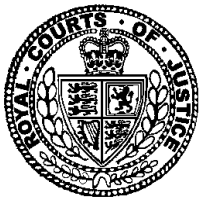

Neutral Citation Number: [2024] EWCA Civ 516

Case No: CA-2023-001191

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
His Honour Judge Monty KC sitting as a Judge of the High Court
[2023] EWHC 1270 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2024

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE NUGEE
and
MR JUSTICE COBB

- -

Between :

KEVIN OSLER	**Claimant / Appellant**
- and -	
(1) MARLENE OSLER **(2) DALE OSLER** **(3) JOLENE OSLER** **(as Personal Representatives of the late Roger Osler)**	**Defendants/ Respondents**

- -
- -

Mark Galtrey (instructed by **Ebery Williams**) for the **Appellant**
Dov Ohrenstein and Matthew Tonnard (instructed by **Roythornes Ltd**)
for the **1st and 3rd Respondents**

Hearing date: 30 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court arises out of an arbitration between the parties in relation to a farming partnership formerly carried on between the Appellant Mr Kevin Osler and his brother Mr Roger Osler. I will refer to them by their first names, without intending any disrespect. Roger died in 2019. The Respondents (his wife and children) are his executors.

2. The arbitrator decided various issues in an interim award. Kevin sought to appeal her decision on one of these on a point of law under s. 69 of the Arbitration Act 1996 (**"the Act"**). That was refused on paper by Joanna Smith J. Her order however provided that any party affected by it could apply to have it set aside or varied. Kevin applied under that provision. The application was heard and dismissed by HHJ Monty KC, sitting as a Judge of the High Court. Kevin now appeals to this Court against the decision of HHJ Monty with permission granted by Asplin LJ.

3. Before the hearing of the appeal Popplewell LJ raised with the parties the question whether this Court had any jurisdiction to hear the appeal, given the terms of s. 69(6) of the Act. This was not an objection that had been taken by Mr Dov Ohrenstein, who appeared for the 1st and 3rd Respondents. But since it goes to the jurisdiction of the Court, we have to satisfy ourselves that we do have jurisdiction and can hear the appeal.

4. Mr Mark Galtrey, who appeared for Kevin, submitted that we did. But I have come to the conclusion, as explained below, that we do not. In those circumstances the appeal falls to be dismissed without consideration of the merits.

Facts

5. By a deed of partnership dated 9 February 1982 a partnership was established under the name Osler Brothers to farm land in Southery, near Downham Market in Norfolk. The original partners were Philip Osler and his wife Ivy, and their three children (Kevin, Roger and their sister Angela). Ivy and Angela in due course each retired from the partnership, and Philip died in 2006. Thereafter Kevin and Roger were the only remaining partners.

6. Roger died on 15 June 2019. By clause 12(a) of the partnership deed Kevin had an option to purchase his share in the capital and assets of the partnership from his estate. He exercised the option on 11 September 2019. Roger's executors accepted that it had been validly exercised.

7. There was however a dispute as to the price payable by Kevin. By clause 12(b) of the partnership deed the amount payable was:

> "the sum standing to the account of such partner … in respect of capital of the partnership and undrawn profits."

8. Clause 8 of the partnership deed provided that:

> "…on the 5th day of April, 1982 and on the 5th day of April in each succeeding year a general account shall be taken of all the assets and

> liabilities and of the profits and losses of the partnership (including therein profits and losses earned and incurred but not yet actually received or paid) for the preceding year and shall be signed by each partner…"

There should therefore have been accounts drawn up and signed each year. But the last signed accounts were in fact as at April 2016. Thereafter accounts were prepared but not signed. Both the signed accounts up to April 2016, and the unsigned accounts for subsequent years, were prepared by the partnership's accountants under the historical cost convention.

