Case No: A4/2019/0139(A)

Neutral Citation Number: [2019] EWCA Civ 1187
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM

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

Friday, 24 May 2019

Before:

LORD JUSTICE FLAUX

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Between:

HMG INVESTMENT HOLDINGS LIMITED (FORMERLY KNOWN AS THE HOLLINS MURRAY GROUP)	**Applicant**
- and -	
NATIONAL WESTMINSTER BANK PLC	**Respondent**

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Mr R Edwards, QC (instructed by Teacher Stern LLP) appeared on behalf of the **Applicant**

Mr A Ayres, QC and **Ms M Cleary** (instructed by Dentons UK & Middle East LLP) appeared on behalf of the **Respondent**

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Judgment

(Approved)

LORD JUSTICE FLAUX:

1. This is an application by HMG Investment Holdings ("the applicants") for the court to reopen pursuant to CPR 52.30 the refusal on 28 February 2019 of permission to appeal the order of Robin Knowles J dated 17 December 2018 dismissing their claim.

2. The background is as follows. The applicants have alleged that the respondent bank had made what was called the decreased risk representation in relation to the proposed "Geared Collar". During a telephone conversation on 4 April 2008, in response to concerns raised by Mr Mitchell of the appellants, who said, "my concern is, are we increasing our risk rather than decreasing it?", Mr Bescoby of the bank said, "Well I think potentially you're actually decreasing it, and I'll tell you the reason why". He went on to explain, as the judge found at paragraphs 34 to 35, 44 to 45, 56 and 66 of his judgment, that although the risk of breaching the floor was increased since the floor was now 4.15 per cent as opposed to 3.95 per cent under the existing hedging arrangements, the impact of breaching the floor was less, because the increase in rates under the Geared Collar if the floor were breached is more gradual than under the original hedging arrangements. The judge held that it was in that sense of the lesser impact of breaching the floor that Mr Bescoby said that potentially the Geared Collar was decreasing the risk. He rejected the applicant's argument that Mr Bescoby was referring to that the Geared Collar exposing the applicants to less risk overall than the original hedging instruments. The judge found at paragraph 70 that the decreased risk representation as alleged by the applicants had not been made, since what was said was not confined to the sentence relied upon by the applicants but included the explanation given and therefore whatever was represented was not false. Because the judge had concluded that the claim in misrepresentation failed, he concluded at paragraphs 59 to

63 of the judgment that the alternative case in negligence failed because he concluded that what he found was said by Mr Bescoby was not negligent. He also rejected the applicant's case based on its expert evidence that the representation was still false and said at paragraph 66 of the of his judgment as follows:

> "I do not consider that this evidence means that what Mr Bescoby said was false. Properly understood Mr Bescoby was not saying 'the new floor structure decreased the risk'. He was saying that the possibility of going through the floor was increased, but the impact was lessened."

3. The judge held that he did not need to enter into questions of loss because they did not arise.

4. By an appellant's notice dated 17 January 2019, the appellant sought permission to appeal on the following grounds of appeal:

> "**Ground 1**
> The judge's interpretation of Mr Bescoby's words to Mr Mitchell in the call on 4 April 2008 is contrary to their natural and ordinary meaning, and the reasons given in support of this interpretation are illogical, internally inconsistent or otherwise inadequate to explain or justify it. As a result, the judge's finding that the decreased risk representation is not made and all the conclusions which followed from that finding of fact, including the dismissal of HMG's claim of misrepresentation, the finding that the bank was not negligent and all the findings in relation to falsity, are wrong.
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> **Ground 2**
> The judge was wrong to make the following two subsidiary findings of fact and wrong to take them into account insofar as he did so in dismissing the appellant's claim.
> (1) The judge's finding at paragraph 47(b) that the appellant obviously appreciated that the absorption of break costs in the new structure would involve the bank receiving benefit elsewhere in the Geared Collar structure to reflect the internal costs is wrong. There was no evidence to support it. It was not put to any of the appellant's witnesses, and it was not open to the judge.

