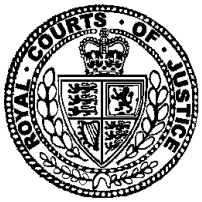

Neutral Citation Number: [2020] EWCA Civ 1460

Case No: A2/2020/0632

IN THE COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL FROM MR JUSTICE GRIFFITHS, SITTING IN THE HIGH COURT OF JUSTICE, HIGH COURT APPEAL CENTRE, BIRMINGHAM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE FLAUX
and
LADY JUSTICE ASPLIN

- -

Between :

L. M. Associates Limited	**Claimant and Respondent**
- and -	
William Gibbeson	**3rd Defendant and Appellant**

- -
- -

Mr Jack Holborn (instructed by **Hegarty LLP**) for the **Appellant**
Mr Simon Sinnatt (instructed by **ODT Solicitors**) for the **Respondent**

Hearing date: 29th October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30a.m. on Friday 6 November 2020

Lord Justice Henderson :

1. This is an application for permission to appeal ("PTA") which, unusually, has been listed for disposal before a full court, because it raises a question of jurisdiction on which differing views have been expressed by a master of the Court of Appeal, on the one hand, and (albeit provisionally) by a judge of the High Court (Soole J), on the other hand.

2. The question arises in circumstances where a High Court judge ("HCJ") refuses a first application for PTA from the County Court, on the papers and without an oral hearing, and considers the application to be totally without merit ("TWM"). In such a case, the normal right of an applicant for PTA to an appeal court other than the Court of Appeal to request the decision to be reconsidered at an oral hearing is disapplied by CPR rule 52.4(3), if the judge exercises the power under that paragraph to "make an order that the person seeking permission may not request the decision to be reconsidered at an oral hearing." By virtue of paragraph (5) of rule 52.4, the applicant for PTA is expressly prevented from requiring an oral reconsideration (or "renewal hearing" as it is often termed) of an order made under paragraph (3). The question which we have to consider is whether the Court of Appeal nevertheless has jurisdiction to entertain an *appeal* against the paragraph (3) order, subject to the applicant being able to satisfy the stringent test for the grant of PTA on a second appeal: see CPR rule 52.7(2).

3. It is worth observing at the outset that, if this court did have jurisdiction to entertain such an appeal, the potential ambit of the appeal would inevitably be very circumscribed. There are two reasons for this. The first is that, by statute, no appeal may be made against a decision of the High Court to give or refuse PTA: see section 54(4) of the Access to Justice Act 1999. The second is that the Court of Appeal lacks jurisdiction to hear an appeal against the certification by a HCJ that an application is TWM. The jurisdiction of the Court of Appeal is conferred by statute alone, and under section 16(1) of the Senior Courts Act 1981 "the Court of Appeal shall have jurisdiction to hear and determine appeals *from any judgment or order of the High Court*" (my emphasis). But the certification by a HCJ of an application as TWM (or, more accurately, the recording by the court, pursuant to CPR rule 23.12(a), of the fact that it considers an application to be TWM) is neither a judgment nor an order of the High Court, so it falls outside the scope of the jurisdiction conferred by section 16(1) of the 1981 Act: see R (Wasif) v Home Secretary [2016] EWCA Civ 82, [2016] 1 WLR 2793, at [25] to [26] of the judgment of the court delivered by Underhill LJ (sitting with Lord Dyson MR and Floyd LJ).

4. In the light of those twin constraints, it is hard to see what practical purpose would be served by the existence of an independent right of appeal to this court against an order under CPR rule 52.4(3) which prevents an applicant for PTA, whose application has been refused and certified as TWM, from seeking an oral renewal hearing. The most that the applicant could hope to achieve on such an appeal, in the unlikely event that it crossed the threshold of permission for a second appeal, is that the judge's refusal of PTA would be reconsidered at an oral hearing, even though the judge had certified the application as TWM, and the TWM certification could not itself be appealed.

