Neutral Citation Number: [2023] EWHC 300 (Comm)

Case No: CL-2021-000620

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: Friday, 10th February 2023

Before:

THE HON. MR JUSTICE BUTCHER

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Between:

NATIONAL IRANIAN OIL COMPANY

Claimant

- and -

(1) CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED
(2) CRESCENT GAS CORPORATION LIMITED **Defendants**

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MR. DAVID BAILEY KC and MS. JESSICA SUTHERLAND (instructed by **Eversheds Sutherland LLP**) for the **Claimant**

MR. RICKY DIWAN KC, DR. TARIQ A. BALOCH and MR. MOEIZ FARHAN (instructed by **McDermott Will & Emery UK LLP**) for the **Defendants**

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Approved Judgment On Application

This judgment was released to the National Archives on 13 February 2023 (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,

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MR. JUSTICE BUTCHER:

1. This is an application by the Defendants ('Crescent') for an order requiring the Claimant ('NIOC') to pay a component of the judgment debt into court by way of security as a condition of permission to appeal the summary dismissal of its section 67 challenge. As with many aspects of the dispute between these parties, the debate on this matter has already become protracted and I considered that it was important, if possible, to give this judgment at once rather than for there to be a further delay.

2. The nature of the dispute between the parties is set out in my judgment of 21st October 2022, [2022] EWHC 2641 (Comm). In that judgment I decided that Crescent failed in relation to its preliminary issue under section 73 of the Arbitration Act but it succeeded in its application for summary judgment on the basis that NIOC's section 67 application had no real prospect of success

3. Before it was handed down, that judgment had been circulated in draft. Both parties had submitted notes on points of difference on consequential matters on 20th October 2022. NIOC indicated that it sought permission for appeal in relation to the decision on summary judgment. Crescent indicated that it opposed permission to appeal. Crescent did not, whether contingently or otherwise, seek that permission to appeal should be made conditional. An order was made dated 21st October 2022, reflecting the main determinations expressed in the judgment, namely the answer to the preliminary issue and the summary dismissal of NIOC's section 67 application.

4. As that order provided, all consequential matters, including the question of the grant of permission to appeal, were adjourned to an oral hearing for the first convenient date, and the time for the filing of any Appellant's Notice was not to commence until the determination of all consequential matters at that hearing, or as the court should otherwise order.

5. The oral consequentials hearing took place on 9th November 2022 and lasted about half a day. Crescent and NIOC were both represented by leading and junior counsel. Crescent had served drafts of two orders which it wished the court to make, including that NIOC's application for permission to appeal should be refused.

6. At the hearing, much of the time was devoted to NIOC's application for permission to appeal. Crescent contended that permission to appeal should not be granted on any of the five grounds which NIOC put forward. Crescent did not make a suggestion that if permission to appeal were to be granted, it should be subject to a condition.

7. One of the grounds in respect of which NIOC had sought permission to appeal, namely Ground 1, was an alleged unfairness by reason of my having given insufficient reasons dealing with an aspect of its arguments. On 15th November 2022, I circulated the draft of a judgment giving additional reasons in relation to Ground 1. That judgment was handed down on 16th November 2022, [2022] EWHC 2906 (Comm). After that, as I had indicated that I would at the hearing on 9th November 2022, I gave the parties until 17th November 2022 to make short further submissions in writing on NIOC's application for permission to appeal, taking account of the judgment on additional reasons. NIOC served such submissions on 17th November. Crescent then asked whether it would assist if it put in further submissions and on 21st November it did so, dealing with NIOC's Ground 1. Those

submissions did not make any suggestion that permission to appeal should be conditional. NIOC then served reply submissions on 23rd November 2022.

8. On 28th November 2022, I gave a ruling on permission to appeal in writing. That ruling stated in part:

> "(5) ... while I have taken a clear view on the section 67 challenge, I consider that NIOC should have permission to appeal in relation to its Grounds 2-5."

9. I refused permission to appeal on Ground 1, as I considered that it stood no real prospect of success. The ruling does not make any reference to a condition or conditions on permission to appeal, as that was not a matter which had been mentioned up to this point by either party. I asked for a draft order to be submitted by the parties embodying the decision on permission to appeal.

10. What then happened was that NIOC's counsel team sent a draft order to Crescent's counsel team for agreement and on 1st December 2022 chased for a response. On the same day, one of Crescent's counsel wrote that it was hoped that Crescent would supply its edits on the draft on the following day. On 2nd December 2022, Crescent's counsel circulated a mark-up of the order, which included proposed orders that the permission to appeal granted to NIOC should be conditional on NIOC's paying into court within 30 days the amount of that part of the Partial Remedies Award which was the subject of the section 67 application, or such other amount as the court should consider appropriate, and that if payment was not made within 30 days the appeal to the Court of Appeal should be dismissed.

