Neutral Citation: [2023] EWHC 2120 (TCC)

Case No: HT-2020-000474

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

Royal Courts of Justice
Rolls Building
London EC4A 1NL

Dated 17 August 2023

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

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Between :

NORFOLK COUNTY COUNCIL

Claimant

- and –

BLANMAR 2 LLP

Defendant

- -

Mr Michael Bedford KC and Mr Shomik Datta
(instructed by **nplaw**) Solicitor for the **Claimant**
Mr Edward Peters KC (instructed by **Hatton Solicitors Ltd**) Solicitor for the **Defendant**

Remote Hearing date: 8 June 2023
Date draft circulated to the Parties: 26 July 2023
Date handed down: 17 August 2023

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JUDGMENT ON PERMISSION TO APPEAL

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30am on Thursday 17th August 2023.

Her Honour Judge Kelly

1. This judgment follows the remote hearing of the Claimant's application for permission to appeal in respect of the judgment handed down on 17 March 2023, following the trial of its claim brought under section 67(1)(b) of the Arbitration Act 1996 ("the 1996 Act"). The claim challenged the award made on 19 November 2020 by Mr Allan Wood concerning his substantive jurisdiction to determine the dispute between the Claimant and the Defendant. The background to the dispute and the meaning of any abbreviations used in this judgment are set out in the judgment of 17 March 2023.

2. Pursuant to section 67(4) of the 1996 Act, an appeal to the Court of Appeal may only be brought with the permission of the High Court determining the claim. There is no fixed procedure laid down for such an application under CPR 62, nor within the TCC or Commercial Court Guides. Paragraphs 4.4 and 4.5 of CPR PD40E therefore apply which require any application to be made by written submissions to the Judge by 12 noon on the day before hand down of the judgment to be appealed and that the application will be determined at a hearing.

3. The Claimant's written submissions were lodged as required on 16 March 2023. The Claimant seeks permission to appeal in respect of two decisions made about the issues identified at paragraph 30 of the judgment. The decisions for which permission to appeal is sought are issues of law, specifically concerning the statutory interpretation of Article 46 of the DCO. The decisions made were that:

   (1) the dispute was a "difference under any provision of the DCO"; and
   (2) the dispute was not "otherwise provided for", so as to fall within Article 46.

4. The Claimant relies upon 4 grounds of appeal as follows:

   (1) Ground 1: The court erred failing to take into account relevant considerations in the interpretative exercise.

(2) Ground 2: The court erred by taking into account irrelevant considerations in the interpretative exercise.

(3) Ground 3: The court erred in determining that a dispute as to "what the Claimant was permitted to do by the DCO" was "a difference under any provision" of the DCO.

(4) Ground 4: The court erred in determining that the difference it had identified was not "otherwise provided for" so as to come within Article 46.

5. I have also had the benefit of a skeleton argument from the Defendant concerning whether I should give permission to appeal or not. In broad terms, the Defendant submits that I should not grant permission. Firstly, it relies upon the well-established policy of the 1996 Act that it is not encouraged that permission should be granted in respect of further appeals and indeed permission "will very rarely be given". In addition, it asserts that the various grounds for permission are not made out to the relevant standard for the granting of permission and there is no compelling reason why permission to appeal should be granted on the facts of this case.

6. I do not propose to set out all of the background to this claim which is set out within the main judgment. Nor do I propose to rehearse all of the arguments and submissions in the skeleton arguments and made orally at the form of order hearing in respect of the application for permission to appeal. However I record that I have read and considered the judgment of 17 March 2023 in the light of all of the submissions made by both parties as well as their skeleton arguments, together with the caselaw and authorities to which I was directed in the skeleton arguments and during the course of this hearing before coming to a decision.

The Test for Permission to Appeal.

7. The first matter about which the parties are at odds is the relevant test for the court to consider when deciding whether or not to grant permission to appeal.