5. In my view, neither the relevant rules of court nor the underlying statutory provisions require us to hold that such a right of appeal exists. As I shall explain, I consider the correct view to be that an order precluding an oral renewal hearing under rule 52.4(3)

is properly to be regarded as an integral part of the order refusing PTA itself, with the consequence that section 54(4) of the 1999 Act bars any appeal against it to this court.

6. Before coming to the facts, I will set out the main legislative provisions which are relevant to the question which we have to decide. I have already referred to most of them in these introductory paragraphs.

Primary legislation

7. Section 16 of the Senior Courts Acts 1981 confers jurisdiction on the Court of Appeal to hear appeals from the High Court. So far as material, section 16(1) provides that:

> "Subject as otherwise provided by this or any other Act… the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

Accordingly, subject to any statutory provision to the contrary, the Court of Appeal would in principle have jurisdiction to hear an appeal from an order of the High Court granting or refusing PTA to the High Court.

8. Section 54 of the Access to Justice Act 1999 states that:

> "(1) Rules of court may provide that any right of appeal to—
>
> …
>
> (b) the High Court, or
>
> (c) the Court of Appeal,
>
> may be exercised only with permission.
>
> …
>
> (4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)."

Section 54(4) is the provision which bars any appeal from the grant or refusal of PTA, thereby giving statutory expression to the old common law rule in Lane v Esdaile [1891] AC 210. Where section 54(4) applies, it plainly prevails over section 16(1) of the Senior Courts Act 1981 because it provides "otherwise". The words in brackets at the end of section 54(4) do, however, expressly preserve any right under rules of court to make a further application for PTA to the same or another court, for example by way of a renewal hearing.

Rules of court

9. CPR rule 52.4 has been in substantially the same form since 3 October 2016. In its current form, which applies to the events with which we are concerned, the rule provides as follows:

> "**Determination of applications for permission to appeal to the County Court and High Court**
>
> 52.4 (1) Where an application for permission to appeal is made to an appeal court other than the Court of Appeal, the appeal court will determine the application on paper without an oral hearing, unless the court otherwise directs, or as provided for under paragraph (2).
>
> (2) Subject to paragraph (3) and except where a rule or practice direction provides otherwise, where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at an oral hearing.
>
> (3) Where in the appeal court a judge of the High Court, a Designated Civil Judge or a Specialist Circuit Judge refuses permission to appeal without an oral hearing and considers that the application is totally without merit, the judge may make an order that the person seeking permission may not request the decision to be reconsidered at an oral hearing.
>
> (4) [*This paragraph defines the meaning of "Specialist Circuit Judge"*]
>
> (5) Rule 3.3(5) (party able to apply to set aside, etc., a decision made of court's own initiative) does not apply to an order made under paragraph (3) that the person seeking permission may not request the decision to be reconsidered at an oral hearing.
>
> (6) A request under paragraph (2) must be filed within 7 days after service of the notice that permission has been refused."

10. As the notes in the White Book (2020 edition) helpfully record, at paragraph 52.4.1, paragraphs (1) and (2) of rule 52.4 were new provisions when enacted by the Civil Procedure (Amendment No 3) Rules 2016 (SI 2016/788) with effect from 3 October 2016, but paragraphs (3) to (6) replicate what were previously paragraphs (4A)(a), (4A)(b), (4B), and (5) in the former rule 52.3.

11. The particular significance of the new paragraphs (1) and (2) of rule 52.4 is that they preserved the right of an applicant for PTA to an appeal court below the Court of Appeal to request an oral renewal hearing within 7 days after an initial refusal of permission on paper. This was necessary, because different provisions were made with effect from 3 October 2016 in relation to applications for PTA to the Court of Appeal. Those provisions are contained in rule 52.5, and as is well known they remove the automatic right to a renewal hearing after an application to the Court of Appeal for PTA has been determined on paper, although the judge who considers the application on paper may direct that the application be determined at an oral hearing, and must do so if of the opinion that the application cannot be fairly determined on paper without an oral hearing: see rule 52.5(1) and (2).

