Neutral Citation Number: [2022] EWHC 120 (Ch)

Appeal Reference: CH-2021-000102

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of Deputy Master Rhys dated 12th April 2021
Lower Court Case Number: Case No. BL-2020-001137

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

21st January 2022

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

DR MEERA KAILASH DAL

Claimant/Appellant

and

(1) DR MARCUS BICKNELL
(2) DENISE NATH

Defendants/Respondents

- -
- -

Determination on paper

- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

THE HONOURABLE MR JUSTICE EDWIN JOHNSON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties or their representatives by email and release to Bailii. The date and time for hand-down are deemed to be 10.00am on Friday 21st January 2022

Mr Justice Edwin Johnson:

Introduction

1. In this case the Claimant/Appellant, to whom I will refer as the Appellant, has sought permission to appeal against an order of Deputy Master Rhys made on 12th April 2021 ("the April Order"). Permission to appeal was refused on the paper application by Bacon J, by an order made on 25th October 2021. The Appellant exercised her right to renew the application for permission to appeal at an oral hearing. The oral application came before me on 10th December 2021. Following the hearing of the application I delivered a judgment refusing permission to appeal. My refusal of permission to appeal was set out in my order made on 10th December 2021, but dated 21st December 2021.

2. The Appellant has now issued a further application, dated 6th January 2022 but issued by the court on 12th January 2022 ("the Application"), by which the Appellant seeks the following relief:
   (1) An order setting aside my decision to refuse permission to appeal and/or permission to re-open the application for permission to appeal pursuant to (i) the inherent jurisdiction of the court and/or (ii) CPR 3.1(7), and/or (iii) CPR 52.30.
   (2) A continuation of a stay ordered by Falk J, by an order made on 27th April 2021, pending determination of the application for permission to appeal.
   (3) Directions in relation to the application for permission to appeal and any consequential appeal, if the application is re-opened and permission to appeal is granted.

3. Essentially therefore, the Appellant is seeking, by the Application, to re-open/set aside my refusal of permission, so that she can pursue further her application for permission to appeal against the April Order ("the Permission Application").

4. The Application is supported by a third witness statement of Stacey Whittle, a solicitor with the Appellant's solicitors, who has the day to day conduct of this case for the Appellant. The Application is also supported by written

submissions prepared by Guy Adams, the Appellant's counsel. Those written submissions also incorporate into the materials in support of the Application all of the submissions and authorities which were before me at the oral hearing of the Permission Application on 10th December 2021 ("the December Hearing"). Mr. Adams represented the Appellant at the December Hearing.

5. An approved transcript of the judgment which I delivered at the December Hearing, setting out my reasons for refusing permission to appeal, is not yet available. Ms. Whittle has however exhibited to her third witness statement a note of my judgment ("the Permission Judgment"), which has been compiled from the notes of Mr. Adams' pupil and the Appellant's solicitors. I also retain a good recollection of the December Hearing and of the terms of the Permission Judgment. With the benefit of the note which has been provided and my own recollection, I consider that I am well able to deal with the Application without the benefit of an approved transcript of the Permission Judgment.

6. The Appellant had originally sought to have the Application listed before a different judge to myself. It seemed to me however that it was more sensible for me to deal with the Application, given my familiarity with the case. It also seemed to me that the Application could be dealt with on paper. I communicated these views to the Appellant in the reasons which I included in an order made on 12th January 2022, granting a short stay of paragraph 3 of the April Order, pending the Application being dealt with. In those reasons I also indicated to the Appellant that it was open to her to seek to persuade me out of my views, which were only views and were not a decision, if she wished to do so. By an email to my clerk sent on 13th January 2022, Mr. Adams confirmed that the Appellant was content for the Application to be considered by myself, and on paper.

7. I also considered that I could deal with the Application without calling for submissions from the Defendants/Respondents, to whom I will refer as the Respondents. In accordance with the usual practice the position was the same at the December Hearing, where I heard only from Mr. Adams, on behalf of the Appellant.

8. In terms of the relief sought by the Application it is convenient to take first the application made under CPR 52.30. Before doing so, I set out a summary of the relevant background to the Application. I do this for ease of reference, given that this summary has already been set out in the Permission Judgment which I delivered at the December Hearing. Reference should therefore be made to the Permission Judgment for a fuller account of the relevant background, and also for a full statement of the reasons for which I refused the Permission Application. I also set out in this judgment, before coming to the application under CPR 52.30, the grounds of the appeal for which the Appellant sought permission.

Relevant background

9. The Appellant, Dr. Meera Kailash Dal, is a medical doctor. The First Respondent in the action, Dr. Marcus Bicknell is also a medical doctor. The Second Respondent, Denise Nath, is a nurse and is, I believe, correctly described as an advanced nurse practitioner. The parties to the action are therefore all medical professionals.

10. The Appellant commenced this action by a claim form issued on 11th August 2020. The claim form was expressed to be issued as a Part 8 claim form, although there was a question mark, no longer relevant, over whether the claim form complied with the requirements of Part 8.

11. The primary relief sought by the Appellant in the action is a declaration that she and the Respondents carried on a medical practice in partnership at the Strelley Health Centre in Nottingham. The Appellant also seeks an order to permit her inspection of the books and records of the alleged partnership, and an order for an account to be taken and for all necessary inquiries to be made.

12. As I noted in the Permission Judgment, it is clear from the evidence so far filed in the action that both of the Respondents deny that they were in partnership with the Appellant. I also noted two other matters which emerge from this

evidence. First, there are factual issues to be resolved in the action. Second, and as is usually the case in partnership disputes, in which reference I include disputes, such as the present case, over whether a partnership has come into existence, there has been a serious falling out between the parties, which has resulted in the Appellant including allegations of bad faith in her complaints against the Respondents' conduct.