8. The Claimant asserts that that the relevant test for permission to appeal is the civil standard in respect of a first appeal pursuant to CPR 52.6(1), namely that the court considers that the appeal would have a real prospect of success or there is some other

compelling reason for the appeal to be heard. The Defendant asserts that is not the test, relying on the decision of Jacob J in *Macepark (Whittlebury) Limited v Sargeant* [2002] (HC0103949 unreported), where he stated that there needed to be something "out of the ordinary" about a case before it would be appropriate to refer the case to the Court of Appeal by granting permission to appeal under section 67 of the 1996 Act.

9. The Claimant relies on the commentary in Merkin on Arbitration Law, service issue No.93, at paragraph 9.20. That paragraph cites the decision of Jacob J relied upon by the Defendant. The commentary sets out that:

> "The threshold test for determining whether permission for an appeal should be given by the judge is the usual civil standard for an appeal, namely whether there was a reasonably arguable case. It was suggested by Jacob J in *Macepark (Whittlebury) Limited v Sargeant* that the test should be the same as for an appeal on an error of law under s 69, that the decision was at the very least open to serious doubt. Jacob J held that there was no basis for imposing a common standard, because s 67 was for the most part concerned with the proper construction of an agreement between the parties and was not subject to the same considerations applicable to error of law by the arbitrators".

10. The Claimant also relies upon the difference in wording between section 67(4) and section 69(8).

11. Section 67(4) reads: "The leave of the court is required for any appeal from a decision of the court under this section". Section 69(8) reads: "The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal".

12. The Defendant referred to the decision of Jacob J in *Macepark* and asserts that the test requires the point on appeal to be something out of the ordinary before permission to appeal should be given, relying upon the words used by Jacob J: "…unless I think there is a question of general importance it is not for the Court of Appeal". In addition, the Defendant referred me to Russell on Arbitration (24th edition) at

paragraph 8 – 083, referring to the Court of Appeal decision in a *Amec Civil Engineering v Transport Secretary* [2005] 1 WLR 2339 (CA) where the Court of Appeal stated "The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration".

13. In addition, I was referred to *Interprods Ltd v De La Rue International Ltd* [2015] EWCA Civ 175 where Briggs LJ (as he then was) said at paragraph 4 of the judgment:

> "The public interest that arbitration should produce a high degree of finality compared with ordinary litigation led to Parliament proscribing strictly limited avenues of challenge and appeal. Though not identically worded, each provides that an appeal to this Court may only be made if the court appealed from gives permission".

14. In my judgment, the Claimant is correct. I find that the usual civil standard for a first appeal is the test to be applied when considering an application for permission to appeal pursuant to section 67 of the 1996 Act. That is the view of the authors of Merkin. In my judgment, it is relevant that the observations made by Jacob J, in respect of the test for permission to appeal, came during an exchange between himself and counsel following an oral judgment on an appeal pursuant to section 67(1) of the 1996 Act from the decision of an arbitrator on his jurisdiction. Jacob J noted the difference between the tests for appeal pursuant to section 67 and section 69 of the 1996 Act. He said that there must have been "some policy decision" in order for the legislature to determine that the decision on whether or not to grant permission to appeal lies solely with the High Court in a section 67 case. He noted that "to cut out the normal jurisdiction of the Court of Appeal to decide whether it takes the case is a pretty strong thing". The matter was not argued in any detail and he decided that unless there was a question of principle, he would not refer the matter to the Court of Appeal.

The Grounds of Appeal

15. I will deal with each of the grounds raised by the Claimant in turn.

Ground 1

16. There are three categories where it is asserted that consideration of the matter was wrongly excluded:

    (1) the practical implications of the competing contentions;
    (2) the context of the legislative scheme for compulsory purchase; and
    (3) the law relating to the implication of terms or words into a statute.

17. Firstly, the Claimant asserts that the Court failed adequately to consider the practical ramifications of the competing interpretations of Article 46 because the judgment states at paragraph 44 that "It is not necessary or desirable to look at interpretation of Article 46 more generally".