11. On 7th December 2022, Crescent informed NIOC that it anticipated that there would be no agreement and that it would apply to the court for directions on the next day. On 8th December 2022, it served a skeleton argument and witness statement supporting the imposition of a condition on permission to appeal. That application came before the court on 20th December. The hearing had been arranged in short order in an attempt to resolve the issue before the end of the Michaelmas Term. At the hearing, however, NIOC contended that the application should be dismissed as being too late and if that course was not taken on that occasion, then it needed more time to deal with the application. I considered that there was not sufficient time for the matter to be properly dealt with on 20th December and that, in any event, it was important that both sides should have sufficient time to put forward all the evidence and arguments which they considered to be germane. I accordingly adjourned that hearing and a date of 10th February 2023 was subsequently fixed for it.

12. At the hearing of 20th December, I was asked by NIOC to stay enforcement of that part of the Partial Remedies Award which is the subject of the section 67 application, but I declined to do so. This was reflected in the order which was drawn up and sealed shortly after the hearing of 20th December 2022.

13. The parties have both served further evidence and skeleton arguments in preparation for this hearing. Crescent contends that this is a case in which there are compelling reasons for the imposition of a condition on permission to appeal. It relies, in brief, on: (1) a risk of NIOC's disposing of its assets; (2) NIOC's strategy of obstruction; (3) a decision of the Dutch Public Prosecutor to reject a criminal complaint made by

NIOC; and (4) further evidence of NIOC's stratagems as demonstrated in what Crescent called a frivolous application challenging the Geneva Tribunal on the grounds of lack of impartiality and/or independence for failing to fix hearing dates convenient to one member of NIOC's counsel team. NIOC contends that the application for the imposition of a condition on permission to appeal is too late. In any event, it contends that there are no compelling reasons for the making of such an order in this case.

14. Before considering these competing contentions, it is helpful to refer to the relevant Civil Procedure Rules. CPR 3.1(3) provides that:

> "When the court makes an order, it may –
>
> (a) make it subject to conditions, including a condition to pay a sum of money into court; and
>
> (b) specify the consequence of failure to comply with the order or a condition."

15. CPR 52.6(2) provides that:

> "An order giving permission under this rule ... may -
>
> (a) limit the issues to be heard; and
>
> (b) be made subject to conditions."

16. CPR 52.18 provides:

> "(1) The appeal court may –
>
> (a) strike out the whole or part of an appeal notice;
>
> (b) set aside permission to appeal in whole or in part;
>
> (c) impose or vary conditions upon which an appeal may be brought.
>
> (2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.
>
> (3) Where a party was present at the hearing at which permission was given, that party may not subsequently apply for an order that the court exercise its powers under sub-paragraphs (1)(b) or (1)(c)."

17. NIOC's first contention is that once unconditional permission to appeal has been granted by the court then it is too late for the actual grant of permission to be made subject to conditions. After unconditional permission has been given, then any question of the imposition of a condition is for the appeal court under CPR 52.18(1), and is one of the imposition of a condition *upon which the appeal may be brought*.

18. That submission appears to me to be correct. It is supported by the words of the rules and also by what is said in *Goldtrail Travel Limited v Onur Air Tasimacilik* [2017] UKSC 57. In that case, Rose J gave judgment against Onur Air. Thereafter, on 15th December 2014, Floyd LJ granted on paper permission to Onur Air to appeal. As Lord Wilson, giving the leading judgment said at paragraph 6:

> "In January 2015, following the grant on paper of permission to Onur to appeal against the order of Rose J, Goldtrail applied for the imposition of conditions. It was too late for it to apply under Rule 52.3(7)(b) (now Rule 52.6(2)(b)) of the Civil Procedure Rules for the actual permission to be made subject to conditions. It therefore applied under Rule 52.9(1)(c) (now Rule 52.18(1)(c)) for the court to exercise its discretion to 'impose … conditions upon which an appeal may be brought'."

19. Thus, once a first instance court has granted permission unconditionally, the rules do not envisage that it can then apply conditions to whether the appeal should proceed. That is a matter for the appeal court under CPR 52.18(1)(c). Crescent contends, however, that there has been no order granting permission to appeal unconditionally, because the order relating to permission had not been drawn up and sealed before an issue in relation to a condition was raised. A condition can now be incorporated into the order granting permission.