> (2) The judge's finding at 53 that the appellant was aware of the increase in the credit line is wrong. It is not supported by the evidence relied on by the judge and is contradicted by the evidence of the appellant's witnesses, Mr Mitchell and Mr Thomas."

5. This application was supported in the usual way by the appellant's skeleton argument from Mr Richard Edwards QC and Ms Lacey. Mr Ayres QC and Ms Cleary for the bank served a respondent's statement under CPR PD 52C, paragraph 19(1) setting out their reasons for submitting that the proposed appeal was hopeless. The application came before me on paper in the usual way. I considered all the documents to which I was referred, including for the avoidance of doubt the appellant's skeleton, and, on 28 February 2019, I refused permission to appeal, giving the following as my reasons:

> "(1) I agree with the respondent that the judge's conclusion on the critical issue as to whether the so-called decreased risk representation was made is correct. In the context of the conversation between Mr Mitchell and Mr Bescoby as a whole, and from the surrounding circumstances, the judge was correct that what Mr Bescoby was saying when he said, 'Well, I think potentially you're actually decreasing it, and I will tell you the reason why' was not as the applicants allege that the Geared Collar would expose the applicant to less risk than the original hedging instruments. Rather, what Mr Bescoby was saying, as the judge found at paragraph 44, was that whilst under the Geared Collar the risk of breaching the floor was increased, the impact of breaching the floor was less than under the original hedging instruments. The judge correctly concluded that this statement of opinion was not false.
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> (2) So far as the second ground of appeal is concerned, I consider that the findings of fact made by the judge are not arguably incorrect, but even if they were, I agree with the respondent that it is not shown how they would have affected the outcome.
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> (3) Whilst it is unfortunate the judge chose not to deal with the other issues in the case, I do not consider that his failure to do so has affected the correctness of his conclusion on the critical issue. In the circumstances the proposed appeal has no real prospect of success."

6. By an application dated 22 March 2019, the applicants seek to reopen that refusal of permission to appeal under CPR 52.30, alleging that I have failed to address any of the arguments advanced by the applicants in their grounds of appeal and skeleton. This allegation was advanced at some length in a further skeleton running to some 14 pages and has been repeated in the oral submissions made by Mr Edwards QC before the Court this morning. Before considering in more detail the arguments now advanced, it is important to note that the circumstances in which the jurisdiction to re-open a refusal of permission to appeal under CPR 52.30 can be exercised are very narrow. This Court recently confirmed in *Goring-On-Thames Parish Council, R (on the application of) v South Oxfordshire District Council & Anor [*2018] EWCA Civ 860; [2018] 1 WLR 5161 the principle established in earlier authorities that the jurisdiction can only be invoked where a significant injustice has probably occurred such that the integrity of the earlier litigation process, whether at trial or at the appeal stage, has been critically undermined or corrupted. In that case the Court made it clear that this narrow, stringent test is not relaxed where what is sought to be reopened is a refusal of permission to appeal in the papers. Paragraph 32 to 34 of the judgment provided as follows:

> "32. It should also be understood, and this case provides an opportunity to dispel any doubt there may be on the point, that the principles governing the CPR 52.30 jurisdiction have not been modified or relaxed in response to the change in the procedure for the determination of applications for permission to appeal that was brought about, with effect from 3 October 2016, in CPR 52.5.
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> 33. The effect of CPR 52.5(1) and (2) is that an application for permission to appeal to the Court of Appeal will be determined on paper without an oral hearing, except where the judge considering the application on paper directs that the application is to be dealt with at an oral hearing. It is for the judge to decide whether the application cannot be fairly determined on paper without an oral hearing. This procedure has replaced the previous arrangements in Practice Direction 52C, under which an application for permission to appeal was normally dealt with by the court on paper in the first

> instance, but if the application was refused the applicant would be entitled to have the decision reconsidered at a hearing, except where the rules provided otherwise – for example, where the application had been found to be 'totally without merit'.
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> 34. The new procedure under CPR 52.5 has considerable advantages in the saving of time, cost and uncertainty for the parties – both applicants and respondents – and in relieving pressure on the court's resources, whilst ensuring that applications continue to be fairly and justly determined. It has not created a procedural vacuum that needs to be filled by an expansion of the jurisdiction under CPR 52.30. Legal representatives advising applicants for permission to appeal should not think, and should not encourage applicants to think, that CPR 52.30 provides a default procedure for challenging the court's decision to refuse the application for permission to appeal, whether on paper or at an oral hearing, if one is held."