13. In terms of the procedural history of the action, the Respondents failed to file acknowledgments of service in response to the claim form within the required time limit of 14 days from the service of the claim form. This failure engaged CPR Rule 8.4, which provides as follows:

> *"(1) This rule applies where—*
>
> *(a) the defendant has failed to file an acknowledgment of service; and*
>
> *(b) the time period for doing so has expired.*
>
> *(2) The defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission."*

14. The Appellant was, as I understand the position, concerned to ensure that certain documents, which engaged issues of confidentiality, should not be made public in the action. To that end the Appellant made an application, on 12th August 2020, for a non-disclosure order under CPR Rule 31.22(2). The application was dealt with, by agreement between the parties, by a consent order made by Master Teverson on 21st October 2020 ("the Teverson Order").

15. The Teverson Order was relevant to the Permission Application, so I will set out its relevant terms. The recitals were in the following terms:

> *"UPON reading the letter from the Defendants' solicitors*
>
> *AND UPON considering the Claimant's application for an order under CPR part 31.22(2) dated 12 August 2020.*
>
> *AND UPON it appearing that documents, which may be referred to in the course of these proceedings, were prepared in the course of investigations by the National Health Service and the General Medical Council into the Claimant's fitness to practice and contain information*

in relation to confidential allegations and assessments and from which it might be possible to identify patients

AND UPON the Parties agreeing the terms of this Order"

16. Paragraphs 3 and 4 of the Teverson Order provided as follows:

> *"3. The claim is hereby stayed until 15 January 2020.*
>
> *4. By 29 January 2020 one of the following steps shall be taken:*
>
> *4.1. The parties shall jointly request a further stay; or*
>
> *4.2 The Defendants shall file an acknowledgement of service."*

17. The draft of the Teverson Order was sent to the court under cover of a letter from the Respondents' solicitors. I make specific reference to two letters in this context. First, there is a letter from Appellant's solicitors, BMA Law, to Capsticks Solicitors, who were acting for the Respondents. In that letter, dated 19th October 2020, BMA Law stated as follows:

> *"We are content for you to write to the Court providing both signed consent orders, noting that your clients' position on the use of the Part 8 procedure is reserved, and that our client's position on the question of relief pending service of an AoS is also reserved."*

18. Capsticks then wrote to the court, by letter dated 20th October 2020, in the following terms:

> *"We act for the Defendants in the above matter.*
>
> *Please find enclosed for filing a Draft Consent Order. The Consent Order relates to the Claimant's application dated 12 August 2020 (regarding disclosed documents) (the "Application") which is listed for hearing at 12pm on 26 October 2020. The draft Consent Order also seeks a stay of the claim to allow for discussions between the parties, in the interests of saving Court time.*
>
> *Please debit the Court Fee (£100) from our fee account number:* [number] *and quote our reference (*[reference]*).*

> *Given the impending hearing listed for 12pm on 26 October 2020 we respectfully request that this letter and the draft Order is put before a Master as soon as possible.*
> *Please note, the Defendants' position in relation to the suitability of the Part 8 procedure in relation to the Claim is fully reserved as is the Claimant's position in relation to the question of relief pending service of an acknowledgement of service. Notwithstanding the parties' areas of dispute on these issues, agreement has been reached on the Application which relates to the use of disclosed documents and a stay which is intended to minimise the use of Court resources and avoid the need for a hearing at this stage.*
> *We look forward to hearing from you with confirmation that the hearing on 26 October 2020 has been vacated."*

19. The Teverson Order was then made, in the terms which I have quoted above.

20. The Respondents then filed acknowledgements of service. The First Respondent filed his acknowledgment of service on 28th January 2021; that is to say one day before the expiration of the time limit in paragraph 4.2 of the Teverson Order. The Second Respondent filed her acknowledgment of service on 5th February 2021; that is to say 7 days after the expiration of the time limit in paragraph 4.2 of the Teverson Order.

21. The First and Second Respondents then made applications of their own to court. The First Respondent applied for relief from sanctions, if and in so far as his acknowledgment of service had been filed out of time, and permission to take part in all hearings in the action. The Second Respondent applied for an extension of time for filing her acknowledgment of service, for permission to attend the hearing of the action, and relief from sanctions.

22. These applications came before Deputy Master Rhys on 12th April 2021 for hearing. This hearing ("the April Hearing") was attended by counsel for all three parties. I had the benefit of a transcript of the April Hearing, which I read prior to the December Hearing. I also had the benefit of a transcript of the two

judgments delivered by the Deputy Master at the April Hearing, which I also read prior to the December Hearing.

23. In summary, in his first judgment, the Deputy Master decided that the effect of paragraph 4.2 of the Teverson Order had been to extend the time for filing acknowledgments of service to 29th January 2021. As such, the First Respondent had filed his acknowledgment of service in time, and did not require relief from sanctions. The Second Respondent did require relief from sanction, because she had filed her acknowledgment of service outside the time limit of 29th January 2021. The Deputy Master decided however that the Second Respondent should have relief from sanction and an extension of time to 5th February 2021 for the filing of her acknowledgment of service. The Deputy Master also decided that the action should continue under CPR Part 7 and gave directions for the service of statements of case, and the listing of a CCMC.

24. The Deputy Master then gave a second judgment, dealing with the costs of the hearing. The Deputy Master decided that the Respondents should have their costs of their respective applications, to be paid on the indemnity basis, and ordered interim payments on account of those costs. The Deputy Master ordered that the balance of the costs of the hearing should be costs in the case.