20. When I gave the ruling in writing on 28th November 2022, I intended that to be a final decision in relation to permission to appeal. I did not, and did not intend to, make that permission to appeal conditional, for the simple reason that that was not a matter which had been raised. The question does therefore become one of whether the court can, or should, change the decision from the one which was announced on 28th November 2022, namely unconditional permission to appeal, to one of permission to appeal subject to condition. That brings into play the principles on which a judge may change an order between the giving of a judgment and the sealing of the order. This was, as I understood it, common ground.

21. Those principles were set out in the decision of the Supreme Court in *AIC Limited v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223. Of particular relevance, in the present context, is what Lord Briggs and Lord Sales said at paragraph 30 of their judgment, as follows:

> "The foregoing review of the authorities shows that the task of a judge faced with an application to reconsider a judgment and/or order before the order has been sealed is to do justice in accordance with the relevant overriding objective. We have set out the overriding objective in CPR r 1.1 above. As we have noted, the overriding objective was amended by the addition of enforcing compliance with rules, practice directions and orders: see CPR 1.1(2)(f). This tends to emphasise, in the present context, the importance of finality attaching to the hearing on 6 December 2019 and the Enforcement Order. ..."

22. At paragraph 31, Lords Briggs and Sales stated that they were "in full agreement with Coulson LJ in the Court of Appeal" in that case, where he had said at paragraph 50 of

his judgment:

> "The principle of finality is of fundamental public importance ... The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or a better legal argument ... There is a particular jurisdiction which permits a judge to change his or her order between the handing down of the judgment and the subsequent sealing of the order. But in most civil cases, the latter is an administrative function, and it would be wrong in principle to allow parties carte blanche to take advantage of an administrative delay to go back over the judgment or order and reargue the case before it is sealed. Hence it is a jurisdiction which needs to be carefully patrolled."

23. Then at paragraph 32, Lords Briggs and Sales said that in light of this principle:

> "... on receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from anything like neutrality or evenly-balanced scales. ... It may be a perfectly appropriate judicial response just to refuse the application in limine after it has been received and read, if there is no real prospect that the application could succeed. Judges should not re-open proceedings just to allow debate on the point if it is already clear that the judgment or order should not be re-opened. That would defeat the overriding objective in the CPR that cases be decided justly and at proportionate cost."

24. Further, as the Supreme Court made clear in paragraph 34, a delayed application:

> "…will always (and especially in the case of a final order) be a weighty matter in the balance against making a different order ..." and as set out in paragraph 39:
>
> "The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place."

25. There are statements in that judgment which refer to a judgment made in open court as giving rise to "the deadweight of the finality principle". I consider that my ruling on permission to appeal is to be treated as the equivalent of such a judgment given in open court. I had only not pronounced my decision on permission to appeal orally at the hearing on 9th November because I needed to consider the issue of whether there should be additional reasons in relation to Ground 1, but I had indicated that if I gave additional reasons, I would allow the parties to make further submissions in writing

and would then give a ruling. No further oral hearing had been mentioned or contemplated. Mr. Diwan KC, for Crescent, has made it clear that it is accepted that the ruling on permission to appeal is the equivalent of a decision made in open court such as to give rise to the applicability of the finality principle.

26. Crescent contended, at least in its skeleton argument, that it is not seeking a reconsideration of the ruling, but is asking only for the court to add conditions. I do not consider that is correct or to be consistent with the passage in *Goldtrail*, which I have set out. The ruling was for unconditional permission to appeal. Reconsideration of unconditional permission for appeal is what is being sought. That, as I understood it, was accepted by Mr. Diwan KC in his submissions today.

27. What I have to make, therefore, is an evaluative judgment as to whether there are sufficiently weighty factors favouring reconsidering that decision which overcome the deadweight of the finality principle. In my judgment, there are not.

28. The starting point is that the decision on permission to appeal was reached after the parties had had a very ample opportunity to make their positions clear. They had not only put in position papers before the handing down of the judgment on 21st October 2022, but had had the opportunity to put in further written documents before the hearing of 9th November 2022 and to make oral submissions on that occasion. They had had a further opportunity to make submissions on permission to appeal in writing before my ruling on 28th November. Crescent did not raise the issue of conditions on permission to appeal, notwithstanding that it is well known, not least from the terms of CPR 52.6(2) itself, that this is an issue that may be considered in relation to permission to appeal.

29. Furthermore, judges in the Commercial Court have, prior to my ruling on permission to appeal, stressed that consequential matters arising from judgments, including permission to appeal, should be dealt with expeditiously so as not to absorb judicial resources unnecessarily.