7. As that judgment also makes clear at paragraph 29, this is an exceptional jurisdiction.

The Court said this:

> "It is 'exceptional' in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered 'Yes', the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong."

8. This is emphatically not a jurisdiction which simply enables a party to reargue an application for permission to appeal that it has lost simply because it considers that the single Lord or Lady Justice has got it wrong: see *Barclays Bank plc v Guy* [2010] EWCA Civ 1396; [2011] 1 WLR 681 at paragraphs 32 and 37 per Lord Neuberger of Abbotsbury, MR. Applications to reopen are usually dealt with on paper, but

exceptionally the Court may order an oral hearing. I did so in this case both to give Mr Edwards QC the opportunity to develop his arguments and to give Mr Ayres QC the opportunity to be heard in a case in which, in the light of my refusal of permission to appeal, his client would have been entitled to assume that the matter had been brought to an end.

9. Despite the persistence of Mr Edwards QC's submissions, I consider that his client gets nowhere near satisfying the stringent test under CPR 52.30 for a number of reasons. Firstly, as is said by the Court of Appeal in *South Oxfordshire* at paragraph 35, the reasons for refusing permission do not need to be lengthy, provided there that an adequate explanation is given for the refusal of permission on each ground of appeal. In short, the applicant must be able to understand why, on the appropriate test under the Rules, the intended appeal is not being permitted to proceed. It is not the function of the reasons to set out seriatim each argument in the skeleton argument like some species of Aunt Sally to be knocked down. As I pointed out during the course of argument, were that to be so, this Court would be occupied full time dealing with paper applications for permission. The Order made by the Court has to address the essential issues raised by the grounds of appeal, which my Order clearly does.

10. Secondly, contrary to Mr Edwards' assertions, it is quite clear from my reasons why I have concluded that the proposed grounds of appeal have no real prospect of success. Specifically, in relation to the principal ground, which seems to be the only ground still pursued, I said in paragraph 1 that I agreed with the respondent that the judge's interpretation of the 4 April 2008 conversation was correct, rejecting the applicant's argument that what was said amounted to a representation that the Geared Collar would

expose the applicant to less risk than the original hedging overall. That was the applicant's case at trial, as is clear from the submissions that have been made to the Court this morning and from the skeleton argument. Rather, I concluded that the judge was right to decide that what Mr Bescoby was saying was that, whilst under the Geared Collar the risk of breaching the floor was increased, the impact of breaching the floor was less than under the original hedging instruments. I referred to paragraph 44 of the judgment, which is indeed one of the paragraphs where the judge expressly so found. In fact the judge essentially repeats that finding in a number of paragraphs of the judgment which I have already referred to earlier in this judgment and I do not propose to repeat.

11. Thirdly, even if Mr Edwards were right that I had failed to deal with all his arguments, having now considered them, they do not demonstrate any reason for reaching a different conclusion on refusal of permission to appeal. Both in his two skeleton arguments and in his oral submissions, Mr Edwards has focused on three points. First, he says, is the fact that Mr Mitchell was concerned about the inferences which could be drawn from the magnitude of the break costs as to the risk posed by the Geared Collar. That is no doubt right given the context, but Mr Bescoby provided the reassurance during a telephone conversation with which Mr Mitchell was satisfied. This point does not assist the applicant in contending that Mr Bescoby made a representation which the judge correctly found he did not make. Mr Edwards submits that Mr Mitchell was clearly asking about the risk of the new structure as a whole. That is not in fact what the judge has found, and it was not suggested that the judge's finding was contrary to the evidence. But whether that was right or not, the assurance that Mr Mitchell was given was that which the judge found, with which, for whatever reason, Mr Mitchell

