Neutral Citation Number: [2022] EWCA Civ 1015

IN THE COURT OF APPEAL (CIVIL DIVISION)

Case No: CA-2020-000002-D (formerly A3/2020/0007/D)

ROYAL COURTS OF JUSTICE
STRAND, LONDON, WC2A 2LL
19 JULY 2022

Before
LORD JUSTICE PHILLIPS
LORD JUSTICE NUGEE
SIR DAVID RICHARDS

BETWEEN:

(1) INGENIOUS GAMES LLP
(2) INSIDE TRACK PRODUCTIONS LLP
(3) INGENIOUS FILM PARTNERS 2 LLP
(the "LLPs")

Applicants

-v-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS
("HMRC")

Respondents

JONATHAN PEACOCK QC, RICHARD VALLAT QC and JAMES RIVETT QC, (instructed by **White & Case LLP**) appeared on behalf of the Applicants
JONATHAN DAVEY QC, MICHAEL JONES QC, NICHOLAS MACKLAM and SAM CHANDLER (Instructed by **The General Counsel and Solicitor for HMRC)** appeared on behalf of the Respondents

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APPROVED JUDGMENT

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LORD JUSTICE NUGEE:

1. This is an application under CPR r 52.30(4) for permission to make an application under CPR r 52.30(1) to reopen the refusal of permission to appeal.

2. Having heard this morning from Mr Jonathan Peacock QC (who appeared with Mr Richard Vallat QC and Mr James Rivett QC for the Appellants) we announced that we did not need to hear from Mr Jonathan Davey QC (who appeared with Mr Michael Jones QC, Mr Nicholas Macklam and Mr Sam Chandler for the Respondents (**"HMRC"**)). That was on the basis that we were satisfied that permission should be refused. I now give my reasons for agreeing to that course.

3. This is a further round in the litigation as to the tax treatment of various Ingenious entities. The Appellants are three LLPs, Ingenious Games LLP, Inside Track Productions LLP and Ingenious Film Partners 2 LLP, the latter two of which were involved in film finance schemes and the first in a similar scheme involving video games. I will refer to them as **"the Film LLPs"** and **"the Games LLP"** respectively and to the three of them as **"the LLPs"**.

4. It is not necessary to give any account of the background. The parties are very familiar with it and anyone else who is interested can refer to the four decisions which are publicly available, namely two decisions of the First Tier Tribunal (**"the FTT"**) at [2016] UKFTT 521 (TC) and [2017] UKFTT 429 (TC), that of the Upper Tribunal (**"the UT"**) at [2019] UKUT 226 (TCC), and that of this Court at [2021] EWCA Civ 1180. For present purposes it is sufficient to say that the FTT decided among other things that, on a true analysis of what the LLPs did, their operations were conducted on the so-called 30:30 basis, not the Ingenious basis, and that on that basis the Film LLPs, although not the Games LLP, were trading with a view to profit. The UT agreed with the contractual analysis of the FTT, although their reasoning was not quite the same. But they held that none of the LLPs was trading on that basis, nor had a view to profit.

5. The LLPs then applied for permission to appeal to this Court. That was a second appeal, to which the Appeals from the Upper Tribunal to the Court of Appeal Order SI 2008/2834 (**"the Appeals Order"**) applied. The Appeals Order was made under s. 13 of the Tribunals, Courts and Enforcement Act 2007, and Article 2 of that Order reads as follows:

> "Permission to appeal to the Court of Appeal in England and Wales ... shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that—
>
> (a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

6. The application for permission came before Arnold LJ. Seven grounds of appeal were relied on. By his Order dated 24 February 2020 he granted permission on Grounds 1 (view to profit) and 3 (trading) on the basis that both had a real prospect of success and raised important points of principle. On the other grounds, that is Grounds 2 and 4 to 7, he refused permission. I should read the reasons that he gave in his Order:

> "Ground 2 (contractual construction): although their reasoning was slightly different, both the FTT and the UT came to essentially the same conclusions. Contrary to the Appellants' contention, the UT reached its conclusions applying conventional principles of contractual construction. (As the UT held and the Appellants accept, *Ramsay* does come in, but at the stage of considering whether the LLPs were trading.) I am doubtful whether the Appellants have a real prospect of success on the construction issues, but in any event this ground raises no important issue of principle or practice.
>
> Ground 4 (incurred): this depends on the Appellants being correct on ground 2. In any event, the FTT and UT reached concurrent conclusions applying what is now a fairly well-established test. This ground has no real prospect of success, and in any event it raises no important issue of principle or practice.
>
> Ground 5 (wholly and exclusively): again, this depends on the Appellants being correct on ground 2. In any event the FTT and UT reached concurrent conclusions applying a very familiar and well-established test. This ground has no real prospect of success, and in any event it raises no important issue of principle or practice.
>
> Ground 6 (GAAP): again, this depends in part on ground 2. In any event, this issue was a matter for the FTT's evaluation of the expert evidence having heard the experts. Moreover, the UT has upheld that evaluation, rightly concluding that the FTT had carefully discharged its task. The Appellants' challenge to those conclusions has no prospect of success.
>
> Ground 7 (capital or income): again, this depends at least in part on ground 2. This ground has no real prospect of success, and in any event it raises no important issue of principle or practice."

7. The appeal on Grounds 1 and 3 was then heard over six days by this Court. In its judgment handed down on 4 August 2021 the Court (Henderson and Phillips LJJ and Sir David Richards) dismissed the appeal of the Games LLP but allowed the appeals of the Film LLPs on both Grounds 1 and 3, holding that they were trading with a view to profit. Subject to an outstanding application by the Games LLP for permission to appeal to the Supreme Court, that is a final determination of these issues.

8. By this application, the LLPs seek to reopen Arnold LJ's dismissal of permission to appeal on Grounds 2 and 4 to 7 under CPR r 52.30. It is not necessary for the purposes of this short permission judgment to conduct an exhaustive analysis of the principles applicable to such applications. They have been repeatedly considered and restated by this Court in numerous judgments. It is sufficient to make the following points:

(1) CPR r 52.30(1) itself reads as follows:

> "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."

By r 52.30(2) the same applies to an application to reopen a permission to appeal decision. But CPR r 52.30 is not to be interpreted as conferring a wide-ranging discretion on the Court to decide whether it is appropriate to reopen an appeal in the light of all the circumstances. The CPR do not expand the Court's jurisdiction but regulate it. That was laid down by this Court in *Jaffray v The Society of Lloyd's* [2007] EWCA Civ 586; see the judgment of Buxton LJ at [7]-[9], where inter alia he says:

> "The CPR, being rules of court, cannot extend the jurisdiction of the court from that which the law provides, but can only give directions as to how the existing jurisdiction should be exercised. ... And quite apart from that general rule, it is apparent from the wording of CPR r 52.17(1) [the equivalent to what is now r 52.30(1)] (which speaks of a jurisdiction *not* being exercised *unless* various conditions, including avoidance of real injustice, are fulfilled) that, as the helpful commentary in *Civil Procedure 2007*, vol 1, para 52.17.1 explains, it was passed to limit, and not to extend, the operation of the supposed jurisdiction under *Taylor v Lawrence*."

In other words, it is not any circumstances which can be characterised as exceptional that engage the rule. It is only those circumstances which are exceptional *and* make it appropriate to reopen the appeal as exemplified by *Taylor v Lawrence* and the subsequent cases, that do so.

(2) All the cases proceed on the basis that what needs to be shown is something that demonstrates that the impugned decision was not a proper judicial decision at all: see for example *Re Uddin (a Child)* [2005] EWCA Civ 52 at [18] in the judgment of the Court delivered by Dame Elizabeth Butler-Sloss P. Among other things she says:

> "But 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. We think this language appropriate because the jurisdiction is by no means solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case) but rather, at least

> primarily, with special circumstances where the process itself has been corrupted. The instances variously discussed in *Taylor v Lawrence* or in other learning there cited are instructive. Fraud (where relied on to reopen a concluded appeal rather than found a fresh cause of action: *Wood v Gahlings* The Times 29 November 1996); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such instances are so far from the norm that they will inevitably be exceptional. And it is the *corruption* of justice that as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of the finality in litigation to second place."

To that can now be added the recent jurisprudence exemplified by the decision of this Court in *Municipio de Mariana and others v BHP Group Plc and another* [2021] EWCA 1156: see at [63]-[64] in the judgment of the Court delivered by Sir Geoffrey Vos MR, in which he refers to a failure by the Lord or Lady Justice in question to grapple with the issues raised by the application for permission, or of them wholly failing to understand the issues raised. But these are again failures of process. We were not shown any case where a successful application under CPR r 52.30 had been based on anything other than a failure of process of these types.

(3) Mr Peacock said that "something had gone badly wrong" with the decision by Arnold LJ. But it is well established that CPR r 52.30 does not confer a licence on the Court to reopen a decision on the grounds merely that the wrong result was reached. There is a very clear illustration of this in *Barclays Bank plc v Guy (No 2)* [2010] EWCA Civ 1396, another decision of this Court. There Lloyd LJ, first on paper and then again sitting with Carnwath LJ at an oral hearing, had refused permission to appeal on the ground that the law was clear. On an application to reopen under what was then CPR r 52.17, the Court of Appeal accepted (as indeed had the Respondent's counsel – see at [12]) that it was possible that the law was not as clear as they had thought, Mr Guy's case being put much more strongly on this occasion than it had been before and on at least one new basis (see at [33]). But this was not enough; see at [36] per Lord Neuberger of Abbotsbury MR, where he said that neither of the points relied on:

> "can be characterised as "corrupting the judicial process", or even near to doing so."

9. In these circumstances, we asked Mr Peacock in what respect the process before Arnold LJ could be said to have gone wrong. He said Arnold LJ had failed to grasp the inter-relationship of the various issues. But I do not think this is a sustainable criticism. A judge dealing with an application for permission to appeal is necessarily bound to grapple with the arguments put before him or her by way of the Grounds of Appeal and the skeleton argument. In the present case, the key question is the way in which Arnold LJ dealt with Ground 2. That is because if he was entitled to refuse permission on Ground 2 I do not think that the decisions on Grounds 4 to 7 can be faulted as they

were all presented to him in the skeleton argument as dependent more or less on the UT's view on contractual construction which was the subject of Ground 2.

10. Thus in the skeleton argument it was said of Ground 4 (incurred):

> "The UT's impermissible approach to the contracts also led the UT to decide that the LLPs had not incurred 100% of the budgeted costs of the film."

Of Ground 5 (wholly and exclusively), the skeleton said:

> "This issue must be considered on the premise that the LLPs incurred 100% of the budgeted cost of the films in the course of a trade carrying on with a view to profit (because this is the only case in which the point is relevant)."

Of Ground 6 (GAAP), it was said:

> "The UT's rejection of the LLP's accounts in the expert evidence rested on (i) the UT's impermissible approach to the contracts…"

Of Ground 7 (capital or income) it was said:

> "The UT's conclusion that the expenses incurred by the LLPs on making the film were capital rests on the UT's impermissible approach to the contracts…"

11. In those circumstances, the key question is whether anything went wrong with Arnold LJ's treatment of Ground 2. The very highest that Mr Peacock put his case on this was that the UT's underlying error on contractual construction was to allow its erroneous perception of the trading with a view to profit questions to infect its consideration of contractual construction and so Ground 2 was all bound up with Grounds 1 and 3.

12. I have very considerable doubts whether this is a sustainable characterisation of the UT's decision. The UT first decided the construction question at length and in detail and, as Mr Peacock eventually accepted in oral argument, this was a decision by them, and not merely obiter comments. The treatment of these issues extends from [79] to [163] in the main decision, and from [564] to [634] in the Appendix. It was only once they had dealt with the questions of construction that they went on to consider the questions of trading and view to a profit. That, as I put to Mr Peacock in argument, seems to me not only what they did but logically the only way in which they could properly have approached the questions, because one cannot ask the question whether someone is trading with a view to profit until you know what it is they are in reality doing. As the UT themselves said at [46] of their decision:

> "The LLP's Ground 1 [which was the contractual construction ground] feeds into their arguments on all of the issues. Therefore, after reaching some general conclusions as to the construction of the contractual documents, we

shall apply our conclusions on the relevant contractual issues that arise when considering each of the issues in turn."

13. But it is not necessary to consider that in any great detail. Even putting Mr Peacock's case at its highest, the critical question for present purposes is whether Arnold LJ understood the way in which the case was being put before him. The way in which Ground 2 was characterised in the skeleton argument put before him was in summary as follows:

> "The UT's conclusions on these contracts were incorrect as a matter of interpretation and (in relation to several issues) impermissibly adopted a "*Ramsay*" approach to contractual construction. In construing the contracts to determine the legal rights of the parties, the UT ignored aspects of the contracts which it viewed as not "*substantive*" or lacking "*commercial reality*" (see e.g. UT [158]). It may be open to the court to ignore such matters when deciding whether a transaction answers a statutory description (i.e. on the *Ramsay* basis properly applied); it is not open to the court to rewrite the commercial deal between the parties at the necessarily prior stage of establishing what the deal was…"

Then later:

> "…if and insofar as the UT decided any issue of contractual construction against the LLPs on what it considered to be a "*realistic*" view of the facts (i.e. a *Ramsay* approach), the UT committed an error of law: *Ramsay* is a principle of statutory, not contractual, interpretation."

14. Nowhere is it said in that skeleton that the UT's decision as to the contractual construction issues which were the subject of Ground 2 was infected by their erroneous decisions as to trading and with a view to profit raised by Grounds 1 and 3. Nowhere is it said that if permission to appeal were granted on Grounds 1 and 3, then it should necessarily be granted on Ground 2 because favourable conclusions on these issues would undermine the UT's decision on construction which was the subject of Ground 2. I therefore reject the submission that there is any material before the Court to support the proposition that the process before Arnold LJ was corrupted or came anywhere close to being within the very narrow set of circumstances in which CPR r 52.30 can be properly invoked.

15. That is sufficient to dispose of the present application for permission. But I add two further matters.

16. Firstly, one of the points taken by HMRC was that there was an unreasonable delay in making the present application. Arnold LJ's decision on permission to appeal was made at the end of February 2020, the appeal was heard over six days in March 2021, and the judgment of the Court of Appeal was handed down on 4 August 2021. This application however was not brought until 11 March 2022, over seven months later.

17. The question is whether that application should have been brought before the substantive appeal was heard, that is between February 2020 and March 2021. Mr Peacock said No; that it was a pre-condition of an application under CPR r 52.30 that the decision could be said to cause injustice; and that this could not be said until it was known whether the appeal on Grounds 1 and 3 succeeded or not, as unless and until that had happened it could not be said that any injustice had been caused.

18. I unhesitatingly reject that submission. Where permission to appeal has been granted on some grounds but not others so that an appeal will take place in any event, an application under CPR r 52.30 on the basis that the refusal of permission on the refused grounds should be reopened must in my judgment be brought as soon as possible and (assuming of course that the relevant facts were then known to the applicants) well before the hearing of the substantive appeal so that if the CPR r 52.30 application succeeds there can be a single hearing of the appeal rather than two. This is particularly so if, as here, it is suggested that the refused grounds should have been permitted precisely because they were all bound up with the grounds on which permission to appeal was granted. Here the LLPs knew the terms of the limited permission granted by Arnold LJ in February 2020 and could at that stage have worked out the potential consequences were their appeal on Grounds 1 and 3 to succeed. It was in those circumstances wholly wrong in my judgment to keep the CPR r 52.30 application back until after they saw whether their appeal on Grounds 1 and 3 succeeded or not. I would have been prepared to refuse this application on that ground alone, although, for the reasons I have given, it does not in fact arise.

19. I add that even if there had been justification for waiting until the outcome of the appeal was known, it is very difficult to see any justification for delaying from 4 August 2021 to 11 March 2022 before bringing the application. It is true that CPR r 52.30 does not contain any specific time limits. That is understandable, as in some cases it may take a long time for matters justifying reopening to come to the attention of the applicant. But that does not mean that where the applicant does know the grounds on which he wishes to make his application he can be as leisurely as he likes about it.

20. The second point I would like to add is this. Mr Peacock pointed out that under the terms of Article 2 of the Appeals Order, which I read earlier, the question is whether *the appeal* raises an important point of principle of practice, not whether each ground does. That is true, and the same is true of the second appeals test for appeals from Court decisions under CPR r 52.7. It was suggested by Mr Peacock, somewhat faintly, that that meant that Arnold LJ was wrong to consider each of the grounds against this test.

21. I do not accept that. The Court has express power under CPR r 52.6(2)(a) when granting permission either under this rule, which is the rule for first appeals, or under CPR r 52.7, which is the rule for second appeals, to limit the issues to be heard. It is standard practice when considering an application for permission to appeal in a first appeal to consider whether each of the grounds has a real prospect of success, even though under CPR r.52.6 the rule is phrased by reference to whether the appeal has such a prospect. Similarly, it is standard practice when considering permission to appeal for a second appeal under CPR r 52.7 or under Article 2 of the Appeals Order to consider whether the grounds put forward should all be permitted to go forward to a full appeal. I see nothing wrong in the familiar practice of permitting some grounds to go forward on the basis they do raise

an important point of principle or practice but refusing permission to appeal on other grounds on the basis that they do not. Of course, if the issues are all truly bound up together the Court may well allow grounds to go further even if, had they been viewed in isolation, it would have been difficult to say that they raised any important point of principle. But the Court is certainly not in my judgment obliged to permit all arguable grounds to go forward just because one of them, and hence the appeal as a whole, raises some important point of principle and practice.

22. Those are the reasons why I agreed that permission in this case should be refused.

23. For the avoidance of doubt we are agreed that permission should be given (if necessary) under paragraph 6.1 of the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 for our judgments to be cited, despite the fact that this application is (arguably) an application for permission to appeal and hence within the categories referred to in paragraph 6.2.

SIR DAVID RICHARDS:

24. I agree that permission was rightly refused for the reasons given by my Lord.

LORD JUSTICE PHILLIPS:

25. I also agree.

MR DAVEY: I am grateful, my Lord.

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