25. The Deputy Master refused the Appellant's application for permission to appeal against his order.

26. All of the above decisions were embodied in the order made by the Deputy Master on 12th April 2021; that is to say the April Order. The relevant paragraphs of the April Order which the Appellant sought to challenge by way of appeal were paragraphs 1-4, of the April Order, which provide as follows:

> *"1. There shall be no order on the First Defendant's application dated 26 February 2021 save for the order in respect of costs set out below.*

> *2. The Second Defendant is granted relief from sanction pursuant to CPR 3.9, time is extended for the filing of her acknowledgement of service and the evidence on which she intended to rely until 5 February 2021 and she is granted permission to take part in the hearing.*
>
> *3. The claim shall continue under CPR Part 7 and in particular:*
>
> *(i) the Claimant shall file and serve Particulars of Claim by 10 May 2021;*
>
> *(ii) the Defendants shall file and serve Defences, and if so advised any Counterclaims by 7 June 2021;*
>
> *(iii) if so advised, the Claimant shall file and serve any Reply and Defence to any Counterclaims by 28 June 2021;*
>
> *(iv) the matter be listed for a CCMC on the first available date (taking into account the availability of the parties) after 9 August 2021 with a time estimate of half a day.*
>
> *4. The Claimant shall:*
>
> *(i) pay the Defendants costs of the applications dated 26 February 2021 and 22 March 2021 (respectively) on an indemnity basis to be subject to detailed assessment if not agreed; and*
>
> *(ii) pay the First Defendant £9,499.60 and the Second Defendant £5,434.30 on account of such costs by 26 April 2021."*

27. In terms of the order sought on appeal, if permission had been granted, this was set out in section 9 of the appellant's notice, and was in the following terms:

> *"1. that the court grant the relief claimed in the claim form;*
>
> *2. alternatively direct the trial of an issue as to whether parties entered into partnership providing primary medical services from Strelley Health Centre;*
>
> *3. that the Defendants or either of them pay any additional costs incurred by the Claimant as a result of the Defendants' applications alternatively made no order as to costs in relation to the costs of the Defendants' applications;*

4. *grant such further or other relief or make such directions as the court shall think fit;*
5. *that the Defendants or either of them pay the costs of this appeal."*

The grounds of appeal

28. The grounds of the appeal for which the Appellant sought permission were set out in an attachment to the appellant's notice. There were six grounds of appeal, as follows:

"1. The learned Deputy Master did not hear from the Claimant in response to the Defendants' applications before determining that the First Defendant's application was unnecessary and that the Second Defendant's application should be allowed. In the circumstances the matter should be reconsidered on appeal on its merits.

2. The Deputy Master was wrong to construe the consent order made by Master Teverson on 21 October 2020 as having had the effect of retrospectively extending the time within which an acknowledgment of service must be filed and served under CPR 8.3. Rather he ought to have found (i) that CPR 8.4 applied automatically when the time period for filing an acknowledgment of service expired 14 days after service of the claim form and (ii) the order of Master Teverson did not determine the question of whether or not the Defendants be permitted to take part in the hearing.

3. The Deputy Master ought further to have found that when considering whether to permit the Defendants to take part in the hearing, among other things and irrespective of whether or not the consequences of the application of CPR 8.4 is a sanction within the meaning of CPR 3.9, that (i) there was a burden on the Defendants to persuade the court that there was any issue which needed to be determined before relief could be granted on the Claimant's claim; (ii) the Defendants had failed to adduce any credible evidence to rebut the prima facie evidence that the

parties entered into partnership owing to the receipt by the Claimant of and/or the agreement of the parties that the Claimant would receive a one half share of the profits of the business of providing primary medical services from Strelley Health Centre; and (iii) should not therefore be permitted to take part in the hearing.

4. *The Deputy Master ought further to have found that, in so far as the consequences of the application of CPR 8.4 is a sanction within the meaning of CPR 3.9, that, having regard among other things to the serious nature of failing to file an acknowledgement of service and evidence (see Chancery Guide paras 9.6-9.7, 17.67-17.69) and the lack of any good reason why these steps were not taken, the Defendants had failed to make out a case for relief from such sanctions.*

5. *If which is denied the Deputy Master ought to have found that there was an issue to be determined as to whether the parties entered into partnership, he ought to have (i) decided that that was the only issue to be determined before considering whether or not to grant the relief claimed and (ii) ordered that the issue be tried by the Master (see the practice set out in Chancery Guide para 9.12 and 29.77) having regard, among other things, to:*

    5.1. *the limited nature of the disclosure required in relation to that issue;*

    5.2. *the limited scope for oral evidence in relation to that issue;*

    5.3. *the disproportionate cost of the claim continuing under Part 7, including the cost of Costs and Case Management;*

    5.4. *the lack of control of the court over the issues that might be raised in Part 7 proceedings;*

    5.5. *the delays that would be caused by the claim continuing as a Part 7 claim.*

> *6. The Deputy Master was wrong to order the Claimant to pay the costs of the Defendants applications and/or on the indemnity basis. He ought to have found that whether or not the court permitted the Defendants to be heard on the claim was a matter between the Defendants and the court and consequently ordered the Defendants to pay any additional costs incurred by the Claimant as a result of the Defendants' applications alternatively made no order as to costs in relation to the costs of the Defendants' applications."*

29. As I have already explained, the Permission Application was unsuccessful, on paper, before Bacon J, and was unsuccessful before me, at the December Hearing. The principal object of the Application is to achieve a setting aside of my decision on the Permission Application, so that the Permission Application can be further pursued.