was satisfied, as is clear from the quotation from the phone conversations which the judge sets out at paragraph 39 and 57 of the judgment. It is particularly striking in this context that, as Mr Ayres pointed out, Mr Mitchell, who towards the end of the passage quoted by the judge at paragraph 39 of his judgment says, "Because now even with the higher thresholds, it is a lower impact", Mr Bescoby then said, "It is a lower impact, absolutely". Mr Mitchell then said, "I have got you, Tony. I have got you". It is quite clear from that passage and indeed from the transcript of the conversation as a whole, which I have read, that both of them were referring to the risk of breaching the floor. If Mr Mitchell had been concerned to explore his overall concerns about break costs further, it would have been open to him to seek further assurances from Mr Bescoby, but he did not do so, and no case was presented at trial to that effect.

12. Secondly, Mr Edwards placed particular emphasis on a submission that the finding the judge had made at paragraph 47(a) of the judgment was wrong. I should read 47(a). At 47 the judge said:

> "47. Mr Edwards QC drew particular attention to three features:
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> a. The first was the fact that Mr Mitchell used the word 'risk'. Mr Edwards QC argued that Mr Mitchell was expressly asking about risk rather than the rates payable pursuant to the new proposed structure. It is however necessary to go further. Taken as part of the conversation as a whole the question, and the answer, each convey that the word was a reference to the risk of breaching the floor, which appeared higher if the cost indicated "a likelihood of it going into that range" and the floor ('threshold' in Mr Mitchell's terminology) was set higher (and that was Mr Mitchell's point). But more importantly still, the conversation continued and clarity of meaning was provided as described above."

I take that reference to what was described above as being the judge referring back to what he had found that paragraphs 44 to 46 of the judgment.

13. Mr Edwards submits that this finding was wrong and that Mr Mitchell and Mr Bescoby cannot have meant to refer simply to the risk of breaching the floor, because that clearly would increase. He submitted that that they must have been referring to the risk of the Geared Collar overall and that I had failed to deal with this critical point and with what he described as the radical inconsistencies in the judgment on this point. With respect, paragraph 1 of my reasons does deal with this argument, because I have accepted the judge's analysis as to what it was that Mr Mitchell and Mr Bescoby were saying about risk, and that what Mr Bescoby was saying was that, although the risk of breaching the floor was increased, the impact of the breach was less than under the existing hedging, which was correct. There was a suggestion, certainly in the written argument, that the judge himself at failed to explain his rejection of the applicant's arguments on this point. That is a false point. The judge, as he was entitled and indeed bound to do, focussed on the critical issue whether Mr Bescoby had made the general misrepresentation for which the applicants contended. He found that he had not. That finding of fact in itself was sufficient explanation of his rejection of the applicant's arguments.

14. Thirdly, Mr Edwards submits that I failed to deal with what has been described as his grammatical point about the word "it" in the sentence "Well I think potentially you're actually decreasing it, and I'll tell you the reason why". Mr Edwards submitted that "it" must be referring to the overall risk, which is how it would have appeared to Mr Mitchell. With respect, that is no more than a forensic variant on his overall argument

that what was being represented was a decrease in the overall risk, which the judge rightly rejected. The judge correctly concluded that the explanation which Mr Bescoby provided explained that although the risk of breaching the floor increased, the impact of such a breach was decreased. That explanation qualified what he had said at the outset of the conversation and was so understood by Mr Mitchell, as is clear from paragraph 39 of the judgment, to which I have referred. The attempt to take the word "it" in isolation and elevate it into a reference to overall risk is thus misconceived.

15. It follows that even if I had accepted that I had failed to deal with the appellant's arguments, which I do not, those arguments do not establish any basis for reopening permission to appeal, let alone for concluding that the proposed appeal has any real prospect of success. This application to reopen is dismissed.

Order: Application refused