12. In courts below the Court of Appeal, the right to an oral renewal hearing under rule 52.4(2) is expressly made subject to paragraph (3), which applies where in the appeal court a HCJ, or other judge of designated seniority, refuses PTA without an oral hearing and considers the application is TWM. It is important at this point to note the provisions of CPR rule 52.20(5) and (6), which in such circumstances require the court's order to "record the fact that it considers the application [*for PTA*]… to be totally without merit", and direct that "the court must at the same time consider whether it is appropriate to make a civil restraint order." It follows that where a HCJ, or other judge of specified seniority, refuses an application for PTA without an oral hearing and considers the application to be TWM, this must be certified in the court's order, and the judge must also go on to consider the making of a civil restraint order. It is in that context that the judge is also authorised by paragraph (3) of rule 52.4 to "make an order that the person seeking permission may not request the decision to be reconsidered at an oral hearing." If the judge does decide to make a further order in those terms, the effect of paragraph (5) is that the applicant for PTA may not request that further order to be reconsidered at an oral hearing, even though the order was made of the court's own initiative.

13. The history of the rules in paragraphs (3) to (5) of rule 52.4 is again helpfully explained in the White Book, at paragraph 52.4.4:

> "The rules in paras (3) to (5) of r.52.4, which have the effect of preventing the reconsideration of an application for permission to appeal at an oral hearing, were originally enacted by the Civil Procedure (Amendment) Rules 2006 (SI 2006/1689) for the purpose of enabling the Court of Appeal to make an order to the effect that a person refused permission to appeal may not request the decision to be reconsidered at a hearing if the court considered that the application was TWM. By the Civil Procedure (Amendment No 2) Rules 2012 (SI 2012/2208) the powers exercisable by the Court of Appeal in this respect were extended to judges sitting at other levels in the appellate hierarchy and dealing with applications for permission to appeal."

14. It is clear from the language of paragraph (3) of rule 52.4 that an order removing the right to an oral renewal hearing is not an automatic consequence of the TWM certification. The judge has a discretion to exercise, and although there are probably few cases in which the judge will consider it helpful to have an oral hearing after certifying the application as TWM, the wording of the rule requires him to direct his mind to the question before making an order under the paragraph. In this respect, the rule differs from the rules relating to permission to apply for judicial review which were considered by this court in the Wasif case: see the judgment of Underhill LJ at [8].

15. It is also convenient to note at this point that the meaning of TWM is that the application in question is "bound to fail": see Wasif at [9] to [12] and R (Grace) v Secretary of State for the Home Department [2014] EWCA Civ 1091, [2014] 1 WLR 3432. Certification of an application as TWM is therefore reserved for cases which have no conceivable prospect of success, and it follows that no judge will lightly certify an application as TWM. As Maurice Kay LJ said in the Grace case, at [15]:

> "no judge will certify an application as [TWM] unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case."

This guidance was repeated in Wasif at [17(2)].

Facts

16. For the purposes of the jurisdiction issue, it is only necessary to give a brief description of the background facts.

17. The claimant, L. M. Associates Limited ("LMA"), is a firm of architects, which was engaged in 2000 by the first defendant Howlett Estates Limited ("Howlett Estates"), in connection with the proposed development of a hospital site in Haywards Heath in Sussex.

18. The third defendant, Mr William Gibbeson, was a director and 50% shareholder of Howlett Estates. He and a business partner, Mr Stephen Goldberg, carried on business together as property developers. The second defendant, Cadebrook Limited ("Cadebrook"), was an associated company of which Mr Gibbeson was also a director. Mr Goldberg died in 2012.

19. LMA carried out a large amount of work for Howlett Estates before its retainer was terminated in 2008. Various disputes had by then arisen, which led eventually to a claim by LMA in the County Court at Leicester seeking recovery of allegedly unpaid fees and a bonus, together totalling approximately £157,000, and damages for breach of copyright. The claim was brought against Howlett Estates and Cadebrook, it being alleged that Cadebrook had also become contractually liable for the sums in dispute. Mr Gibbeson was not at that stage a party to the proceedings.

