In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2019 No: 292

BETWEEN:

(1) APEX FUND SERVICES LTD
(2) MR. PETER HUGHES

Plaintiffs

And

(1) MR. MATHEW CLINGERMAN
(IN HIS CAPACITY AS RECEIVER OF THE SILK ROAD M3 FUND, A SEGREGATED ACCOUNT OF SILK ROAD FUNDS LIMITED)
(2) SILK ROAD FUNDS LIMITED

Defendants

RULING

Application for Leave to Appeal Decision to Set Aside Interim Anti-Suit Injunction - Section 12(2)(a) of the Court of Appeal Act 1964 and Order 2/ 3 of the Rules of the Court of Appeal – Clarification on the legal test for granting leave to appeal against an exercise of judicial discretion -Application for stay of decision pending appeal - Whether Costs should follow the event for the Interim Order

Date of Hearing: Tuesday 11 February 2020
Date of Decision: Tuesday 18 February 2020

Plaintiffs: Mr. Mark Chudleigh / Ms. Laura Williamson (Kennedys Chudleigh Ltd)
Defendants: Mr. Jeffrey Elkinson (Conyers Dill & Pearman Limited)

Ruling of Shade Subair Williams J

Introduction:

1. This Court is concerned with a Notice of Motion for leave to appeal my 12 November 2019 Ruling in this matter ("my November Ruling") where I set aside my earlier *ex parte* order of 22 July 2019 granting interim anti-suit injunctive relief.

2. The Notice of Motion contains various grounds of appeal which criticize my findings that the Plaintiffs failed to prove their legal entitlement (whether statutory, contractual or non-contractual) to an anti-suit injunction.

3. Mr. Chudleigh also foreshadowed the Plaintiffs' intention to supplement the grounds of appeal to include an application to adduce fresh evidence which is said not to have been reasonably available for placement before me in the lead-up to my November Ruling.

4. Additionally, the Plaintiffs seek the restoration and extension of the interim injunctive relief granted *ex parte* on 22 July 2019 so to effectively stay the New York proceedings pending the outcome of the appeal proceedings in this matter.

5. During the course of oral arguments from both sides, it became readily apparent that a written ruling from this Court would be desirable as a means of clarification on the correct test and approach to the Court's consideration of leave applications where the subject of criticism under appeal is the exercise of judicial discretion.

The Application for Leave to Appeal:

Grounds against my November Ruling

6. In the Grounds pleaded in the Notice of Motion, it is said that I erred in refusing both the claims to a contractual and non-contractual entitlement to an anti-suit injunction.

7. Where the Plaintiffs complain about my decision that there was no contractual right to the pursued relief, they submit that I wrongly interpreted the jurisdiction clause in the Administration Agreement. The Plaintiffs also advance a ground of complaint against my interpretation of the scope of the Receiver's Court ordered powers.

8. On the subject of the non-contractual entitlement to the anti-suit injunction where it was argued that the New York proceedings are vexatious and/or oppressive and/or unconscionable, the Plaintiffs say that I erred in finding that the New York Court had a real potential of being found to be a natural and appropriate forum.

9. As a bottom-line position, the Plaintiffs aver that my refusal to grant the interim injunction and to set aside the 22 July *ex parte* order was wrong in law and/or manifestly wrong in the exercise of my discretion.

Prospective Grounds relying on Fresh Evidence

10. Relying on the supporting affidavit evidence, Mr. Chudleigh explained the current status of the New York proceedings where it is recorded that on 21 November 2019 the Hon. O. Peter Sherwood, J.S.C. conditionally granted the Plaintiffs' motion to dismiss on jurisdictional grounds in the following terms:

"*Upon the foregoing documents, it is ordered that this motion to dismiss (Motion Sequence Number 001) is GRANTED, as plaintiff has not carried its burden of showing the court has jurisdiction over defendants Apex Fund Services Ltd., a Bermuda company, and Peter Hughes, a Bermuda resident (together "Apex"). Apex provides fund administration services from offices in Bermuda. It does not have custody of funds. Plaintiff's allegations that defendant Alisher Ali ("Ali") effected fraudulent transfers and that Apex aided and abetted the fraud using New York based banks is irrelevant because said defendants had custody of any funds or utilized any New York bank in this matter.*