9. Both parties agreed that the amount payable under the option was to be calculated by reference to accounts to be drawn up as at 5 April 2019. Kevin's case was that such an account was to be drawn up by reference to the accounting conventions that had been consistently applied in respect of the partnership accounts before Roger's death, that is the historical cost convention. The estate's case was that Roger had been entitled, and his executors were equally entitled, to have an account drawn up as at 5 April 2019 which reflected the current market value of the partnership assets rather than their historic cost. It was said that that would make a significant difference to the values ascribed to the partnership assets and hence to the purchase price under the option, and it is not difficult to accept that that would be the case.

10. By an arbitration agreement dated 9 July 2020 Ms Emily Windsor of counsel was appointed as arbitrator to give a reasoned award in relation to the matters in dispute between the parties. It was subsequently agreed that she should determine three preliminary issues, of which this issue (which I will call **"the valuation issue"**) was one. The others concerned a question whether a particular tenancy was an asset of the partnership or not, and whether the proceeds of a policy on Roger's life belonged to Kevin or the partnership. Neither is of any relevance to the appeal and no more need be said about them.

11. Ms Windsor published her interim award on these three issues on 6 May 2022. So far as the valuation issue was concerned, she preferred the argument for Roger's estate. She therefore answered the preliminary issue in the following terms:

> "The correct basis of valuation in respect of the option exercised by Kevin on 11 September 2019 (pursuant to clause 12(a) of the Partnership Agreement dated 9 February 1982) is that the value of Roger's share is to be calculated by reference to the general account due to be prepared under Clause 8 of the Partnership Agreement as at 5 April 2019, with the assets valued on an open market basis rather than a historic basis. In other words, a revaluation of the Partnership assets is required."

Proceedings

12. By a claim form issued on 31 May 2022 Kevin sought an order under s. 69 of the Act granting him permission to appeal the valuation issue, and if permission were granted an order varying the relevant part of the award so that the valuation was based on the historic book value recorded in the partnership's accounts.

13. The application for permission to appeal was put before Joanna Smith J as a paper

application and dealt with by her without a hearing. By Order dated 17 October 2022 (**"the Joanna Smith Order"**) she refused permission to appeal. I should set out the substantive part of the Order. After the recitals, it provided as follows:

> "**IT IS ORDERED THAT:**
>
> 1. The application for permission to appeal is refused.
>
> 2. **This Order has been made by the court without a hearing pursuant to CPR PD 52B paragraph 7.1. Any party affected by the order may apply to have it set aside or varied within 7 days of the date of service upon that person. The application may be made by CE-filing a letter of request under the appeal reference number above, or alternatively by email to ChanceryJudgesListing@justice.gov.uk or by post to the Chancery Appeals Office, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL quoting the above appeals reference number. A copy of the application must be served on all other parties at the same time.**
>
> **REASONS:**
>
> 1. There is no issue of public importance. The Arbitrator did not apply an inappropriate presumption in the context of construing the relevant provisions of the Partnership Agreement. On the contrary, she expressly identified that the correct approach was to ascertain what the parties intended by the words they actually used.
>
> 2. There is no basis whatever on which to determine that the Arbitrator's decision is "obviously wrong".
>
> 3. In all the circumstances it is not just and proper for the court to determine the questions raised (see section 69(3) of the Arbitration Act 1996)."

Paragraph 2 is in bold in the original.

14. By letter dated 21 October 2022 Mr P R Williams of Ebery Williams, Kevin's solicitors, applied to the Court to set aside the Joanna Smith Order.