18. The Claimant relies upon the dicta of Males J (as he then was) in the case of *Patterson v Ministry of Defence* [2012] EWHC 2767 (QB) to assert that it is legitimate to consider the practical consequences of the competing meanings for Article 46. That dicta was recorded as being the applicable law at paragraph 35(4) of the judgment. The Claimant asserts that the court was thus required to consider the likely consequences of competing meanings contended for the words in this case and specific examples raised by the Claimant. Therefore, by excluding detailed consideration of possible consequences, including the Claimant's example of trespass, there was inadequate consideration of the practical considerations for the interpretation found.

19. The Claimant gave an example (in its skeleton argument for trial and for permission to appeal) of a trespass claim brought by a neighbouring owner arising from the construction of the NDR, where a neighbouring owner might assert that the construction had "strayed beyond the 'red line' of the Order limits into another's land". In the context of construing Article 46, it was asserted that unless the trespass was admitted, "it is inevitable that there would be a dispute between the Claimant and a landowner about whether the actions said to be the putative trespass were permitted by the DCO".

20. The Claimant also relies on the passage in Bennion, Bailey and Norbury on Statutory Interpretation (8th edition) at paragraph 11.6 to argue that practical considerations were wrongly excluded. The Defendant also quoted the same passage and put an emphasis on particular phrases in that passage (as set out below). The passage (with the Defendant's added emphasis) reads:

"When considering, **in relation to the facts of the instant case**, which of the opposing constructions of the enactment corresponds to its legal meaning, the Court should assess the likely consequences of adopting each construction, both to the parties in the case (**and where similar facts arise in future cases**) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction. "

21. In response to the argument that practical considerations were wrongly excluded, the Defendant directs me to the sentences in paragraph 44 of the judgment before and after the single sentence quoted by the Claimant , which additional sentences I accept are relevant in putting the single sentence quoted and relied upon by the Claimant in its proper context. The three sentences together read:

"What is in issue is whether the arbitrator had jurisdiction in this particular case. It is not necessary or desirable to look at interpretation of Article 46 more generally. There may be a myriad of situations which may constitute "any difference under any provision of this Order"".

22. What was in issue was whether the arbitrator had jurisdiction in this particular case. I accept that there was not a detailed consideration of the practical implications of the Claimant's trespass example when considering of the facts of the instant case. However, I do not accept that there is a real prospect of success in establishing that the court should have considered further the trespass example given. I also do not accept that there is a real prospect of success in establishing that the court should have considered further multiple possible different hypothetical situations which did not apply to the factual circumstances before the court and would be neither relevant nor applicable to the parties.

23. In my judgment, there is a fundamental difficulty with the Claimant's submissions in relation to the alleged failure to consider the effect of the Court's interpretation of Article 46 on a trespass claim. As with the claim in the present case, the trespass dispute example given would be based on the assertion that the Claimant has done something which was not authorised by the DCO. In those circumstances, the DCO

would inevitably have to be considered. This would be a dispute under a provision of the DCO for the same reasons as the dispute between these parties was held to be a dispute under a provision of the DCO. There is no realistic prospect of establishing that a failure to consider this hypothetical example in further detail would have led to a different interpretation of Article 46.

24. In my judgment, this case was and remains a decision on a simple question. A dispute arose as to whether the Claimant was entitled to do what it did as a result of the provisions of the DCO. Was that dispute within the scope of Article 46 as being "any difference under the provisions of this order"? Thereafter was the dispute otherwise provided for? Consideration of other hypothetical situations did not assist in relation to consideration of the facts of this case, nor the alternative interpretations contended for by the parties.

25. Secondly, the Claimant asserts the failure to consider fully the law of compulsory purchase as it existed at the time of the DCO, referencing in detail the Compensation Code, the Land Compensation Act 1961 and the Compulsory Purchase Act 1965, means that the court wrongly excluded the context of those schemes in coming to its determination of the meaning of Article 46.

26. It is telling that in making submissions on this point, the Claimant makes reference to the DCO being "***intended to permit*** the construction of the NDR, which authorised the compulsory acquisition of land by application of a well-established legislative scheme" (emphasis added). Further, the Claimant asserts that the failure to consider the various pieces of legislation in relation to compulsory purchase, "where a DCO included a provision ***authorising*** the compulsory purchase of land" (emphasis added), means that the legislative context has been wrongly excluded. This is because unless the Court determined as a matter of law whether or not the Claimant took possession in the soil, the Court's conclusion would inevitably be affected when considering the various matters of construction and interpretation of Article 46.