Plaintiff alleges Ali had a New York residence and defendants communicated with him regularly in New York. Plaintiff also maintain that Apex, acting through an agent in New York had knowledge of Ali's improper acts and worked to terminate Apex's connection with M3 Fund which is sufficient to satisfy New York's purposeful availment requirement. The evidence presently before the court is insufficient for assertion of jurisdiction. However, the court will permit limited discovery in aid of the claim of jurisdiction.

The scope of that discovery is described in the transcript of oral argument on the motion dated November 20, 2019. Discovery shall be completed by January 31, 2020. Counsel shall appear for a status conference on Tuesday, January 21, 2020…"

11. Mr. Chudleigh argued that the recent dismissal of the New York action is a significant factor for an appellate Court to consider against my analysis on the Plaintiffs' claim to a non-contractual entitlement to an anti-suit injunction. In my November Ruling I remarked that the New York Court might find on the evidence that it too is a natural and appropriate forum for the resolution of the underlying action. At paragraph 139 of my November Ruling I stated:

"The lion's share of the claims factually center on the actions of the Plaintiffs and Mr. Ali. The case against Mr. Ali and the Transferee Defendants is tied to the New York banking transactions which moved the proceeds of the Fund from one New York bank account to the next. In my judgment, the Plaintiffs have shown it highly likely that they will meet the satisfaction of the second limb of the test requiring Bermuda to be a natural and appropriate forum for the determination of matters in issue. I cannot, however, at this point say that the same is not so in respect of the New York Court which also has a real potential of being found to be a natural and appropriate forum. For example, if it is later found on the facts that Mr. Ali was resident in New York between around 16 February 2013 and 3 October 2014 from where he operated the Transferee Defendants and mismanaged the proceeds of the M3 Fund, a case will likely be made out that New York is also a natural and appropriate forum, as this would go beyond the non-determinative question on where the loss occurred (see Base Metal Trading Ltd v Shamurin (CA) [2005] 1 WLR at p. 1172)."

12. However, Mr. Clingerman in his third affidavit, reiterated that the New York Court had not yet reached a final decision and that it is still considering whether the claims before it should be ultimately dismissed.

13. The Plaintiffs also propose to argue on fresh evidence that the Defendants have now irrevocably submitted to the jurisdiction having served the Writ (i.e. the Generally Endorsed Writ (Case No. 64 of 2019) filed on 15 February 2019) on 25 January 2020. The Defendants, on the other hand, contend that they have not irrevocably submitted to the jurisdiction since the Writ was filed for protective purposes against becoming time-barred under the Limitation Act 1980.

The Arguments on the Legal Test for Granting Leave to Appeal

14. The principal dispute before me related to the applicable legal test in deciding whether or not to grant leave to appeal.

15. Mr. Chudleigh relied on *Dobie v Interinvest (Bermuda) Ltd and Black* [2010] Bda L.R. 25 per Kawaley J in contending that the correct test is whether the appeal has arguable prospects of success.

16. Mr. Elkinson, however, insisted that Mr. Chudleigh was wrong in referring to the 'reasonably arguable' test for appeals which concern discretionary decisions made by a judge. Mr. Elkinson argued that the correct test required the Court to be satisfied that the decision made was plainly wrong. Mr. Elkinson pointed to the commentary under Order 59/1/142 of the 1999 White Book:

"***Appeals against exercise of discretion*** *– There are many authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the judge to make, unless it be shown that he exercised his discretion under a mistake of law (Evans v Bartlam [1937] A.C. 473) or in disregard of principle (Young v Thomas [1892] 2 Ch. 134) or under a misapprehension as to the facts (ibid.); or that he took into account irrelevant matters (Egerton v. Jones [1939] 3 ALL E.R. 889 at 892, CA) or failed to exercise his discretion (Crowther v. Elgood (1887) 34 Ch. D. 691 at 697) or the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (G. v. G. [1985] 1 W.L.R. 647; [1985] 2 ALL E.R. 225, HL). Many of the cases in this area are decisions refusing to interfere with a judge's discretion in making some interlocutory order. Examples are: striking out or refusing to strike out a pleading as embarrassing… … or giving directions for trial (Mangan v. Metropolitan Electric Supply Co [1891] 2 Ch. 551) or granting or refusing an adjournment of the trial (compare Maxwell v. Keun [1928] 1 K.B. 645, with Re Yates's Settlement Trusts, Yates v. Yates [1954] 1 W.L.R. 564; [1954] 1 ALL E.R. 619, where the appeal was allowed), or the grant or refusal of an interlocutory injunction (Hadmore* (sic) *Productions Ltd v. Hamilton [1983] 1 A.C. 191; [1982] 1 All E.R. 1042, HL)…*"

17. Mr. Elkinson was forceful in his submission that the 'plainly wrong' test (although not formulated in those precise words under the commentary) applied to both the decision on appeal and to the decision on whether to grant leave to appeal.

18. In reply, Mr. Chudleigh drew the Court's attention to paragraph 4 of his written submissions where it is argued:

"*Leave to appeal 'will normally be granted unless the grounds of appeal have no realistic prospects of success'- see: The Supreme Court Practice 1999 § 59/14/18 and Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538. In other words, the question is whether the case on appeal is arguable, as opposed to fanciful*. (footnote: *See also Dobie v Interinvest (Bermuda) Limited and Black [2010] Bda LR 25 at [4] (which was appealed to the Court of Appeal but not on this ground)- 'the primary role of an application for leave is to determine whether the appeal has arguable prospects of success'*)."

19. Order 59/14/18 deals more specifically with the test for determining when leave will be granted:

"*Circumstances in which leave will be granted- The general test which the Court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospects of success (Smith v cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538; [1997] 4 ALL E.R. 840, CA). The Court of Appeal may also grant leave if the question is one of general principle, decided for the first time (Ex p. Gilchrist, Re Armstrong (1886) 17 Q.B.D. 521, per Lord Esher M.R. t 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes L.J., in Bubkle v. Holmes [1926] 2 K.B. 125 at 127).*"

Analysis and Reasons for Decision:

Decision on Leave to Appeal

20. As reported in previous cases, this Court has undergone a long trend of applying the 'reasonably arguable' test to leave applications, even where the decisions under challenge were made in the exercise of a judicial discretion: see *David Tucker v Hamilton Properties Ltd* [2018] Bda LR 20, per Subair Williams A/J; *Bermuda Life Insurance v June Robinson et al.* [2019] SC (Bda) 39 Civ (10 July 2019), per Subair Williams J; *WF and Sannapareddy et al v Commissioner of the Bermuda Police Service* [2019] Bda LR 17 per Subair Williams J.

21. These decisions followed the reasoning of Kawaley CJ in *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd* [2007] Bda LR 81 where he cited with approval *The Iran Nabuvat* [1990] 1 WLR 1115, per Lord Donaldson of Lymington:

*"…no one should be turned away from the Court of Appeal if he had **an arguable case** by way of appeal" and "That is really what leave to appeal is directed at, screening out appeals which will fail."*

22. The English Court of Appeal in <u>*Bank of Credit & Commerce International SA v Ali, Husain and Zafar*</u> [2001] EWCA Civ 636 [para 39] approved of the test for granting leave to appeal as stated under a 1999 Court of Appeal Practice Direction:

"The relevant test for granting leave to appeal are set out in the Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027. The general test, and the test on points of law, are as follows:

> *"2.8.1 . .The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. . . .*
>
> *2.9.1 Permission should not be granted [on a point of law] unless the judge considers that there is a realistic prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case. . ."*

Permission to appeal is not usually given on the Judge's findings of primary fact but may be given in appropriate cases where the question is whether the Judge drew the correct inferences (Practice Direction, paragraph 2.10.1).