20. The action was tried by Recorder Rhodri Davies QC over three days in October 2015. In a lengthy reserved judgment, reflected in his order dated 14 April 2016, he gave judgment for LMA against Howlett Estates in the sum of £24,175.43, but dismissed LMA's other claims, including the claim against Cadebrook. Howlett Estates was ordered to pay 75% of LMA's costs of the action on the standard basis, with an interim payment of £30,000 on account of those costs to be paid together with the judgment sum by 5 May 2016.

21. None of those sums was paid, and within a few days of the order Mr Gibbeson took steps to place Howlett Estates in voluntary liquidation.

22. In due course LMA applied for a non-party costs order against Mr Gibbeson and his wife, Susan, who had been the company secretary of Howlett Estates at the material time. In accordance with the usual procedure, Mr and Mrs Gibbeson were joined as parties to the proceedings for the purposes of costs only. The application was heard on 30 July 2019 by Her Honour Judge Hampton. LMA was represented at the hearing, as it has been before us, by Simon Sinnatt of counsel. Mr and Mrs Gibbeson were represented at the hearing by Caroline Allen of counsel, but by Jack Holborn of counsel (who also appeared before us) on 7 October 2019 when the judge dealt with

consequential matters following the handing down of her reserved judgment on 9 September 2019.

23. By her order dated 7 October 2019, HHJ Hampton made a third party costs order against Mr Gibbeson, on the basis that he was to be jointly and severely liable with Howlett Estates for the payment of LMA's costs pursuant to the relevant paragraphs of the order made by Recorder Rhodri Davies QC in April 2016. The claim against Mrs Gibbeson was, however, dismissed. Mr Gibbeson was also ordered to pay 80% of LMA's costs of the application, with a payment on account of £16,000 to be made by 28 October 2019. He was refused permission to appeal.

24. Mr Gibbeson then made an application for PTA to the High Court. This was dealt with on paper by Griffiths J on 17 December 2019. Mr Gibbeson's grounds of appeal, settled for him by Mr Holborn, extended over some eight pages. Mr Holborn apologised for their length, submitting that they were "inevitably, overlapping and extensive": see paragraph 10 of the grounds. They alleged various errors of law and procedure by the judge, and attacked some of her key findings of fact. Paragraph 9 of the grounds summarised the proposed appeal as follows:

> "This is a case where a director of a defendant company has been made personally liable for the costs of a successful claimant in circumstances where he neither funded the litigation, nor directed the company to run an improper or entirely unmeritorious defence. The Appellant submits, reviewing the authorities, this is a decision without precedent, and manifestly wrong."

25. Griffiths J refused the application for PTA on paper and without an oral hearing. This was, of course, the normal procedure envisaged (or, more accurately, required in the absence of a contrary direction) by CPR rule 52.4(1). The order of Griffiths J recited that he had read the appellant's notice, the grounds of appeal, Mr Holborn's skeleton argument in support of the application, the judgment under appeal, and other relevant documents in the appeal bundle.

26. The operative part of the order then reads as follows:

> "1. Appellant's application for permission to appeal is refused. This appeal is wholly without merit.
>
> 2. REASONS:
>
> (1) The appeal is against the judge's exercise of a discretion in relation to costs, given to her by section 51 of the Senior Courts Act.
>
> (2) The judge correctly directed herself in law by reference to the authorities.
>
> (3) The judge clearly identified the factors which led her to decide that [*Mr Gibbeson*] (but not [*Mrs Gibbeson*]) should be

> jointly liable for the costs as a non-party. They were relevant and sufficient in fact and law to justify the decision she made.
>
> (4) The basis upon which she made her decision made it unnecessary for her to order or allow cross examination of witnesses and this was particularly so given that this was an application for costs and therefore a form of satellite litigation which had to be conducted on the principles of the overriding objective which are fully Article 6 compliant.
>
> (5) The judge considered the suggestion that more warning should have been given and decided that aspect in paragraphs 17-18 of her judgment with care. No criticism can be made of her reasoning or of her conclusion.
>
> (6) It is not the function of an appeal to ask the court to construe and resolve any disagreement about the true construction of an order made below.
>
> (7) The suggestions that the learned judge failed to consider various matters or to understand the evidence in various respects is based on disagreement with conclusions which she was entitled to reach and did reach in a soundly based and fully reasoned judgment.
>
> 3. Pursuant to CPR 52.3(4A)(a), the appellant may NOT request this decision to be reconsidered at a hearing. This decision is final and is not subject to review or appeal."