CPR 52.30 – the jurisdiction

30. CPR 52.30 provides as follows (I have added italics to quotations in this judgment):

> *"(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.*
>
> *(3) This rule does not apply to appeals to the County Court.*
>
> *(4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.*
>
> *(5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.*

> *(6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.*
>
> *(7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.*
>
> *(8) The procedure for making an application for permission is set out in Practice Direction 52A."*

31. I note the following matters in relation to this jurisdiction:

    (1) The final determination of an appeal will only be reopened if the three conditions in sub-paragraph (1) are satisfied.

    (2) The jurisdiction in CPR 52.30 applies to my refusal of the Permission Application, because an appeal is defined in sub-paragraph (2) to include, in the relevant sub-paragraphs of the Rule, an application for permission to appeal.

    (3) My determination of the Permission Application was a final determination. Accordingly, the Appellant requires permission to make the Application, so far as the Application is made under CPR 52.30.

32. In terms of guidance on the exercise of the jurisdiction under CPR 52.30 Mr. Adams alerted me, in his written submissions in support of the Application, to the then pending decision of the Court of Appeal in *Ceredigion Recycling v Pope*; a case in which Mr. Adams appeared for the applicant on an application to reopen a refusal of permission to appeal in the Court of Appeal. As matters have turned out, the Court of Appeal (Sir Julian Flaux C, Newey LJ, and Edis LJ) have now handed down their decision, on 14th January 2022 (*Ceredigion Recycling & Furniture Team v Clifford Pope and Allison Cann* [2022] EWCA Civ 22). In his judgment, with which the other members of the Court of Appeal agreed, the Chancellor reviewed the case law on the jurisdiction under Rule 52.30, and identified the principles which govern applications under the Rule. Mr. Adams kindly sent me a copy of the decision. I am therefore in the fortunate position of having recent and authoritative guidance on the correct approach to the exercise of the jurisdiction under CPR 52.30.

33. In his discussion of the jurisdiction, the Chancellor began by emphasizing that the jurisdiction to reopen an appeal or application for permission to appeal is not a jurisdiction which can be exercised simply because the decision on the relevant appeal or application for permission to appeal was wrong, or arguably wrong. As the Chancellor said, at [41]:

> *"41. Ingenious though Mr Adams' submissions were, they proceeded on the fundamental misapprehension that this Court has some inherent jurisdiction to review a decision by a single Lord or Lady Justice to refuse permission to appeal if the issue raised on appeal was an arguable one, so that the decision to refuse permission was "wrong". Such supposed jurisdiction would be completely contrary to CPR 52.30(1) and (2) which make it clear that it is only if the criteria set out in that rule are satisfied that the Court of Appeal will reopen a refusal of permission to appeal. It would also contradict a number of decisions of this Court on 52.30 which make it clear that it is never enough under that rule to demonstrate that the refusal of permission was arguably wrong. This is stated most clearly in the judgment of the Court (Sir Terence Etherton MR, McCombe and Lindblom LJJ) in R (Goring on Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 860; [2018] 1 WLR 5161 at [29]:*
>
> > *"The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". 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."*

34. The Chancellor then emphasized the need for an applicant to satisfy the criteria in CPR 52.30(1). As he said at [44]:

> *"44. Furthermore, this application to reopen must fail unless the first defendant can satisfy the criteria set out in CPR 52.30(1) . Not only is this clear from the wording of the rule itself, but the limits on the jurisdiction have been clearly stated in a number of decisions of this Court. Contrary to Mr Adams' submission, these decisions are not simply statements of practice not binding on this Court in the manner described in Gourlay, but authoritative statements of law (albeit on matters of procedure under the CPR) intended to be binding on this Court."*

35. The Chancellor then proceeded to set out a lengthy quotation from the decision of the Court of Appeal in *R. (on the application of Goring-on-Thames Parish Council) v South Oxfordshire DC* [2018] EWCA Civ 860 [2018] 1 W.L.R. 5161, at [10] to [15]. I also quote the same extract from the decision in *Goring-on-Thames*:

> *"10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:*
>
> > *"... Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly*

> *exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined…."*

11. *We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.*

12. *Giving the judgment of the court in In re Uddin (A Child) [2005] 1 W.L.R. 2398 , Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the Taylor v Lawrence jurisdiction "can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined". And she added this (in paragraph 22):*

> > *"22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result has in fact been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1) . It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important*

considerations": Taylor v Lawrence [2003] QB 528 , para 55. Earlier we stated that the Taylor v Lawrence jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

13. *In Barclays Bank plc v Guy (No.2) [2011] 1 W.L.R. 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):*

> *"36. ... If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). ... ."*

14. *In Lawal v Circle 33 Housing Trust [2014] EWCA Civ 1514 , Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):*

> *"65. ... The following principles relevant to [the] application [of CPR 52.17 , as the relevant rule then was] to this appeal appear from Re Uddin (A Child) ... and Guy v Barclays Bank plc ... . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of*

> *permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in Taylor v Lawrence ... . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17 . The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."*

Sir Terence Etherton C went on to say (in paragraph 69):

> *"69. ... [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the Taylor v Lawrence jurisdiction."*

15. For completeness, there should be added to that summary of the principles in Lawal the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

36. I also follow the Chancellor, in setting out the following identification of the relevant principles by the Court of Appeal in *Municipio De Mariana v BHP Group plc* [2021] EWCA Civ 1156, at [60]-[64]:

> *"60. The Court of Appeal (Sir Keith Lindblom SPT, Coulson and Andrews LJJ) revisited CPR 52.30 in R (Wingfield) v. Canterbury City Council [2020] EWCA Civ, [2021] 1 WLR 2863 ("Wingfield") , on the basis that "the clear message of [Goring] has still not been understood". At [61], five principles were extracted from the authorities as follows:*
>
> *"(1) A final determination of an appeal, including a refusal of permission to appeal, will not be reopened unless the circumstances are exceptional (Taylor v Lawrence).*
>
> *(2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (Taylor v Lawrence , ... Re Uddin).*
>
> *(3) The paradigm case is fraud or bias or where the judge read the wrong papers (Barclays Bank v Guy , Lawal).*
>
> *(4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (Lawal).*
>
> *(5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (Goring...)."*
>
> *61. Although that is a helpful summary, we would sound a note of caution about [62] in Wingfield , where the court recorded a submission that the combination of factors enumerated above "meant that in practical terms, the requirements of CPR 52.30 are 'almost impossible' to meet" and observed:*

> *"That may be so; but it seems to us that the difficulty of succeeding in a such an application is merely the inevitable consequence of the principles to which we have referred."*

62. Experience shows that practitioners, and even sometimes judges, can fasten on phrases like "almost impossible to meet" and use them as a short-cut to avoid analysis of the circumstances of the particular case. It is better not to put glosses on the language of the rule itself, though of course illustrative guidance based on the case-law such as that given in Goring and Wingfield is sometimes helpful.

63. At [66] in Wingfield , the court said this:

> *"In our view, an application for reconsideration of a refusal of permission to appeal involves a two-stage process. First, the court should ask whether the Lord or Lady Justice of Appeal who refused permission to appeal grappled with the issues raised by the application for permission, or whether they wholly failed so to do. Secondly, if the Lord or Lady Justice of Appeal did grapple with the issues when refusing permission to appeal, the court should ask whether, in so doing, a mistake was made that was so exceptional, such as wholly failing to understand a point that was clearly articulated, which corrupted the whole process and where, but for that error, there would probably have been a different result."*

64. The claimants submitted that a judge considering an application for PTA must "grapple with" (or "engage with")[2] the issues raised. This means, in our view, that the appellate judge should address the essential points raised by the grounds and identify why in their view the point in question does not satisfy the test for the grant of PTA: cf. Wasif at [20]. The concept of "grappling with" the issue does not connote any particular degree of detail: what is required depends on the case."

37. Finally, it is also worth noting the essential reasons why, in *Ceredigion*, the Court of Appeal decided that the application to reopen must fail. The core of the Chancellor's reasoning can be found in [50] and [51], as follows:

> *"50. It follows that, although Popplewell LJ did not deal expressly with all Mr Adams' arguments, he was quite right to refuse permission to appeal. From this, it must also follow that the first defendant cannot begin to satisfy the first two criteria for reopening an appeal under CPR 52.30. There is no question of it being necessary to reopen the appeal to avoid real injustice and the first defendant cannot show that he has suffered any injustice from his application for permission to appeal being refused. Furthermore, there is no question of the circumstances of the case being exceptional. It is clear from the authorities on 52.30 (see for example [29] in Goring on Thames cited above) that "exceptional" here means more than merely out of the ordinary run of cases, but that an obvious and egregious error has occurred in the permission to appeal process which error has vitiated or corrupted the very process itself or as it is put in other cases, the integrity of that process has been critically undermined. In circumstances where Popplewell LJ may not have expressly dealt with a particular point, but was right to refuse permission to appeal, the first defendant comes nowhere near satisfying that test.*
>
> *51. Given that the first defendant cannot satisfy the first two criteria, it is not necessary to decide whether he would satisfy the third, although I would incline to the view that the fact that he may have a claim over against his professional advisers, however complex or difficult that may be, means that he does potentially have an alternative remedy."*

38. As can be seen, the applicant in *Ceredigion* could not *"begin to satisfy"* the first two criteria for reopening an appeal/application for permission to appeal under CPR 52.30.

Discussion

39. *Ceredigion* was a case where permission to make the application to reopen under CPR 52.30 was in fact granted, by Andrews LJ, so that the application was heard as a substantive application, with the respondents to the application also represented.

40. This is not the position in the present case. The Appellant does not have permission to make the application under CPR 52.30, and seeks the grant of that permission.

41. CPR 52.30 does not give any express guidance on how to approach the permission application, and the matter did not arise in *Ceredigion*. CPR 52.30 does provide, in sub-paragraph (5), that there is no right to an oral hearing of the permission application, unless, *"exceptionally"*, the judge so directs. Sub-paragraph (6) then provides, if permission is granted, for the other party to the original appeal or application for permission to appeal to be served with the application to reopen, and to make representations on the application to reopen Sub-paragraph (7) provides that there is no right of appeal or review from the decision of the judge on the application for permission, which is final.

42. Paragraph 7 of Practice Direction 52A sets out the procedure for making applications to reopen appeals. Paragraph 7.2 provides that the application for permission to make the application to reopen must be made by application notice, supported by written evidence verified by a statement of truth, and that the application for permission should not be served on any other party unless the court so directs. Paragraph 7.4 provides that the application for permission will be considered on paper by a single judge. Paragraph 7 thus confirms that the application for permission should be dealt with on paper, and without (at the permission stage) the involvement of the respondent party. Paragraph 7 does not however set out any criteria for the grant or refusal of permission to make the application to reopen.