27. The Claimant argues that the context necessarily includes the law of compulsory purchase, as it then was, including the law on notices to treat and notices of entry. The

Claimant asserts that because there was no analysis of the relevant provisions concerning compulsory purchase in the judgment, the court failed to consider the effect of that legislative context. It submits that the only tenable analysis of those compulsory purchase provisions, as a matter of law and fact, is that the Claimant had taken lawful possession of and was entitled to exercise full powers of ownership over all of the Defendant's land within the relevant title.

28. The Claimant's arguments are set out in paragraphs 18 and 19 of their appeal submissions. It is then argued that as a result of those errors in considering and analysing the legislative context, the court erred as a matter of law in a way which materially affected its conclusion in relation to whether or not there was a dispute or difference under a provision of the DCO.

29. I do not propose to set out all of the legislation concerning compulsory purchase compensation because, in my judgment, it is not necessary to do so to consider whether not the arbitrator had substantive jurisdiction or not. I accept the Defendant's submission that the Claimant's arguments are based on a false premise. The arbitrator determined, as a matter of fact, that the Claimant had taken materials outside the limits of deviation permitted. That decision was appealed and Eyre J then refused the application for permission to appeal on the point of law under section 69 of the 1996 Act.

30. In those circumstances I do not accept that the Claimants raise or establish a realistic prospect of success on this point. I do not accept, against that background, that there is a real prospect of success in arguing that as a result of the failure of analysis of those compulsory purchase provisions, the Court erred in determining that there was a dispute under the provisions of the DCO. Nor do I accept that there is a real prospect of success in arguing that that the Court therefore erred in concluding that the dispute was not otherwise provided for. The Claimant's argument presupposes that what the Claimant did either was or would be authorised as a result of the legal consequences of their actions under the compulsory purchase legislation. The fact that the Defendant did not judicially review the compulsory purchase notices served by the Claimant does not mean the extent of the land sought to be compulsorily purchased

was authorised under the DCO. Nor, in my judgment, can the fact that the Defendant later claimed £1.6 million in respect of mineral rights have any bearing on the question of whether or not the Claimant was in fact authorised by the DCO to compulsorily purchase all of the land.

31. The DCO did permit the construction of the NDR and authorised a degree of compulsory purchase of land. However, there were limits on what was permitted by the DCO. That is precisely what the arbitrator in this case was being asked to determine. In my judgment, the Claimant's submissions here conflate the issues of whether or not the DCO in fact authorised a particular action with the legal effect of the consequences which would flow if the action had in fact been authorised by the DCO.

32. I do not accept that there is a real prospect of successfully arguing that a failure to consider in detail and make determinations in relation to the law of compulsory purchase means that the court wrongly excluded the context of the legislative scheme for compulsory purchase. Nor do I accept that the effect of application the compulsory purchase legislation following on from the Claimant's actions, in taking all of the Defendant's land rather than taking the various strata of land which was necessary to construct the NDR as was authorised by the DCO, can turn what would otherwise be actions unauthorised by the DCO somehow into authorised actions.

33. Further, the practical effect of the Claimant's submissions on this point would be that any arbitrator or judge on an appeal would be compelled to decide the substantive position in relation to a particular act (here, whether the compulsory acquisition of all of the land taken was in fact permitted by the DCO) before the arbitrator or judge could decide whether or not he or she had jurisdiction to hear the dispute between the parties. That position plainly puts the cart before the horse and cannot be right. I do not accept that this argument has a real prospect of success.

34. Further, I do not accept the Claimant's submission that the mere fact that the proper meaning of Article 46 or the model provisions from which it derives have not been

considered judicially by itself and in the circumstances of this case mean that there is some other compelling reason to refer the case for an appeal to the Court of Appeal.

35. Thirdly, in respect of the implication of words into Article 46, the Claimant asserts that the Court failed to consider the relevant tests for the implication of words and whether they were met in the circumstances of this case. It argues that it was not logically necessary to imply the words nor was it necessary to give the document practical coherence in a commercial context. In short, the Claimant asserts that the law, although correctly identified, was incorrectly applied to the facts of this case.