30. In *Royal & Sun Alliance Insurance Limited v Tughans* [2022] EWHC 2825 (Comm), Foxton J said this, at paragraph 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. ..."

31. Then at paragraphs 18 and 19 Foxton J said this:

> "18 Lewison LJ memorably remarked in *FAGE UK Ltd v Chabani UK Ltd* [2014] EWCA Civ 5 [2014] FSR 29 at [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 will be astute to ensure that consequential issues are resolved promptly after hand-down, and in a proportionate manner. …"

32. The thespian reference used by Foxton J in that case was specifically related to attempts to reformulate points on the substantive merits in the context of application for permission to appeal, but I consider that it is applicable, at least as strongly, in relation to the situation with which I am concerned, which involves new arguments on whether unconditional permission to appeal should have been given after a decision on that subject has been announced.

33. Furthermore, in the present situation I consider that CPR 52.18(3) is of relevance, even though not of direct application. As I have already set out, CPR 52.18(3) provides that:

> "... a party [who] was present at the hearing at which permission was given ... may not subsequently apply for an order that the court exercise its powers under sub-paragraphs 1(b) or 1(c)."

34. As the commentary in the White Book says, at 52.18.5, the purpose of this provision :

> "is to control costs and delays in the progress and determination of appeals by denying parties, once they have had the opportunity of doing so, the further opportunity to make submissions about the matters refers to in sub-paragraphs 1(b) and 1(c) of rule 52.18."

35. In *Spar Shipping v Grand China Logistics Holdings (Group) Co. Limited* [2016] EWCA Civ 520, Longmore LJ said this, at paragraph 15:

> "The whole point it seems to me of 52.9(3)" -- I need to interpose that that is now 52.18(3) – "is to avoid the enormous potential expense and time taken in applications of this kind. Many thousands of pounds have been spent on this application. Four hours have had to be set aside to consider the application, which is a lot to ask of this court when its lead times are as great as they are, particularly at the moment, for interlocutory jousting. The whole point is that these considerations should be advanced to the judge at the time he is minded to grant

> permission to appeal so that he can have them in mind and so an order can be made at a time when considerable sums of money and further time is not required for consideration of these matters."

36. As I have said, I accept that CPR 52.18(3) is not directly applicable. It is directed to whether the appeal court can make the orders under 52.18(1)(b) or (c). Furthermore, it can also be said that if Crescent's argument is accepted and the decision in the ruling of 8th November 2022 is reconsidered to the extent of adding a condition, then the hearing at which permission is given will not have concluded until a time when that condition was attached and there will be no need for a subsequent application to impose a condition. Even accepting those points to be correct, however, it appears to me that the policy between 52.18(3), as enunciated by Longmore LJ in the *Spar Shipping* case and as summarised in the White Book passage which I have referred to, militates strongly against a reconsideration of the ruling of 28th November 2022. Crescent had the opportunity of making submissions in relation to conditions prior to that point and its attempt to raise such issues now has indeed led to additional costs and delays.

37. Of relevance too is the fact that Crescent had no good reason why the issue of conditions was not raised prior to the ruling of 28th November 2022. When I asked Crescent's leading counsel on the last occasion as to why it had not been raised, the answer which he gave was, "I am willing to stipulate this: we did not give consideration to the question of conditions prior to your Lordship's ruling on 28th November. That I have to take on the chin, but that is rightly or wrongly, we did not, so that was a failing on our part." That was a candid acceptance, as I saw it, that there was no good reason for the omission.

38. In light of those points, I consider that the deadweight of the finality principle is, in the present case, a substantial one.

39. Against that, Crescent contends that there have been a series of developments after the ruling on permission to appeal which could not have been put before the court prior to the hearing on 9th November or the ruling of 28th November. I have already touched on the points relied upon briefly, but they are, in particular:

(1) That Crescent learned on 15th November 2022 of the transfer of the registered title of NIOC House, a commercial property located at 4-8 Victoria Street, London SW1 with an estimated value of £80-104 million, or possibly more, from NIOC to the Retirement Saving and Welfare Fund of Oil Industry Workers (which I will call "the Retirement Fund"), for zero consideration, which had occurred on 23rd August 2022.

(2) That on 5th December 2022, the Dutch court gave a judgment which rejected NIOC's resistance to enforcement. It is said that the findings as to NIOC's conduct "go beyond the norm and provide sufficient evidence by itself for the court to conclude that there is a risk of future disposal of assets". These included seeking to introduce into the record an alleged 2015 Iranian Court judgment regarding allegations of corruption; allegations of a new criminal investigation in Iran; and attempts by NIOC to persuade the Dutch Public Prosecutor to open criminal investigations.