43. One might think that the correct approach to an application for permission to make an application to reopen, pursuant to CPR 52.30, should reflect the test for the grant of permission to make a first appeal; that is to say one considers whether the application to reopen has a real prospect of success or whether there is some other compelling reason for the application to be heard; in each case bearing in mind what will have to be demonstrated if the substantive application to reopen is to succeed. If, at the permission stage, there is enough in the application to reopen for permission to be granted, one then proceeds to direct service of the application on the respondent, and to give the respondent the opportunity to make representations.

44. In the present case however I am considering the application for permission on paper, and without the benefit of submissions specifically directed to the nature of the permission requirement in CPR 52.30. In these circumstances, rather than attempting a definitive statement of the correct approach to a permission application under CPR 52.30, it seems to me that the right course to take is to consider the merits of the substantive application to reopen, and to see where that consideration leaves the application for permission.

45. In terms of the substantive application to reopen my refusal of the Permission Application, the Appellant must satisfy the criteria in CPR 52.30(1). This requires the Appellant to demonstrate (i) that it is necessary to reopen my decision in order to avoid real injustice, (ii) that the circumstances in the present case are exceptional and make it appropriate to reopen the Permission Application, (iii) that there is no alternative effective remedy.

46. The difficulty which would confront the Appellant on the substantive application is a simple one. At this point I refer to the Permission Judgment. There were six grounds of appeal. In the judgment which I delivered at the December Hearing I went through each of those six grounds of appeal and explained why, in my judgment, each ground of appeal had no real prospect of success. I also considered whether there was any other compelling reason for the appeal to be heard, and concluded that there was not.

47. In his written submissions filed in support of the Application, Mr. Adams sets out his arguments as to why the refusal of the Permission Application should be reopened. Those arguments are however arguments which, as I read them, principally seek to demonstrate (i) that the Deputy Master was wrong in the decisions which he made at the April Hearing, and (ii) that I was wrong in my decision to refuse the Permission Application.

48. As the Chancellor has stated very clearly, in *Ceredigion*, it is not enough to argue that my decision was wrong. Much more than this is required to satisfy the criteria in CPR 52.30(1).

49. The Appellant's difficulties are illustrated by paragraph 16 of Mr. Adams' submissions, which asserts as follows:

> *"16. If, which is not admitted, the guidance given by the Court of Appeal in relation to CPR 52.30 is applicable to this case then if Edwin Johnson J has on the face of his reasons made an error of law, which vitiates his decision - see Regina (Goring-on-Thames Parish Council) v South Oxfordshire District Council; Practice Note [2018] 1 WLR 5161, in particular at [29] - or has failed to grapple with an issue in the case - see Municipio de Mariana v BHP Group plc [2021] EWCA Civ 1156 at [64], then the appeal should equally be re-opened in accordance with the court's practice (in so far as the court's substantive obligations to hear an appeal leave any room for such practice). In a procedural context, where there has been no substantive determination of the appeal and the focus of the court remains to do justice rather than avoid an injustice, exceptional circumstances means no more than "outside the ordinary run of cases" and where it is just in all the circumstances to do so - see e.g. Dymocks Franchise Systems (NSW) Pty v Todd [2004] 1 WLR 2807 at [25]."*

50. I do not think that this paragraph describes the jurisdiction under CPR 52.30 correctly, either by reference to the case law prior to *Ceredigion*, or by

reference to the restatement of the relevant principles in *Ceredigion*. I stress the reference to restatement. It does not seem to me that *Ceredigion* has changed these principles. Rather they have been restated and emphasized.

51. It is not sufficient simply for the Appellant to demonstrate that I made an error of law in the Permission Judgment, or that I failed to grapple with an issue in the case. The jurisdiction under CPR 52.30 is an exceptional jurisdiction, which will only be engaged where some obvious and egregious error has occurred in the underlying proceedings, and that error has corrupted the very process itself. The hurdle to be surmounted is a high one. The jurisdiction can only properly be invoked where it is demonstrated that the integrity of the earlier proceedings has been critically undermined; the paradigm cases being those where fraud or bias has occurred, or the judge has read the wrong papers. Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality. There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined.

52. In *Ceredigion* the fact that the judge who considered the original application for permission to appeal might not have dealt with a particular point did not mean that the circumstances were exceptional or that the jurisdiction in CPR 52.30 could be invoked. Exceptional, in this context, means more than merely out of the ordinary run of cases. As the Chancellor explained in *Ceredigion*, at [50]:

> *"Furthermore, there is no question of the circumstances of the case being exceptional. It is clear from the authorities on 52.30 (see for example [29] in Goring on Thames cited above) that "exceptional" here means more than merely out of the ordinary run of cases, but that an obvious and egregious error has occurred in the permission to appeal process which error has vitiated or corrupted the very process itself or as it is put in other cases, the integrity of that process has been critically undermined."*

53. This leads on to the question of whether the Appellant can demonstrate that an obvious and egregious error occurred in the permission to appeal process in the present case, which had the effect of critically undermining the integrity of that process. In terms of specific criticisms of the Permission Judgment Mr. Adams' written submissions assert as follows, at paragraph 17:

> *"17. In particular:*
>
> *17.1 in relation to the interrelationship between the CPR 8.4 and Master Teverson's order the learned judge, with respect, despite acknowledging that the argument is "interesting", appears to have formed his own view as to the effect of the order and the rule, without properly considering whether or not the matter is properly arguable and has therefore failed to grapple with the right issue and/or made a mistake of law - see his reasons in relation to Grounds 1, 2 and 4.*
>
> *17.2 in relation to Ground 3 the learned judge was, with respect, wrong to find that the Deputy Master was not required to consider the evidence in order to determine whether or not any arguable issue arose, rather that is precisely the role of a judge at the first hearing of a Part 8 claim. He also failed to grapple, again, with the interrelationship of that issue with the effect of CPR 8.4 and 3.9, which potentially would have thrown the burden on the Defendants to persuade the court that there was an issue in relation to the existence of a partnership, which justice required be determined in all the circumstances.*
>
> *17.3 in relation to Ground 5, having effectively acknowledged that the Deputy Master was wrong to determine that the issue of partnership required extensive disclosure, the learned judge went on to hold that it was impossible to say that the Deputy Master went wrong in a way that the appeal court could interfere and therefore, again, with*

respect, failed to grapple with the issue and/or made an error of law.