27. The judge's reference in paragraph 3 of the order to CPR 52.3(4A)(a) should have been to the materially identical paragraph (3) of rule 52.4, which had replaced it in 2016: see paragraph [10] above. It has not been suggested that anything turns on this error, which could if necessary have been corrected under the slip rule.

28. That, one might have thought, would have been the end of the matter. Mr Gibbeson's application for PTA had been given careful consideration by a judge of the High Court, who not only refused PTA but also certified the appeal as TWM, and decided in exercise of his discretion not to permit his decision to be reconsidered at a renewal hearing. Griffiths J clearly intended his decision to be "final and… not subject to review or appeal".

29. Mr Gibbeson, however, was not content to let matters rest there. By an application notice dated 31 January 2020, but apparently not sealed until 3 April 2020, he sought permission to re-open his appeal pursuant to CPR rule 52.30 "due to exceptional circumstances". The application was accompanied by fourteen pages of detailed written submissions by Mr Holborn, and brief written evidence from Mr Gibbeson's solicitor, Mr Andrew Hornsby, who said:

> "Having taking the advice of counsel, my client wishes to seek to re-open the appeal on the basis that insufficient reasons are given for dismissing the appeal and/or certain grounds of appeal

> have not been dealt with by the judge, including in respect of the failures of the judge below to make findings as to causation and funding of the underlying claim. The lack of reasons are such that the judicial process has been undermined and there would be a real injustice if the appeal is not re-opened. There is no alternative remedy. Fuller reasons are set out in the submissions provided with this application.
>
> It has come to [*the applicant's*] attention today – after this application was drafted – that Griffiths J may have been wrong to say his order could not be appealed. An appeal against his declaration that the appeal was totally without merit is being drafted to be filed as soon as practicable. This application is made in the event Griffiths J was correct."

30. The suggestion that it might have been possible to appeal against Griffiths J's certification of the appeal as TWM was, on any view, misconceived. As I have explained, the judgment of this court in Wasif makes it clear that the Court of Appeal has no jurisdiction to entertain an appeal from the certification by a HCJ of an appeal as TWM.

31. CPR rule 52.30 is headed "Reopening of final appeals". For present purposes, it is enough to quote the first two paragraphs of the rule:

> "(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal."

The authorities on CPR rule 52.30 emphasise the truly exceptional nature of the jurisdiction which it confers. It may properly be invoked only "where it is demonstrated that the integrity of the earlier litigation process… has been critically undermined", and there must also exist a powerful probability that the decision in question would have been different if the integrity of the earlier litigation process had not been critically undermined: see generally In re Uddin (A Child) [2005] EWCA Civ 52, [2005] 1 WLR 2398 and the review of the subsequent case law by this court in R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 860, [2018] 1 WLR 5161, at [9] to [15].

32. Mr Gibbeson's application under CPR 52.30 was considered on paper by Soole J on 27 March 2020. By his written order of that date, sealed on 3 April 2020, he ordered that Mr Gibbeson's application to reopen his appeal be stayed pending his application to the

Court of Appeal for PTA, following which the application should be restored to a HCJ for further consideration.

33. The reasons which Soole J gave for adopting this course need to be set out in full:

> "1. My provisional view is that, whereas s. 54(4) Access to Justice Act 1999 precludes an appeal to the Court of Appeal against an order refusing permission to appeal from a lower court, it does not preclude an appeal against a further order made pursuant to CPR 52.4(3): see by analogy the observations in Clark v Perks [2001] 1 WLR 17 per Brooke LJ at [21].
>
> 2. If so, the consequence of a successful appeal against the CPR 52.4(3) order would be restoration of the opportunity to request reconsideration at an oral hearing of the Appellant's application for permission to appeal the Orders of HHJ Hampton.
>
> 3. If so, the Appellant's application to reopen the application for permission to appeal pursuant to CPR 52.30(1) would fail in any event to satisfy condition (c) thereof, namely that "there is no alternative effective remedy".
>
> 4. However a stay should be granted against the eventuality that the Court of Appeal decides that s. 54(4) AJA 1999 precludes an appeal against an order made pursuant to CPR 52.4(3).
>
> 5. For the avoidance of doubt this decision is made without consideration of whether the Appellant's application demonstrates any arguable basis for satisfaction of conditions (a) and (b) in CPR 52.30(1)."

