



The Court of Appeal for Bermuda

CIVIL APPEAL No 9 of 2015

Between:

**MICHAEL MACLEAN,
YASMIN MACLEAN,
SHANE MORA (as Trustee of the Skyline Trust), &
MATTHEW Hollis (as Trustee of the Skyline Trust)**

Applicants

-v-

MEXICO INFRASTRUCTURE FINANCE LLC

Respondent

**Before: Baker, President
Bell, JA
Bernard, JA**

Appearances: Mr Eugene Johnston, J2 Chambers, for the Applicants
Mr Ben Adamson, Conyers Dill & Pearman, for the Respondent

Date of Hearing & Decision: 19 June 2015

DECISION

Justice Bell

1. There is before the Court a notice of motion for leave to appeal a decision of Mr Justice Hellman dated the 27th of May 2015. The grounds in relation to the matter were that the judgment granted by the judge was wrong because he proceeded to hear the application for summary judgement when a short

adjournment was more appropriate, and secondly, in deciding that Bermuda was the proper jurisdiction to hear the action.

2. Mr Justice Hellman's decision, which is contained in Tab 2 of the bundle before us, granted summary judgment to Mexico Infrastructure Finance LLC, the respondent to the proposed appeal, against the first defendant below, that is to say Par-La-Ville Hotel and Residences Ltd, known as PLV, for an amount of approximately US\$19,397,000, together with costs.
3. There were two issues before Mr Justice Hellman. The first of these was whether or not Bermuda had jurisdiction, given the terms of clause 14 of the Credit Agreement which was exhibited to the sixth affidavit of Xavier Gonzalez, sworn in these proceedings on the 9th of March. The second issue was whether the \$18,000,000 had actually been paid to PLV. As to the jurisdictional issue, Mr. Gonzalez indicated that this was a matter of legal argument; that legal argument is now set out in the respondent's submissions, at paragraphs 15 to 17.
4. The claim against PLV is made pursuant to the Credit Agreement and that agreement at section 14 contains a non-exclusive jurisdiction clause in favour of the courts of the state of New York, specifically in terms which are contained in the sentence from five lines down "borrower hereby irrevocably submits in any such action or proceeding that is brought by the lender to the non-exclusive jurisdiction to each of such court, namely courts within the United States."
5. The respondents say that the point is that the clause is non-exclusive, PLV is a Bermuda company, the Bermuda courts have jurisdiction over PLV as of right, and that is not affected by a non-exclusive jurisdiction clause.
6. If the argument was that Bermuda was not the appropriate jurisdiction on forum grounds, then that would have to be dealt with, as Mr Johnston conceded, by an application to stay the Bermuda proceedings on the basis that the parties intended that any dispute between them should be resolved in proceedings in New York. Mr Johnston says that those were matters which he argued in a separate application before Mr. Justice Hellman on a different date.

7. In the event no application on forum grounds was made to Mr Justice Hellman, and no affidavit in reply to that of Mr Gonzalez was filed pursuant to the direction which he had given on the 19th of March, that the first defendant PLV should have 14 days within which to file evidence. So it was on that basis that Mr Justice Hellman ordered that judgment should be given on the 27th of May.
8. So now turning to the grounds of appeal, the first ground relates to the failure to grant the adjournment on the basis that the judge did not understand the effect of the Mareva injunction, and secondly that the respondent MIF was controlling the defendant's ability to obtain representation. I concede that I have difficulty understanding the basis for those arguments to be made; the Mareva injunction is not before us, but the answer surely is that the judge has a discretion to exercise in relation to file management. The transcript which was put before us in relation to this aspect of matters indicated that the judge's view was that PLV had had ample notice of these proceedings, that the summary judgement summons was issued on the 10th of March, directions were given on the 19th of March, there had been a change of attorneys a month or so after the directions were given, and there had then been a subsequent change of attorney very shortly before the matter came back before Mr Justice Hellman, and that subsequent change of attorney put back on the record the attorneys who had been acting at the time that the summary judgment application was made and when the directions were given.
9. So in relation to the adjournment, that was clearly a matter for the judge's discretion and there were no grounds put before this Court upon which we could properly interfere with the exercise of that discretion.
10. In relation to the jurisdiction clause to which I have already referred, as appears from the extract that I cited, that is a non-exclusive jurisdiction clause. The position therefore is as submitted on behalf of the respondent, that since PLV is a Bermuda company, it is quite in order for proceedings to be taken against them and the Bermuda courts have jurisdiction as of right.
11. The only matter which would affect that and cause this Court to take a different view would be if a forum application were to have been made. And the

reality is that no application was made that the Bermuda proceedings should be stayed on forum grounds, and with respect to the argument made by Mr Johnston, it does not seem to us that the judge can properly be criticised for not dealing with an application which was not made before him.

12. It follows from the view that we take of these matters that we do not believe that there are grounds which can properly justify the grant of leave and we therefore dismiss the notice of motion.

Costs

13. Costs of the application are awarded to the Respondent.

Signed

Bell, JA

I agree

Signed

Baker, P

I agree

Signed

Bernard, JA