23. In the *Bank of Credit* case, Lady Justice Arden in her judgment of the Court of Appeal referred to the above-stated test as both the general test and the test on points of law. The 'general test' that '*permission will be given unless an appeal would have no real prospect of success'* obviously applies to decisions decided as a matter of judicial discretion.

24. I find no meaningful distinction between the tests which require the appeal points to be 'reasonably arguable' or to have 'arguable prospects of success' and tests which require a 'reasonable prospect of success'. In the final chapter, it all means the same thing.

25. To a great extent, Counsel's opposing arguments on the applicable test perch on the same branch. Where a decision made by a judge was done in the exercise of the Court's discretion, the grounds will not likely be reasonably arguable or have any real prospect of success unless one can sensibly contend that the judge erred by:

    (i) exercising his/her discretion under a mistake of law or misapprehension of the facts;

(ii) taking irrelevant matters into consideration or (as I would add) failing to take relevant matters into consideration; or by

(iii) reaching any illogical conclusion on any reasonable view.

26. Where a judge's exercise of discretion is flawed on any of the above grounds, it is then arguable that the judge 'plainly got it wrong'.

27. The test for leave to appeal stated by the English Court of Appeal in the *Bank of Credit* case is consistent with the ratio in *Hadmor Productions Ltd v. Hamilton* [1983] 1 A.C. 191; [1982] 1 All E.R. 1042, HL where the House of Lords granted leave to appeal from the Court of Appeal which set aside an interlocutory injunction ordered by Dillon J at first instance. Lord Diplock delivering the unanimous judgment of the House of Lords held as follows [page 220-221]:

"*…An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.*

…

My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J., is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do, is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my

view if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J.'s reasons for refusing the interlocutory injunctions."

28. At page 233, Lord Diplock in accord with Lord Fraser of Tullybelton, Lord Scarman, Lord Bridge of Harwich and Lord Brandon of Oakbrook concluded:

    "*I can find no fault with the way in which Dillon J. exercised the discretion vested in him, in deciding to refuse the interlocutory injunctions sought and nothing in the additional evidence before the Court of Appeal which in any way falsified or conflicted with the reasoning on which he based his decision. It follows that I would set aside the order of the Court of Appeal and restore the order of Dillon J*."

    It was made clear by the House of Lords in *Hadmor Productions* that the function of the appellate court is not to substitute its view for the original decision merely because of a difference of opinion. The emphasis here is that an appellate Court is a review panel charged with the task of deciding whether or not the judge erred in exercising his or her discretionary powers. Only where the appellate Court is satisfied that the judge so erred will it then go on to exercise an original discretion of its own.

29. As for the proper approach to fresh evidence, the appellate Court will only be concerned with whether the reasons given for the judge's decision are undermined by the newly introduced facts. In this case, the fresh evidence discloses that the New York Court has provisionally declined jurisdiction. This Order is subject to further discovery in aid of producing possible evidence probative of Mr. Ali's and the other Defendants' New York ties in addition to Apex's alleged conduct through a New York agent. While the New York Court considers the current state of the evidence to be insufficient to prove its jurisdiction, the claim of jurisdiction has yet to be finally determined.

30. The fresh evidence, if admitted, does not undermine the reasoning behind my November ruling in refusing the interim injunction. In my written reasons, I envisaged a real potential that the New York Court would declare its jurisdiction as a natural and appropriate forum in answer to the then pending challenge by Apex and Mr. Hughes. I did not decline the requested interim relief on the notion that the New York Court's jurisdiction was a certainty; rather, I declined the anti-suit injunction at the interim stage because of the real potential that its jurisdiction would be confirmed. Nothing in the proposed fresh evidence has undone that fact.