34. It can be seen, therefore, that the essence of Soole J's reasoning lay in his provisional view that section 54(4) of the 1999 Act does not preclude an appeal against a further order made pursuant to CPR rule 52.4(3). As Soole J rightly recognised, the effect of such an appeal, if successful, could go no further than restoring an opportunity for Mr Gibbeson to request reconsideration at an oral hearing of his application for PTA which Griffiths J had dismissed on the papers.

35. On 4 February 2020 Mr Gibbeson's solicitors submitted appeal papers to the Civil Appeals Office of the Court of Appeal, seeking to appeal against the order of Griffiths J. The grounds of appeal, settled by Mr Holborn, contended that his order was in fact appealable, despite the judge's statement that his decision was final and not subject to review or appeal. However, the grounds also said that the appeal "must be… against the refusal of permission to appeal". Given the clear terms of section 54(4) of the 1999 Act, this was an ambitious contention, and it is unsurprising that the papers were returned unissued on 15 February 2020 under cover of a letter stating that the papers had been referred to a master of the Court of Appeal who drew attention to section 54(4) and ruled that the Court of Appeal lacked jurisdiction to hear the application for PTA.

36. After Soole J had made his order, Mr Gibbeson's solicitors re-submitted the appeal papers on 15 April 2020 with amended grounds of appeal and an amended supporting

skeleton argument. The amended grounds asked the court to reconsider whether it had jurisdiction to hear the appeal, on the footing that the appeal would be against the decision of Griffiths J under rule 52.4(3) to refuse to permit an oral renewal hearing. The papers were again referred to a master, who again ruled that the court lacked jurisdiction to entertain the appeal. The reason given, however, was that the court had no jurisdiction to entertain an appeal from a TWM certification made by the High Court when refusing an application for PTA. It is fair to say that this reasoning did not engage with the argument that the intended appeal was now against the judge's refusal of an oral renewal hearing, and this was duly pointed out in a letter to the court from Mr Hornsby on 16 April. He emphasised that the proposed appeal was against the order made under paragraph (3), not the TWM declaration. He accepted that the application raised a novel issue, on which there was no clear authority, and asked the court to again reconsider the question of jurisdiction.

37. The papers were then referred to Newey LJ, who on 20 April 2020 gave directions that the PTA application be listed before three judges for a hearing on notice to the respondent, LMA. Newey LJ further directed LMA to file and serve written submissions, including in particular submissions on the question of jurisdiction, and to attend the hearing. It was also made clear that the hearing was to be of the PTA application alone, and not a rolled-up hearing with the appeal to follow if permission were granted.

38. Pursuant to those directions, Mr Sinnatt filed helpful written submissions on behalf of LMA and attended the hearing, although in the event we only found it necessary to receive very brief oral submissions from him.

Submissions

39. Mr Holborn invited us to uphold the provisional reasoning of Soole J. He submitted that the master had wrongly overlooked the existence of a right of appeal against the order of Griffiths J refusing an oral renewal hearing. He referred us to Clark v Perks, where this court reviewed the then new provisions governing civil appeals in England and Wales which had been introduced in May 2000. In the course of that review, the court considered section 54(4) of the 1999 Act, and said (in the judgment of the court delivered by Brooke LJ) at [20].