17.4 in relation to Ground 6, as the appeal is in relation to costs there was no room for the exercise of any discretion (in so far as there is any) which exists in relation to case management decisions and the learned judge again, therefore, failed to grapple with the issues of construction, practice and procedure, all of which were properly arguable."

54. It seems to me that these criticisms are essentially saying that I was wrong, in relation to each of the grounds of appeal, in refusing permission to appeal. As it happens I do not consider that I was wrong in those decisions, and Mr. Adams' submissions do not seem to me to identify any good reason for thinking that I was wrong. That however does not seem to me to be the key point. The key point is that I cannot find, either in paragraph 17 of the submissions or anywhere else in the submissions and other materials put before me on the Application, any identification of an obvious and egregious error having occurred in my reasoning which had the effect of critically undermining the integrity of the process. The most which is said is that I failed to grapple with certain issues, but even this does not seem to me to be correct. Comparison between the grounds of appeal and the Permission Judgment demonstrates that I did deal with the arguments in support of each ground of appeal. The Appellant's essential complaint is that I was wrong to find that those arguments had no real prospect of success.

55. As the Court of Appeal explained in *Mariana*, at [64], grappling with an issue means that the appellate judge should address the essential points raised by the grounds of appeal and identify why, in their view, the point in question does not satisfy the test for the grant of permission to appeal. This does not connote any particular degree of detail. What is required depends on the case. In that sense, I do not think that there was any failure on my part to grapple with an issue in the present case and even if, contrary to my view, that did occur, I cannot see that it resulted in a wrong decision.

56. Turning specifically to the three criteria in CPR 52.30(1), the position seems to me to be as follows.

57. I can see no necessity to reopen the Permission Application in order to avoid real injustice. I do not think that any injustice, let alone a real injustice will be caused by a refusal to reopen. In the submissions Mr. Adams does attempt to argue that it would be an injustice to deprive the Appellant of her right of appeal, but the matters advanced in support of this argument do not demonstrate that the Appellant has suffered any injustice. The relevant part of the submissions simply sets out what are said to be the adverse and unfair consequences of the decision of the Deputy Master. All this seems to me however to amount to no more than a complaint that the Deputy Master did not find in favour of the Appellant. The Appellant is not able to identify any actual injustice which she has suffered, of the kind referred to in sub-paragraph (a) of CPR 52.30(1).

58. I cannot see any exceptional circumstances in the present case, of the kind required to reopen the Permission Application. The reality in the present case is that the Appellant lost a case management dispute in front of the Deputy Master. Far from it being appropriate in the present case to reopen the Permission Decision, it seems to me that the appropriate and correct course is for this action to proceed, in accordance with the directions given by the Deputy Master. I can see no advantage to any party in this action in the Permission Application being brought back to life, and thereby further delaying the progress of this action.

59. I do not know whether the Appellant has any alternative effective remedy in the present case. The question does not arise, given that the Appellant cannot satisfy either of the criteria in (a) and (b) of CPR 52.30(1). A relevant point in this context is that the dispute before the Deputy Master was a case management dispute. The Appellant did not, by the decisions of the Deputy Master, lose the action or a substantive issue in the action. What the Appellant lost was the ability to pursue the action on the procedural path for which she contended. The Appellant also suffered the adverse costs consequences of

her defeat before the Deputy Master. These matters seem to me to bring out further the absence of anything exceptional in the present case.

60. Drawing together all of the above discussion, my conclusion is that if the substantive application to reopen my refusal of the Permission Application was before me, it would fall to be refused. The Appellant simply cannot satisfy the qualifying criteria in sub-paragraphs (a) and (b) of CPR 52.30. There is no question of it being necessary to reopen my refusal of the Permission Application in order to avoid an injustice, let alone a real injustice to the Appellant. The Appellant cannot show that she has suffered any injustice in the Permission Application having been refused. Nor is there any question of the circumstances of this case being exceptional. The Appellant cannot begin to satisfy the test in CPR 52.30, as that test is explained in the relevant case law.

61. This brings me back to the question of whether the Appellant should be granted permission to make the substantive application under CPR 52.30. In my view, and for the reasons which I have set out, the substantive application has no real, or indeed any prospect of success. If the substantive application was before me or any other appellate judge, it seems to me that it would inevitably fall to be refused.

62. As such, it seems to me that the grant of permission for the substantive application would serve no useful purpose, and would be wrong. I therefore arrive at the conclusion that the grant of permission for the making of the substantive application under CPR 52.30 should be refused.