36. It was asserted that the consequence of the implication of the words (italicised as follows) into Article 46 (so that Article 46 in this regard reads "unless otherwise provided for *in this order*") means that is that any dispute concerning the excavated materials would as a result inevitably fall to be considered by two separate entities, the Upper Tribunal when considering any compulsory purchase claim and an Arbitrator when considering removal of excavated materials outside what was permitted by the DCO. If those words were not implied into Article 46, a tribunal could consider all matters concerned with the dispute because the Upper Tribunal "otherwise provided for" determination of that dispute. A multiplicity of tribunals would thus be avoided.

37. I do not accept that that argument has real prospects of success either. It ignores, as the Defendant points out, that the Defendant had denied that the provisions of the DCO entitled the Claimant to take lawful possession of the materials. It also ignores that that was the position as found by the arbitrator and that Eyre J refused permission in respect of that point both legally and factually in the appeal brought under section 69 of the 1996 Act.

Ground 2

38. It is asserted that the court erred in taking account of irrelevant considerations in the interpretative exercise, firstly by applying the Privalov guidance to a statutory instrument and secondly by considering post-DCO conduct.

39. As to Privalov, the Claimant asserts that there is a real prospect of arguing that the guidance is limited to international commercial contracts. This was not an agreement between two parties, but rather authority given by statutory instrument and thus the Privalov guidance cannot be applied to this case. Further, the Claimant argues that as a result of the court wrongly applying the guidance, the acceptance of that guidance materially led to the court incorrectly preferring a broad construction of the relevant words in Article 46.

40. I do not accept that the Claimant has a real prospect of successfully arguing that the Privalov guidance does not apply to the interpretation of an arbitration clause merely because the clause binds the parties as a result of the DCO rather than as a result of an commercial contract. Although the Privalov case did concern commercial contracts, Privalov emphasised the general approach to the construction of arbitration clauses since the Arbitration Act 1996 and the policy considerations which lay behind its enactment. As commented on by the editors in Russell on Arbitration (24th edition) at paragraphs 2-099 and 2-100, the Courts now deprecate fussy distinctions concerning semantic linguistic nuances:

> "The tendency now is very much to treat claims based on other causes of action as within the tribunal's jurisdiction, particularly if they relate to the same facts as other contractual claims falling within the arbitration agreement".

41. I do not accept that there is a real prospect of successfully arguing that the fact that this particular arbitration clause was not individually negotiated and agreed between these parties suffices to mean that it should be treated differently and the Privalov guidance should not be applied. This is particularly the case, in my judgment, when the wording used in Article 46 of "any difference" and of disputes arising "under the provisions" of the DCO are precisely the kind that are commonly used (see Russell at paragraphs 2-101 and 2-102).

42. With regard to the post-DCO conduct, I accept that the post contractual conduct of the parties is inadmissible in interpreting the meaning of a contract. I accept the same principle applies by analogy to the interpretation of a statute or statutory instrument where the court is concerned with ascertaining the objective intention of the legislator.

43. However, I do not accept that there is a real prospect of successfully arguing that the fact that there was reference to post DCO conduct in the judgment means that irrelevant matters were taken into account when interpreting the disputed provision. The part of the judgment complained about at paragraph 45 noted that the Claimant was unsuccessful in its attempt to persuade the Secretary of State to amend retrospectively the provisions of the DCO. The judgment noted that fact was "of relevance". Read as a whole, the judgment is clear that the reason for referring to the attempt by the Claimant to persuade the Secretary of State was simply to underline the nature of the dispute between the parties - whether the DCO permitted the Claimant to do what it did.

Ground 3

44. The Claimant asserts that the court erred in determining that what the Claimant was permitted to do by the DCO amounted to a difference under any provision of the DCO.