31. Additionally, the proposed fresh evidence refers to the recent service of the Bermuda writ in support of the Plaintiffs' argument that from a contractual perspective the Defendants have now submitted to the jurisdiction. In my judgment, this irrevocable submission to the jurisdiction clause applies to the first steps taken in bringing on litigation under the Administration Agreement. Given the active stage of the New York action, the parties are now well beyond the point where the Plaintiffs can reasonably point to any such recent actions to prove irrevocable submission to the jurisdiction.

32. I do not accept that there is an arguable case that I erred in the exercise of my discretion nor do I accept that the proposed fresh evidence discloses that I exercised my discretion on a mistake of fact or law.

33. For all of these reasons, I refuse leave to appeal.

Decision on Stay Application

34. I now turn to the application for a stay of my November Ruling wherein I set aside the 22 July 2019 Order. This Court's power to stay an order pending appeal is uncontroversial.

35. In *Island Construction Ltd and Zane Desilva v Rebecca Phillips and Barbara Phillips* [2019] SC (Bda) 78 App (15 November 2019), per Subair Williams J [paras 16-17] I observed the following:

Section 9(1)(g) of the Court of Appeals Act 1964 empowers the President of the Court of Appeal (or any Justice of Appeal appointed by the President) to make Rules providing for the stay of execution pending the determination of an appeal and the conditions, as to security or otherwise, which may be imposed in an order granting a stay.

Order 2/37 of the Rules of the Court of Appeal empowers the full Court or a single Justice of Appeal to stay the execution of any judgment of the Supreme Court until the determination or disposal of the appeal with a proviso that no such application shall be entertained until it is shown that the stay application was first made and refused in the Supreme Court.

36. Mr. Chudleigh accepted that his application for a stay of the orders under my November Ruling was somewhat academic given that the New York Court is currently seized of the question of its jurisdiction. More so, on Mr. Chudleigh's description of the proceedings, the Court has more or less declined to accept jurisdiction of Mr. Clingerman's Complaint.

37. I see no reason to stay my order setting aside the interim injunction at this stage. In fact, to do so would be to unnecessarily delay the New York Court's final determination on the question of its own jurisdiction. In my judgment, it would actually be helpful all around for any fresh evidence to disclose the New York Court's final decision. So, I will not endorse any delay of those proceedings without good reason for doing so. In this case, I see no good reason to justify an order of stay.

38. With that said, the Plaintiffs should be given liberty to re-apply for a stay pending appeal once the New York Court has ultimately disposed of the jurisdiction issue.

Decision on Costs Application following my November Ruling

39. All that remains is for me to resolve the issue of costs following my November Ruling. I reject Mr. Chudleigh's submission that the ordinary course would be for me to reserve costs until a final order is made. It is always up to a Plaintiff to decide whether his or her case is strong enough at the early stages (or whether the Defence case is so weak) to bring a claim for any particular kind of interim relief. It is a judgment call for the Plaintiff to make which, in ordinary cases, comes with costs consequences if the application is lost.

40. Where a Plaintiff loses the application for interim relief, those costs consequences will not be forgiven merely because of a subsequent success on the substantive underlying dispute.

41. In this case, the Plaintiffs of their own accord pursued an application for interim injunctive relief and lost. I see no reason why costs should not follow the event. This would be so even if the Plaintiffs later prove to be successful in their pursuit of a final costs order.

Conclusion:

42. I have refused leave to appeal on all of the grounds pleaded. Additionally, I refused leave on any grounds proposed in respect of the fresh evidence application.

43. I have also refused the application for a stay of my order setting aside the earlier *ex parte* order of 22 July 2019. However, the Plaintiffs have liberty to reapply for a stay pending appeal once the New York Court has ultimately disposed of the jurisdiction claim before it.

44. Costs of the *inter partes* application decided by my November Ruling are awarded to the Defendants on a standard basis to be taxed if not agreed.

45. Unless either party files a Form 31D to be heard on the issue of costs of these applications within 14 days of this ruling, I award costs of all of the applications decided by this Ruling in favour of the Defendants on a standard basis to be taxed if not agreed.

Tuesday 18 February 2020

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT