Steen & Hamilton LLP**) for the **Defendant**

Hearing dates: **17th June 2024**

APPROVED RULING

Mrs Justice Cockerill
(10:41 am)

Monday, 17 June 2024

Ruling by **MRS JUSTICE COCKERILL**

1. On permission to appeal, the application is made on “*real prospect of success*” grounds only, rightly so, because this could not be a “*some other compelling reason*” case.
2. The defendants have helpfully summarised the law on this test and we remind ourselves that the Appeal Court will only allow an appeal if this court's decision was wrong. Any challenge to an evaluative decision will only be allowed if the judge “*was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the decision*”, *Prescott v Potamianos*, known as *Re Sprintroom* [2019] EWCA Civ 932 at 72 to 78; and alternatively, if the finding was plainly wrong on the evidence, *Clin v Walter Lilly* [2021] EWCA Civ 136 at 83 to 87; or there is the other formulation cited by the claimants, which is one of my favourites, that of Lord Justice Coulson in *Jalla v Shell* [2021] EWCA Civ 1559 at 27 to 28, where he uses the formulation “*plainly wrong or outside the range of proper decisions or lacking in cogency*” and so forth.
3. So there is a large degree of common ground as to the test.
4. The other point to note, which does not make an appearance and which is often forgotten, is that appeals are to orders, not to fragments of judicial reasoning. Unless there is a real prospect of success of a different result, there is no real prospect of success. That is, of course, a relevant factor where one is looking at a decision where there are alternative bases of a decision, because it is not enough to win on one unless you win on the one that makes the difference. Thus, even if I was

wrong on “real risk of prosecution” in this case, the defendants would need to win on the balancing exercise point in order to get anywhere.

5. It will probably come as no surprise to the defendants to learn that, against that background, I do not consider that the test is met in this case. I conclude without difficulty that there is no real prospect of success.
6. The broad point is: there is no real prospect of the appellate court overturning this decision. The grounds of appeal, which have very helpfully been provided in this case, are, as drafted, very broad, basically encapsulating the test, and very, very similar to each other. In terms of the grounds, they lack particularity. They just say in essence, “*The judge got it wrong, see the test*”.
7. Once one gets the skeleton, one can see that the points which are taken, although there is an overlap, they do not actually identify the same points between the two sets of litigants. So, for example, in relation to the balancing exercise, one of the defendants only takes the expedition point in relation to further letters of request. A number of the points are similar, but taken in a different order. So one can see that there is essentially no common approach, no identified error which both defendants can agree on, which takes them through.
8. That is not itself a ground, but it is a background to where I go on real risk, grounds 1 and 2.
9. The question of real risk of prosecution is, of course, one which is a factual one. That is a question the court is naturally slow to interfere on, particularly where it deals with questions of foreign law and practice, evaluation of expert evidence, specific factual circumstances and so forth.

10. Any reading of the arguments and grounds makes it clear that what is being sought to be done is to unpick a complex, multi-layered analysis based on the evidence, and where a different conclusion on one individual part might not make a difference to the overall analysis.
11. It is, overall, an absolute classic of the kind of case that the Court of Appeal is loath to interfere in, particularly where the burden is on the defendants, a point which is somewhat a dog which does not bark in the arguments advanced by the defendants.
12. This is a case where the decision which I have reached is also consistent with a clear run of similar decisions by the English courts on the French blocking statute, including the post-2022 one of Mr Justice Waksman.
13. Overall, bearing in mind all those factors and that fact that it is really an evaluative decision with multiple layers of factors going into it, I conclude that there is no real prospect of success in this.
14. In relation to the balancing exercise, it only gets stronger. That is effectively a discretionary decision, which is right out at the far end of the kind of cases in which the Court of Appeal does not like to interfere. It is a balancing exercise. I have explicitly balanced various factors.
15. The argument appears to proceed almost on the basis that I did not conclude that on this basis one must assume that there was a risk of prosecution. I did, of course, proceed on the basis that there was a real risk of prosecution. So it is wrong to say that I did not take into account real risk of prosecution.
16. So the arguments have tried to suggest that one should unpick again the argument as to real risk of prosecution and put it yet higher in order to get further into the balancing exercise.

17. The argument which the defendants would want to put forward involves effectively reworking the “real risk of prosecution” argument beyond the real risk of prosecution. It is dependent on showing that is a real prospect of the Court of Appeal finding that the risk was not just real but that much higher than real, that all these other evaluative factors do not tilt the argument as I have found they do. Given that I have explicitly considered a number of evaluative factors and it is quite clear on the authorities that comity weighs heavy, I have no difficulty in concluding that there is no prospect of success on this ground.

18. The claimants have invited me to refuse because of the procedural consequences of an appeal by reference to PD52A paragraph 4.6. As will be apparent, I do not need to take this into account. It would, of course, be an extra factor were I persuaded that the case was slightly closer to the line for a real prospect of success, but given that I am satisfied that it is some way off real prospect of success, it need not for me come into the equation though it is possible the Court of Appeal might want to think about it when, as inevitably will be the case, this application is removed to them.