> "These words mean what they say. In the judgment of Robert Walker LJ in *Riniker v University College London (Practice Note)* [2001] 1 WLR 13, with which Brooke LJ agreed, he explained that this court, whose jurisdiction is wholly statutory, has no inherent jurisdiction to hear an appeal against such a decision (unless it can be truly said that there was no decision at all, for which see *Daisystar Ltd v Town and Country Building Society* [1992] 1 WLR 390, 394). On the other hand if, on such an occasion, the appeal court makes a further order, such as a costs order or an order refusing an adjournment, an appeal does in theory lie to this court, with permission, although it is likely to be a very rare case in which such permission would be granted."

40. It will be noted that in Clark v Perks the examples given of further orders which would not be caught by section 54(4) were a costs order and an order refusing an adjournment, neither of which are likely to involve consideration of the same factors as the application for PTA. Moreover, even in relation to such unrelated matters, the court was at pains to observe that, although an appeal would in theory lie to this court, with permission, the grant of such permission was likely to be "very rare". The court was also not concerned with cases certified as TWM. At that date, the rules provided a general right to an oral renewal hearing if PTA was refused on the papers, and this right was expressly preserved by the words in brackets at the end of section 54(4). It was only in 2006 that the rules were amended so as to give the Court of Appeal the power to order that an application for PTA should not be reconsidered as an oral hearing where it was TWM, and it was only in 2012 that the power to refuse an oral hearing in such cases was extended to orders refusing PTA made by HCJs or specialist circuit judges.

41. Mr Holborn also reminded us that the basic jurisdiction of the Court of Appeal to hear appeals against decisions of the High Court is contained in section 16(1) of the Senior Courts Act 1981, which expressly confers "jurisdiction to hear and determine appeals from any… order of the High Court." An order refusing an oral renewal hearing under CPR rule 52.4(3) was clearly an order of the High Court, submitted Mr Holborn, and therefore fell within the clear wording of the section. He further submitted that, if Parliament had intended an order made under rule 52.4(3) to be unappealable, it would have said so expressly, in the same way as paragraph (5) of the rule expressly provides that such an order may not be reconsidered at an oral hearing.

42. More generally, Mr Holborn submitted that, even in TWM cases, the right to an oral hearing provides an important safety valve for the rare cases where the judge is wrong to certify an application for PTA as TWM. The certification cannot itself be appealed to the Court of Appeal for the reasons given in Wasif, but that makes it all the more important that the right to an oral renewal hearing should not be unfairly removed, and that an appeal should lie to this court against an order removing that right under paragraph (3). Any concerns that this might lead to a flood of unmeritorious applications for PTA against refusals of oral renewal hearings in TWM cases should be remedied, if appropriate, by further amendments to the rules, and not by adopting a strained construction of rule 52.4(3) in its present form.

43. On behalf of LMA, Mr Sinnatt submits that this court lacks jurisdiction to hear the proposed appeal. The position is governed by section 54(4) of the 1999 Act, which expressly removes the right of appeal to this court which an appellant would otherwise have, under section 16(1) of the 1981 Act, against an order made by a HCJ refusing PTA to the High Court. The fallacy in the argument for Mr Gibbeson, says Mr Sinnatt, is that it seeks to separate the order refusing an oral renewal hearing from the refusal of PTA where the application is certified as TWM pursuant to rule 52.4(3). In such cases, the refusal of an oral hearing is an integral part of, and arises directly from, the substantive refusal of PTA. It is therefore caught by the prohibition in section 54(4) of the 1999 Act, and cannot generate a freestanding right of appeal to this court.

44. Mr Sinnatt distinguishes Clark v Perks on the basis that the kind of further orders contemplated in that case, against which an appeal would at least in theory lie to this court, were orders made on separate applications for different relief which require consideration of factors other than the merits of the proposed appeal. By contrast, he submits, an order under rule 52.4(3) removing the right to an oral renewal hearing is

ancillary to, and reinforces, the refusal of PTA in a case which the judge, ex hypothesi, has certified as TWM. The order is therefore properly to be regarded as part and parcel of the refusal of PTA itself, and is reserved for cases where the judge considers the lack of merit so obvious that the time and resources of the court should not be wasted by permitting an oral renewal hearing.

