Neutral Citation Number: [2022] EWHC 2825 (Comm)

Case No: CL-2021-000582

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2022

Before :

MR JUSTICE FOXTON

- -

Between :

ROYAL & SUN ALLIANCE INSURANCE LIMITED & OTHERS	**Claimants / Arbitration Respondents**
- and -	
TUGHANS (a firm)	**Defendant / Arbitration Claimant**

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- -

Ben Hubble KC and **Brendan McGurk** (instructed by **DAC Beachcroft LLP**) for the **Claimant (and Arbitration Respondent)**
Richard Coleman KC and **Nathalie Koh** (instructed by **Fenchurch Law Limited**) for the **Defendant (and Arbitration Claimant)**

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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.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 09 November 2022 at 10:00AM.

Mr Justice Foxton:

1. This ruling relates to the judgment handed down in this case on 14 October 2022 ([2022] EWHC 2589 (Comm)) and addresses a number of consequential issues which arise from that judgment, including applications for permission to appeal.

2. I have taken the unusual step of handing down a reserved judgment, because the resolution of the consequential issues in this case has generated difficulties which are occurring in a number of cases in the Commercial Court, and which have made it clear that a change in approach to the resolution of consequential issues is desirable.

The procedural background to the consequential submissions

3. It is necessary to set out the chronology in some detail.

4. The hearing took place on 27 and 28 July 2022.

5. The parties filed further written submissions on 22 August (RSA), 2 September (Tughans) and 7 September (RSA).

6. The judgment was provided to the parties in draft on 13 September, with a request that the parties seek to agree a timetable for consequential issues.

7. On 4 October, the parties responded saying that they would endeavour to agree a proposed draft order for the court by 7 October 2022, and, in the absence of agreement "file and serve short written submissions to the Court by 14 October 2022, following which parties will file and serve replies (if any) to the Court by 21 October 2022".

8. By return, I asked the parties for submissions on the issue of anonymisation. On 7 October I was informed that Tughans were seeking to anonymise the judgment, that this "may not be straightforward" and that:

> "in light of this, we jointly propose the following amended timetable for production of a proposed redacted judgment, draft order and any consequentials:
>
> 1. The parties will file and serve joint proposed redactions and a joint note on anonymisation to the Court by 21 October 2022.
>
> 2. The parties will endeavour to agree a proposed draft order for the Court by 21 October 2022.
>
> 3. In the event that parties are unable to agree on a proposed draft order, both parties will file and serve short written submissions to the Court by 28 October 2022, following which parties will file and serve replies (if any) to the Court by 4 November 2022.
>
> We apologise for the delay to the original timetable provided to the Court on 4 October 2022. However, having discussed the issue, we consider that it will take some time to agree on an approach to anonymisation in the circumstances. The parties' view, subject to the Court's approval, is that it is sensible to

> provide the proposals for anonymisation and the position on the order and consequentials in accordance with a single timetable as set out above."

9. I responded stating:

> "The draft of this judgment was provided to the parties on 13 September. The process of finalising a draft is intended to be a relatively quick process. The Judge intends to hand down judgment on 14 October and the parties are asked to put forward their submissions in support of and proposals for anonymisation in sufficient time for that to happen".

10. On 10 October, I received a joint email from the parties confirming that I would receive joint submissions on anonymisation that week, and asking:

> "Please can we clarify that otherwise the timetable for submissions on consequentials as set out in our email dated 7 October is acceptable? This is as follows:
>
> 1. The parties will endeavour to agree a proposed draft order for the Court by 21 October 2022.
>
> 2. In the event that parties are unable to agree on a proposed draft order, both parties will file and serve short written submissions to the Court by 28 October 2022, following which parties will file and serve replies (if any) to the Court by 4 November 2022."

I would emphasise the words "short written submissions".

11. I confirmed my acceptance of that timetable. With the benefit of hindsight, I should not have done so, and, in respect of the period after 10 October, it is entirely my fault that the consequential process has been so strung out. I should also not have proceeded on the basis that there was a shared understanding between all concerned as to how long "short written submissions" would be, and it would have been better to have imposed a page limit.