45. In short, the Claimant argues again that the dispute referred to arbitration remains an action in tort, in either trespass or conversion and, as such, does not arise under the provisions of the DCO but at common law. Whilst the dispute may involve consideration of the meaning and effect of provisions within the DCO, that does not render it a difference under any provision of the DCO. To conclude otherwise, it is argued, ignores the meaning of the express words. There was a significant degree of overlap in the submissions made here with those made in support of Grounds 1 and 2.

46. I do not accept that there is a real prospect of successfully arguing that the interpretation of Article 46 meant that the judgment conflated the effect of the DCO when actions were taken in accordance with it with the dispute being a difference under the DCO. It was asserted that the difference, for example, was not under the individual article which permitted compulsory purchase of land but rather the dispute was an action in tort for trespass or conversion. It was further argued that even though determination of the tortious dispute may involve considering the meaning and effect of some of the provisions within the DCO, that does not make it a difference under a provision of the DCO.

47. I do not propose to repeat the reasons given in respect of Grounds 1 and 2. There is no real prospect of arguing the various points raised by the Claimant in Ground 3 for the reasons already given above. I do not accept that there is a real prospect of successfully arguing that the interpretation of Article 46 has the effect of curtailing common law rights as asserted. Again, the Claimant proceeds from a basis of development and actions being "authorised by the DCO". That is precisely the dispute which the arbitrator was asked to determine.

48. Further, I do not accept the proposition that because the President of ICE was the person to nominate the arbitrator this by itself provides support for the assertion that only engineering or technical disputes were to be determined under Article 46. Whilst the Claimant states that the appointment of a lawyer or survey was not contemplated and that indicates the scope of the arbitration provision, I do not accept that there is a real prospect of successfully arguing this point when, as noted in the Defendant's skeleton argument on appeal:

"the Arbitrator who the President of ICE appointed in this case had qualified as a barrister (unregistered) as well as a civil engineer, and is an adjudicator on the Royal Institution of Chartered Surveyor's panel; whilst the ICE dispute resolution service advertises itself as "a multidisciplinary service that includes lawyers, surveyors, architects, structural, mechanical and civil engineers.""

Ground 4

49. Lastly, it is asserted that the Court erred in determining that the difference it had identified was not "otherwise provided for" so as to come within Article 46. As with Ground 3, there is again a substantial overlap between Ground 4 and Grounds 1 and 2.

50. Again, I do not propose to repeat the reasons given in respect of Grounds 1 and 2. There is no real prospect of arguing the various points raised by the Claimant in Ground 4 for the reasons already given above. I do not accept that there is any real prospect of successfully arguing that the interpretation of Article 46 runs contrary to the terms of section 126(2) of the Planning Act 2008 which states that a DCO:

".. may not include provision the effect of which is to modify the application of a compensation provision, except to the extent necessary to the compulsory acquisition of land authorised by the order".

51. The difficulty with that submission in my judgment is that again, the submission puts the cart before the horse and thus for the reasons given above, there is no real prospect of successfully arguing it. The question comes back to whether or not what the Claimant did was authorised by the order.

52. It is well established and accepted that the policy of the 1996 Act does not encourage the granting of permission for further appeals. Permission is rarely given as one of the general purposes of the 1996 Act was to limit the extent of intervention of the courts in the arbitral process for public policy reasons - see for example the decision of May LJ in *Amec Civil Engineering v Transport Secretary* [2005] 1 WLR 2339 (CA) at paragraph 9. The arbitration provision in this case used straightforward and well established language and the reasons given above, I do not accept that there is any real prospect of successfully arguing the various Grounds raised by the Claimant.

53. Further, I do not accept that permission ought to be given in this case because of the Claimant's assertion that the interpretation has wider ramifications as well as potential public importance because it relates to model provisions used in DCOs enacted pursuant to the Planning Act 2008. As noted by the Defendant, the relevant model provisions considered by the court were repealed 11 years ago by the Localism Act 2011. Although I accept that there may be other DCOs which were made under the same model provisions, I had no evidence or submissions on the number of likely DCOs made which may be affected. I do not accept that there is a real prospect of successfully arguing this is a compelling reason for an appeal to be heard by the Court of Appeal.

54. For all of those reasons, the application for permission to appeal is dismissed.