(3) That the Dutch Public Prosecutor had on 30th December 2022 rejected NIOC's criminal complaint.

(4) That on 2nd December 2022, NIOC had made the application, to which I have already alluded, challenging the Geneva Tribunal and that this had been given short shrift by the Tribunal on 8th December 2022.

40. These points have clearly been identified and highlighted as ones which can be said to have been developments since the consequentials hearing. The difficulty with isolating these as changed circumstances is that I have no doubt that Crescent could have made an application to permission to appeal to be subject to a condition on the basis of matters which had occurred before the consequentials hearing. Crescent has contended for some considerable time that NIOC's conduct of the arbitrations has been reprehensible and that NIOC is prepared to take points of no merit: thus in the first witness statement of Mr. Darowski, a partner of MWE, Crescent's solicitors, dated as long ago as 15th December 2021, a sustained criticism is made of "NIOC's tactics of delaying and disrupting the progress of the case", especially at paragraphs 30-38 of that witness statement. Mr. Darowski said that the history of NIOC's procedural obstruction had been extensive, including what were said to be meritless challenges to Dr. Gavan Griffith KC, applications to adjourn hearings "virtually on their eve", the procurement of the resignation of NIOC's appointed arbitrators on three occasions to prevent the final hearings taking place, and extraordinary tactics and misconduct in the course of the liability phase.

41. The matters now identified as new circumstances are, on that case which Crescent has made, a part of a continuum of misconduct which it has already complained of and relied on in the course of these proceedings.

42. Furthermore, and more specifically, by the time of the consequentials hearing on 9th November 2022, Crescent knew that in the Rotterdam proceedings, NIOC was relying on what it contended was a judgment of the Supreme Court of Iran dated 8th June 2015; that NIOC had requested the Dutch Public Prosecutor to investigate Crescent; and that NIOC had requested that the Geneva Tribunal hold a CMC to discuss the setting of a new date for the evidentiary hearing on account of the unavailability of some of its legal team and that the Tribunal had rejected this. By 15th November 2022, Crescent was also aware of the transfer of the title to NIOC House.

43. I consider that had it wanted to do so, Crescent could have deployed these matters, no doubt as part of a wider case as to NIOC's obstructiveness, before my ruling on permission to appeal was delivered. It would not have been necessary for these points to have been deployed with full evidential support. It could at least have used them to put down a marker that there were further matters to be taken into account.

44. Thus, I do not consider that there was a material change of the relevant circumstances after I had given my ruling on 28th November 2022. Crescent could have made an application for the imposition of a condition which would have been broadly of the same shape and weight and substance as its present application on the basis of the knowledge it had before that ruling was given. The matters it has now pointed to would no doubt have added somewhat to the force of that application, but they would not, in my judgment, have transformed its aspect.

45. Crescent also contends that had it raised the issue of a condition earlier than it did, it would inevitably have resulted in a further hearing after my ruling on permission to appeal. I do not accept that this is necessarily so. If it had been raised at the hearing of 9th November, I consider it likely that I would have heard it then and dealt with it in my ruling on permission for appeal. Even had it been raised at some time between the 9th and 28th November, it might have been possible to deal with on paper or at a very short hearing.

46. Nor do I accept another suggestion which is made in Crescent's written argument that another hearing would have been inevitable to address NIOC's application for a stay pending the appeal. That is a matter which could have been dealt with in writing in short order. When it was in fact raised at the hearing of 20th December 2022, it took very little time to deal with.

47. Thus, I consider that the principle of finality is offended where a ruling on permission to appeal, delivered on 28th November, after extensive submissions, is being challenged at a hearing in February 2023. This was the responsibility of Crescent which could and should have raised the issue of conditions earlier. Matters which are said to have arisen since my ruling are not of sufficient materiality to justify re-opening a decision on permission to appeal which was intended to be final, even assuming, which I do for the purposes of the argument, that the case is one where I would, putting aside the finality principle, now impose conditions on a grant of permission to appeal. The overriding objective is, in my judgment, properly served by refusing to make an order for conditions which could have been sought prior to my ruling on permission to appeal.

48. Crescent will not be left without any remedy in the case of a true change in circumstances. There is the possibility of an application to the Court of Appeal under CPR 52.18(1)(a), a possibility indicated in the case of *SpiceJet* v *De Havilland Aircraft of Canada* [2021] EWCA Civ 1834. Equally, Crescent may have other potential remedies, perhaps including an application for a freezing order. However, as I say, in my judgment, the overriding objective is properly achieved by refusing to make the order for conditions. For those reasons I refuse the application.

(For continuation of proceedings: please see separate transcript)

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