12. On 13 October 2022, both parties confirmed that they were not seeking to anonymise the judgment, and the hand-down was listed for 10am on 14 October on a remote basis. At 09.47 on the day of hand-down, my clerk received a joint request from the parties to delay hand-down. I was hearing another matter at 10am and given the lateness of the application and the fact that the hearing had already been listed for judgment, I proceeded with the hand-down.

13. On 28 October 2022, I received the parties' first round of submissions. On RSA's part, they comprised a skeleton argument of 24 pages solely addressing the issue of permission to appeal, doing so at much greater length than the issues covered had been addressed in the skeleton argument for the hearing. Tughans' skeleton argument, at 12 pages, was not only much shorter but addressed all the consequential issues.

14. On 4 November 2022, I received the reply submissions, at a combined length of some 17 pages.

15. The end-result is that over 7 weeks after the parties were provided with the judgment in draft, the Court is faced with over 50 pages of written submissions to resolve issues arising from a judgment which followed a 2-day hearing.

16. Dealing with consequential issues arising from a judgment following a short hearing in this way is not conducive to the efficient conduct of litigation in this court. Time is not reserved in judges' diaries to deal with lengthy disputes about consequential matters, a task which becomes more time-consuming the longer the period which has elapsed from the provision of the draft judgment to the parties. The process of resolving consequential issues on the basis of written submissions is not intended to involve a substantial departure from the way in which these issues are traditionally dealt with at short oral hearings immediately following the handing down of judgment. Nor is it appropriate or realistic to expect the court to grapple with lengthy written submissions on permission to appeal which far exceed the length of the submissions addressing those issues filed for the hearing. It is not difficult to discern a link between these two issues (delay in resolving consequential matters after judgment and lengthy written submissions on permission to appeal): the increased time available is used for the purpose of seeking to re-argue the case in retrospect.

17. Mr Justice Jacobs has commented on similar issues in *Contra Holdings Ltd v MJC Bamford* [2022] EWHC 2799 (Comm). In that case, the hearing took place on 8 July 2022, and he handed down judgment on 18 July 2022. As he explains ([10]):

> "The draft judgment was provided to parties approximately a week later, and formally handed down shortly after that, on 18 July 2022. An increasingly common, but regrettable, feature of Commercial Court litigation is the apparent difficulty in counsel making themselves available for a hearing of "consequential" matters, following the hand-down of a judgment. This was the reason why, in the present case, no 'consequentials' hearing was fixed for July or early August, but instead was deferred until the end of September. Had the consequentials hearing taken place promptly, it is most unlikely that the present application to amend would have been made. Delayed consequential hearings create an increased amount of work for the parties and the judge, who has to deal with a case weeks or (as here) over 2 months after judgment has been given, when the case is no longer fresh in his or her mind. They also, as in the present case, allow time for parties to re-think and try to salvage a case which has been lost. Quite often this involves very lengthy draft grounds of appeal, sometimes involving points which were not advanced at the trial or hearing. Here, it involves a substantial application to amend, with the intended result of saving a case which would otherwise be struck out. Commercial Court judges will be far less tolerant in the future of consequential hearings being delayed because of the unavailability of counsel, and will fix consequential hearings to take place within a short time after judgment."

18. Lewison LJ memorably remarked in *FAGE UK Ltd v Chabani UK Ltd* [2014] EWCA Civ 5, [114] of an attempt to advance arguments on appeal that had not featured at trial that "the trial is not a dress rehearsal. It is the first and last night of the show". That observation is, if anything, even truer when such an attempt is made in the context of an application for permission to appeal. The parties' performances must be given on the stage during the play, not as the actors depart for the wings while the curtain descends.

19. As Mr Justice Jacobs observed, going forward, judges of the Commercial Court judges will be astute to ensure that consequential issues are resolved promptly after hand-down, and in a proportionate manner. This will involve:

    i) Hand-downs of judgments taking place promptly after the provision of the draft judgment to the parties.

    ii) Consequential matters being determined much more frequently at short oral hearings, of the order of an hour for hearings other than significant trials, which the Court will look to fix within 7 to 14 days of hand-down. It should not be assumed that such a hearing will be fixed for the convenience of all counsel involved, where this would be incompatible with a prompt determination of any consequential issues.

    iii) If consequential issues are to be dealt with on paper, then for most hearings this will be on the basis of a timetable which will be completed within the same period.

    iv) The fixing of strict page limits on the length of skeletons and submissions. In particular, the 15 page limit for ordinary applications of half a day or less should be sufficient in most cases to deal with consequential issues other than those arising after significant trials.

The applications for permission to appeal in this case

RSA's application for permission to appeal on the s.67 issue: Ground 1

20. This raises a "one-off" question of the construction of the Notice of Arbitration in this case against the background of the parties' prior dealings. Having regard to the parties' exchanges, and the fine divide on which the supposed limitation on the arbitrator's jurisdiction is said to depend, I am not persuaded that RSA has a realistic prospect of success. Nor is there any other reason why the policy of speedy finality should be compromised by allowing RSA a third opportunity to argue this issue. Permission to appeal is, accordingly, refused.

RSA's application for permission to appeal on what constitutes an insured loss: Ground 2

21. I am satisfied that this issue raises an arguable point of law, and one of general public importance (meeting the test in s.69(8) of the Arbitration Act 1996). It is an issue on which there is a significant volume of US case law and commentary, but very little in this jurisdiction, although at least one English law textbook acknowledges that this is an open question. Whenever a client sues a professional who has provided it with allegedly defective professional services, it is an issue which is likely to arise, and it is one which most lawyers with an insurance litigation practice encounter in their professional lives. Permission to appeal is granted.

RSA's application for permission to appeal on the effect of the interpretation of the Tughans' Letter of Engagement: Ground 3

22. In its opening submissions at the hearing, RSA accepted the correctness of the construction of the Tughans Letter of Engagement which I found in the judgment was correct. Ground 3 raises an issue of construction of a one-off document. Having

worked through the issue in detail, I was ultimately satisfied that RSA's construction is inconsistent with the terms of the Tughans Letter of Engagement, and would have uncommercial consequences. RSA offers no basis for challenging those conclusions, but asserts that a construction should be favoured which would benefit RSA as a party providing insurance cover to Tughans. However, the construction of the Tughans' Letter of Engagement cannot conceivably depend on the impact of a particular construction on one of the parties' insurers.

23. Against that background, and given the very limited (and in my view hopeless) basis on which RSA challenges my conclusion, I am not persuaded that RSA has a realistic prospect of success. Nor is there any wider public or market interest in the determination of the point. Permission to appeal on Ground 3 is refused.

Tughans' application for permission to appeal on the s.68 question: Grounds 1, 2 and 3

24. Tughans contend that I was wrong to conclude that there had been any, or at least any serious, irregularity in the arbitrator permitting Tughans to seek a declaration for relief it had disclaimed, and that I was wrong to conclude that this issue occasioned RSA substantial injustice.

25. So far as the first point is concerned, it is said that it is open to an arbitrator in an appropriate case to allow a party to seek relief which it had not claimed in the pleadings. As is clear from the judgment, that much is not in dispute. However, in my determination the arbitrator did not approach Tughans' application for the Disputed Declaration in that way, but proceeded on the basis that it was relief which Tughans had an unqualified right to seek in the arbitration. As a result, the arbitrator gave no consideration to the issue of whether it would be fair to allow Tughans to change tack at such a late stage, nor what steps might be required to prevent any prejudice to RSA. In those circumstances, Tughans does not have a realistic prospect of success on the issue of whether there was a serious irregularity in the conduct of the arbitration.