45. In cases of this extreme character, which in his brief oral submissions he suggested might be dubbed "TWM plus", Mr Sinnatt says it is entirely right and appropriate that the only possibility of further recourse for the appellant should be an application to reopen his application for PTA under the truly exceptional jurisdiction conferred by CPR 52.30. Mr Gibbeson has already instructed his lawyers to make such an application, and it should now be left to proceed in the usual way. Soole J was wrong to consider that there was an alternative effective remedy, because any appeal to this court against the refusal of an oral renewal hearing is conclusively barred by section 54(4).

Discussion and conclusion

46. As I indicated in the first part of this judgment, I would accept the submissions of Mr Sinnatt. It seems clear to me that Parliament could not have intended to confer a freestanding right of appeal to this court from an order refusing an oral renewal hearing under CPR 52.4(3), in circumstances where such an order can only be made if the judge refuses an application for PTA and certifies it as TWM. As I have explained, neither the refusal of PTA nor the TWM certification could ground an appeal to this court, so it would be paradoxical if the addition of an order refusing the right to an oral renewal hearing were to unlock the door to an onward appeal. Such a result would be wholly at odds with the obvious purpose of TWM certification, which is to prevent cases which are wholly unmeritorious from occupying further judicial time and scarce court resources.

47. It is true that rule 52.4(3) itself expressly envisages that the judge may permit an oral renewal hearing, in the exercise of his discretion, even where he considers the application for PTA to be TWM on the papers. The cases where a judge will consider it appropriate to permit a renewal hearing, having certified an application for PTA as TWM, will probably be few in number, but the need to give consideration to the possibility is a valuable discipline, and it is possible to envisage circumstances where such an order will be appropriate. One example could be where the judge feels some doubt about the TWM certification, or where he may wish there to be a fuller exploration of the history of former applications by the appellant which have been so certified. The possibility of an oral renewal hearing therefore provides a valuable safeguard for the appellant, in addition to his "long-stop" right to make an application under CPR rule 52.30 if PTA is refused.

48. None of this, however, leads to the conclusion that, if the judge decides to exercise his discretion in favour of making an order under CPR 52.4(3), a right of appeal should lie against the refusal. On the contrary, the refusal of the right to a renewal hearing operates to reinforce the refusal of PTA and the TWM certification, and is in my view rightly regarded as an integral part of the refusal of PTA itself. If that is the correct analysis, Mr Holborn was constrained to accept, in his oral submissions, that any further appeal to this court (otherwise than pursuant to a successful application made under CPR 52.30) would be prohibited by section 54(4) of the 1999 Act.

49. I find further support for this conclusion in the elaborate care taken by the draftsman of what are now paragraphs (3) to (5) of CPR rule 52.4 to exclude any right to request an oral reconsideration of an order made under paragraph (3). In my judgment it would make no sense for such an order to be appealable where there is no prior right to request an oral reconsideration of it, and where the scope of any such appeal, were it possible to bring one, would be so severely circumscribed as to make it virtually meaningless: see my introductory observations at [3] and [4] above.

50. Against this background, I see no difficulty in adopting a purposive construction of paragraph (3) whereby an order refusing permission for an oral renewal hearing is to be treated as part of the order refusing PTA, and not as an independent order of the kind exemplified in Clark v Perks. In my respectful opinion, Soole J's provisional view to the contrary was mistaken, and the Civil Appeals Office was right to decline to accept Mr Gibbeson's proposed appeal papers on the ground that jurisdiction to entertain the appeal is precluded by section 54(4) of the 1999 Act.

51. Mr Holborn opened the application to us with enthusiastic charm and a realistic appreciation of the difficulties in his path. In the event, however, we only needed to hear briefly from Mr Sinnatt, and at the conclusion of the hearing we announced that the application for PTA would be dismissed, for reasons which we would later give in writing. This judgment contains my reasons for coming to that conclusion.

52. Since this application for PTA has been heard by a full court, and since it deals with an issue of jurisdiction on which there is no prior authority, we give permission for our judgments to be cited pursuant to paragraph 6.1 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 (CA).

Flaux LJ:

53. I agree.

Asplin LJ:

54. I also agree.