The application under the inherent jurisdiction of the court

63. As I have already noted, the Chancellor made it clear, in his judgment in *Ceredigion*, that there is no independent inherent jurisdiction in the court, to reopen the determination of an application for permission to appeal, which operates independently of, or in a wider form to CPR 52.30. The Chancellor made this clear at [42]-[43], where he said this:

> *"42. Furthermore, contrary to Mr Adams' submission, the jurisdiction for which he contends cannot be derived nor does it receive any support from the power given in CPR 3.1(7). In Tibbles v SIG plc [2012] EWCA Civ 518; [2012] 1 WLR 2591, this Court made clear that, whilst an exhaustive definition of the circumstances in which the discretion could be exercised was not possible, as a matter of principle it may normally only be exercised: (a) where there has been a material change of circumstances since the order was made or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated: see per Rix LJ at [39]. Mr Adams had not addressed this principle in his opening submissions and really had no answer in reply to the point made by the Court that he could not bring this case within it.*
>
> *43. In other words, rule 3.1(7) will not avail the first defendant and any application to reopen the appeal can only be made under CPR 52.30. The "implicit" or "residual" jurisdiction of the Court of Appeal to correct injustice recognised by this Court in Taylor v Lawrence [2003] QB 528 was subsumed into what was rule 52.17 (now 52.30) which, as the note in the White Book at 52.30.1 states, was the procedure formulated by the Civil Procedure Rules Committee to regulate the exercise of the jurisdiction identified in Taylor v Lawrence. There is simply no other inherent jurisdiction to which the first defendant can have resort."*

64. I have already set out my discussion of the Application so far as made under CPR 52.30. It must follow, from that discussion, that the application to reopen my decision on the Permission Application must fail, so far as that application is made pursuant to the inherent jurisdiction of the court. The position under CPR 52.30 cannot be outflanked by resort to the inherent jurisdiction of the court.

The application under CPR 3.1(7)

65. The position is effectively the same in relation to CPR 3.1(7). As the Chancellor explained in *Ceredigion*, at [42] and [43] (set out above), CPR 3.1(7) cannot save an application which fails under CPR 52.30.

66. It follows, from what the Chancellor has said, that the application to reopen my decision on the Permission Application, so far as that application is made under CPR 3.1(7), must also fail.

The application for a stay and for directions

67. The application for a continuation of the stay ordered by Mrs Justice Falk, and the application for directions as to the further hearing of the Permission Application depend upon the outcome of the application to reopen my decision on the Permission Application. As the application to reopen has failed, the applications for a stay and for directions fall away. The decision on the Permission Application stands, and the action must now continue in accordance with the (now somewhat delayed) directions in the April Order. Accordingly, this part of the Application also fails.

Conclusion

68. The outcome of the Application is as follows:

(1) So far as permission is required for the Application, I refuse permission for the Application to be made.

(2) So far as the Application does not require permission, I refuse the Application.

69. I will make an order to the above effect. As I am making the order without having heard from either of the Respondents I will include a provision allowing for the Respondents or either of them (if so advised) to apply for the setting aside or variation of my order. Given the terms of my order, I assume that any such application is unlikely.

Postscript

70. I circulated this judgment in draft, prior to handing down of the judgment, for corrections to be suggested. In his list of proposed corrections Mr. Adams advanced what was described as a further argument, made by reference to CPR 52.30(6), which provision I have set out earlier in this judgment. The relevant correction, in the context of which the further argument was raised, was a suggestion that I had misstated the terms of sub-paragraph (6) in paragraph 41 of this judgment. I do not think that this misstatement did occur, but whether it did or not, sub-paragraph (6) has been quoted in terms earlier in this judgment, and I do not consider that I was under any misapprehension as to what it says.

71. Turning to the further argument itself, the further argument was that if an application raises issues of law which go to jurisdiction, then as the judge considering an application cannot finally decide their own jurisdiction, the proper course would be to direct an oral hearing after full argument, so that such a point can be finally determined and, if necessary, appealed. Specific examples of this, introduced by the words *"for instance"* in Mr. Adams' further argument, were identified as (i) the proper approach to an application for permission under CPR 52.30 and (ii) points (which were said not to have been raised on the appeal in *Ceredigion*) as to the extent of the court's inherent jurisdiction/power under CPR 3.1(7); namely whether such power was expressly additional to CPR 52.30 under CPR 3.1(1) and/or that the guidance in *Tibbles v SIG plc [2012] EWCA Civ 518* (referred to by the Chancellor in *Ceredigion* at [42]) was expressly predicated on there being a right of appeal. Both of these specific examples were said to be raised by the Application.

72. On this basis Mr. Adams submitted that *"as the judge considering an application cannot finally decide his own jurisdiction, the proper course would be to direct an oral hearing after full argument, so that such a point can be finally determined and if necessary appealed"*. On this basis I was invited to reconsider whether directions should be given for an oral hearing of the Application, pursuant to the *Barrell* jurisdiction. The point was also made that, although a judge can properly reconsider the merits of their own decision, it was

not obvious how a judge could exercise a supervisory jurisdiction over their own exercise of an administrative power.

73. I have considered Mr. Adams' further argument, but I do not consider that any change to my decision is appropriate. I do not regard myself as having done anything in this judgment other than apply well-established principles of law, as explained and restated in *Ceredigion*, to the application for permission and, so far as the Application does not require permission, to the Application itself. I cannot see any basis on which I was required to direct an oral hearing, either in respect of any jurisdictional question or otherwise.

74. I add the point that, if the Application had simply been an application to reopen the Permission Application under CPR Rule 3.1(7), and if one ignores what the Chancellor said in *Ceredigion*, the application would still have fallen to be refused. Even without CPR 52.30, and even without what was said in *Ceredigion*, there would still be no basis for reopening the Permission Application under CPR 3.1(7), or for that matter under any inherent jurisdiction of the court. This is simply not a case where the exceptional jurisdiction to reopen a decision of the court should be exercised.