15. That application was dealt with at an oral hearing by HHJ Monty on 24 May 2023. He dismissed the application for the reasons given in a reserved judgment handed down on 30 May 2023 at [2023] EWHC 1270 (Ch). His judgment was given effect to by an Order also dated 30 May 2023 (**"the Monty Order"**). This read as follows:

> "**UPON** the Application by the Applicant made by letter dated 21 October 2022 to set aside or vary the order of 17 October 2022
>
> …

IT IS ORDERED that:

1. The Application is dismissed

2. The Applicant is to pay the Respondents' costs which are summarily assessed in the sum of £11,500 inclusive of VAT

3. Permission to appeal refused".

16. In essence he held that on an application under s. 69 of the Act for permission to appeal an arbitration award the procedural position was binary in the sense that the application is either to be determined on paper or at a hearing. Joanna Smith J had refused permission on paper. That was a final determination of the application for permission. It was therefore the end of the road for the application because (despite the terms of paragraph 2 of her Order, which he held was included in error) there was no right to an oral hearing. He therefore dismissed the application.

17. As paragraph 3 of his Order indicates, HHJ Monty also refused permission to appeal. In the N460 form giving his reasons for doing so, he described the issue as follows:

> "The issue was whether the court can entertain a renewed oral application for permission to appeal an arbitral award, under section 69 of the Arbitration Act 1996, where permission had been refused on paper, but where the order on its face went on to give the right to apply to set aside or vary that order."

18. By an Appellant's notice submitted on 20 June 2023 Kevin applied to this Court for permission to appeal the Monty Order. That came before Asplin LJ and by Order dated 26 September 2023 she granted permission to appeal.

Does this Court have jurisdiction to hear the appeal?

19. This question turns on s. 69 of the Act. It is helpful to set it out in full. It provides as follows:

> "**69 Appeal on point of law**
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further

> appeal.
>
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

20. The question is whether s. 69(6) applies to the present appeal against the Monty Order. If it does "the leave of the court" is required. By s. 105(1) "court" in the Act means (in England and Wales) the High Court or the county court. So where leave to appeal is required under s. 69(6), it has to be given by the lower court and cannot be given by the Court of Appeal. (The same applies to the requirement in s. 69(8) for the leave of the court to be obtained to appeal a substantive decision under s. 69). There is no dispute about this: see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388. HHJ Monty of course refused permission to appeal against his Order. So if s. 69(6) does apply, Asplin LJ's purported grant of permission to appeal was of no effect and we have no jurisdiction to hear the appeal.

21. The question whether s. 69(6) applies depends on whether HHJ Monty's decision to dismiss the application was a decision "under this section to grant or refuse leave to appeal" (that is, to appeal from the arbitrator). I consider that it was. In order to test this, one has to ask what Kevin was applying for. Although Mr Williams in his letter in terms only applied for the Joanna Smith Order to be set aside, it seems plain that in fact he was asking for it to be varied and for leave to appeal against the arbitrator's award to be given. He said that he hoped the Court "may agree that this is in fact a matter of public importance" but regardless of that the arbitrator's decision was indeed "obviously wrong".

22. That is confirmed by Mr Galtrey's skeleton argument for the hearing before HHJ Monty. This addresses the merits of the challenge to the award at length and concludes as follows:

> "42. In the circumstances, it is respectfully submitted that the Award was clearly wrong, and/or that by falling into error by in fact applying a presumption of market value, she raised a point of general importance, namely the need for clarity about the lack of any such presumption.
>
> 43. It is therefore submitted that the Order of Mrs Justice Joanna Smith should be set aside, and the Court should allow the appeal, alternatively should grant permission to appeal and give directions for the hearing of the appeal."

23. It is also apparent from HHJ Monty's judgment which makes it clear that the application was for permission to appeal, premised on the assumption that the Joanna Smith Order had conferred the right on Kevin to apply for an oral hearing of the question whether permission should be granted. As he records in the judgment at [43] HHJ Monty was in fact pressed to go on and determine the application for permission to appeal in any event on the basis that he might be wrong about jurisdiction, but declined to do so on the basis that the position on jurisdiction was clear. At [45] he expressed his conclusion as follows:

> "45. In my judgment, the right order is simply to dismiss the application to set aside or vary the Order, and I do so."

24. It also appears from the N460 form that HHJ Monty understood that the application was a "renewed oral application for permission to appeal" (see paragraph 17 above). I think that was an accurate description.