26. Nor does Tughans have a realistic prospect of success on the issue of whether RSA suffered significant prejudice from the arbitrator's decision that Tughans were entitled to seek as of right a form of relief which would only be available if, having considered all the circumstances, the arbitrator had exercised his discretion to allow Tughans to resurrect relief they had consistently disclaimed. RSA contended that it had suffered serious prejudice because it would or might have adduced different evidence at the hearing before the arbitrator if there had been an application by Tughans to advance the point. Tughans had a full opportunity to address the contention that RSA's inability to do so amounted to significant prejudice.

27. In any event, the proof of the pudding on both points will be found in the remission to the arbitrator. If the arbitrator permits Tughans to raise the issue with appropriate procedural safeguards, Tughans' proposed appeal would be entirely moot. If the arbitrator declines to permit Tughans to resurrect the disclaimed relief, the argument that there will have been no serious irregularity and no substantial injustice in the prior decision to grant such relief will not get off the ground.

Tughans' application for permission to appeal relating to RSA's arguments on the construction of the Tughans Letter of Engagement: Ground 4

28. In the light of my conclusion on RSA's ground 3, this question does not arise. Nonetheless, it is appropriate briefly to comment on it. Tughans contend that RSA should not have been permitted to argue at the hearing that, on the true construction of the Tughans Letter of Engagement, the Tughans Fee had never become due. However, Tughans' skeleton for the hearing provided:

> "The suggestion that, on BR's case, the conditions for the release of the success fee were not met is incorrect (para. 15 of the Insurers' skeleton argument). The payment was conditional on representations and warranties being provided (see the contract terms between Tughans and BR set out at para 43 of the BR Statement of Claim). It was not conditional on those representations and warranties being true. The success fee was the price paid for the services rendered, not for warranties and representations. If the warranties and representations were untrue, then contractual remedies were available subject to the usual limitations.
>
> The Insurers are therefore wrong to say that Tughans were not entitled to the fee. They ignore some basic principles of contract law".

29. That was, in effect, the argument I accepted in the judgment. The fact that Tughans raised it reflected their recognition that it was an issue fairly falling within the broad ambit of the s.69 appeal, and in any event, having deployed that argument themselves in opposition to RSA's s.69 challenge, Tughans can scarcely complain that RSA was permitted to answer it. Had this issue been live, therefore, I would have refused permission to appeal.

Costs

30. There is no doubt that Tughans is substantially the successful party, having succeeded on s.67 (which would have provided RSA with a complete answer to the claim for the Disputed Declaration) and s.69 (which would have provided RSA with a complete answer to both the claim for the Disputed Declaration and the Qualified Claim).

31. However, Tughans did not succeed on the s.68 challenge, which leaves open the possibility of RSA defeating the claim for the Disputed Declaration. Further, on both that issue, and the s.67 issue, I have comprehensively rejected Tughans' argument as to the effect of their correspondence and statements of case in the arbitration. Those issues took up a considerable amount of time in the hearing and the judgment and required a significant volume of material to be put into evidence.

32. Against that background, I am satisfied that the outcome of the three applications is fairly represented by an order requiring RSA to pay Tughans 60% of their costs.

33. Tughans' costs are £162,290 as at 18 October 2022. Having regard to my order at [32] above, and the fact that certain heads of costs may be reduced on a detailed assessment, I am satisfied that the appropriate amount of the interim payment is £72,000.

The terms of the order

34. Taking the draft order prepared by the parties, and dealing with the paragraphs which are in dispute:

i) Proposed paragraph 5 is not necessary.

ii) Proposed paragraph 7 should provide that RSA will pay 60% of Tughans' costs of the Arbitration Claim, such costs to be subject to detailed assessment if not agreed.

iii) Proposed paragraph 8 should provide that RSA will pay £72,000 to Tughans by way of an interim payment on account of costs, such sum to be paid within 14 days.

iv) The order should provide that RSA has permission to appeal on its ground 2, but RSA's and Tughans' applications for permission to appeal are otherwise refused.

35. The parties are asked to submit an order for the court's approval reflecting these determinations, and to do so within 7 days.