25. The position therefore is this. The application that Kevin brought and that HHJ Monty dismissed was not just an application to set aside the Joanna Smith Order. It was an application to set it aside and replace it with the grant of permission to appeal. HHJ Monty dismissed that application. By doing so, it seems to me, he was necessarily deciding that he would refuse the application for the grant of permission. I do not think it matters that he refused it on procedural or jurisdictional grounds rather than on the merits: the effect of his decision was nevertheless to refuse permission under s. 69 of the Act. It was therefore in the language of s. 69(6) a "decision of the court under this section to grant or refuse leave to appeal". It follows that the leave of the court (that is the High Court not the Court of Appeal) was required to appeal that decision, and that was refused.

26. I therefore consider that we cannot hear the appeal.

Was HHJ Monty right?

27. That makes it unnecessary to consider the merits of the proposed appeal. But I can say that I would not have been persuaded that HHJ Monty was wrong to dismiss the application.

28. It is clear that paragraph 2 of the Joanna Smith Order contained an error as it referred to the Order having been made without a hearing pursuant to PD 52B paragraph 7.1. It is not disputed that this was wrong. PD 52B only applies to appeals (a) within the County Court, (b) from the County Court to the High Court, or (c) within the High Court (PD52B para 1.1). This does not include an appeal under the Act from an arbitrator. This is governed by s. 69 of the Act itself and CPR Part 62.

29. The question is whether the remainder of paragraph 2 of the Joanna Smith Order was also included in error. HHJ Monty thought it was, and would have been prepared to apply the slip rule. I think he was right about that, as the remainder of the paragraph follows PD52B paras 7.3 and 7.4 (which also have no application) and the only rational explanation is that this too was a mistake.

30. Mr Galtrey submitted that Joanna Smith J plainly intended to give Kevin the opportunity to make further arguments at an oral hearing by way of application of s. 69 of the Act. But that seems to me most unlikely. By s. 69(5) of the Act the Court is directed to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required. If she had thought a hearing was required, one would not expect her to have dealt with the matter on paper at all. On the other hand if she did not think that a hearing was required why would she provide for one? In fact of course she did determine the application on paper (by dismissing it), and there is nothing in her reasons which suggests that this was a preliminary or provisional view, subject to revision at an oral hearing: the reasons are trenchantly expressed and clear and the application for permission is simply refused. In those

circumstances it seems to me that HHJ Monty must be right that the explanation for the form of order is that the whole of paragraph 2 was included by mistake (no doubt due to some template for orders made on paper) rather than that Joanna Smith J decided, without explaining why, to make a most unusual order which both purported to dismiss the application and to give the appellant another opportunity to argue it, a procedure that is not contemplated by the Act or by CPR Part 62.

31. On that basis I do not think HHJ Monty made any error in refusing to entertain the application; as he said, once permission to appeal under s. 69 of the Act is refused on paper, that is a determination of the application and the applicant does not have any right to renew it.

Was Joanna Smith J right?

32. This also does not arise. But I think I should add that I see nothing wrong in Joanna Smith J's refusal of permission. The valuation issue turned on the construction of a one-off contract. It did not raise any issue of general public importance. So by s. 69(3)(c)(i) permission to appeal could not be granted unless the award was obviously wrong. Mr Galtrey addressed us on why the award was wrong. He persuaded me that there were reasonable arguments to that effect. But there are also arguments to the contrary that were well articulated by Mr Ohrenstein. As the reported cases show a similar point crops up not infrequently and the cases go both ways. It all depends on a close analysis of the facts and contractual provisions in each case. I think Joanna Smith J was entirely right in the circumstances that the award was not obviously wrong. It is unnecessary to go into any greater detail.

Conclusion

33. For the reasons I have given I would hold that we have no jurisdiction to hear the appeal and the appeal must therefore fail.

Mr Justice Cobb:

34. I agree.

Lord Justice Popplewell:

35. I also agree.