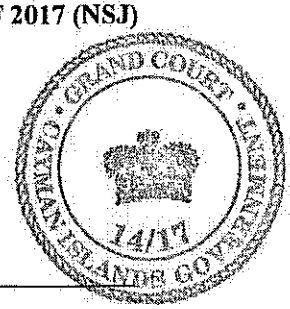
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF TRINA SOLAR LIMITED



JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL ORDER DATED 19 JULY 2017

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1 This is my judgment on the summons dated 1 August 2017 (the ***Leave Summons***) issued by Trina Solar Limited (the ***Applicant***) for leave to appeal my order dated 19 July 2017 (the ***19 July Order***). Draft grounds of appeal (the ***Draft Grounds of Appeal***) were appended to the Leave Summons.

2. By the 19 July Order I refused to grant the relief sought by the Applicant in its summons (the ***Original Summons***) dated 7 July 2017. The Original Summons sought an order setting aside a consent order dated 21 June 2017 (the ***Consent Order***). The Consent Order required the Applicant to pay interim payments to Maso Capital Investments Limited and Blackwell Partners LLC - Series A (the ***Respondents***) in connection with the Applicant's Petition under section 238 of the Companies Law (2016 Revision) seeking a determination by the Court of the fair value of the Respondents' shares. I refused to set aside the Consent Order on the basis that the grounds relied on by the Applicant were not made out and held that the Consent Order remained valid and binding. On 18 July 2017 (following the hearing of the Original Summons on the previous day) I gave and read out in Court my reasons for dismissing the Original Summons and these reasons were subsequently recorded in a Note of *ex tempore* judgment (the ***Judgment***).

3. Pursuant to a timetable agreed by the Applicant on the one hand and the Respondents on the other, the Applicant's attorneys Harney Westwood & Riegels (***Harneys***) filed a skeleton argument in support of the Leave Summons on 4 September 2017; Robert Levy

Q.C. and Walkers acting for the Respondents filed their written submissions in opposition on 11 September 2017 and Harneys filed a skeleton in reply on 13 September 2017. Subsequently, Walkers sent a further email on 14 September 2017 to clarify its position in relation to a particular matter dealt with in Harneys' reply skeleton. Both the Applicant and Respondents invited me to deal and consented to my dealing with the Leave Summons on the papers without the need for a hearing. On 25 September 2017, I sent an email to counsel and explained that I had prepared my judgment on the Leave Summons but suggested, subject to the agreement of the parties, that I delay handing it down until I was in a position to hand down my judgment on the related application for leave to appeal paragraph 2 of the order dated 8 August 2017 in Cause No: FSD 138 of 2017 since the two leave applications were very closely connected (and the timetable for the filing of submissions in that other leave application was running behind the timetable for this application). Both parties agreed with this suggestion. Therefore this judgment is being handed down at the same time as the judgment in the leave application relating to Cause No: FSD 138 of 2017.

4. Both parties accept that leave from this Court must first be sought under section 6 of the Court of Appeal Law (2011 Revision) since the 19 July Order is to be treated as an interlocutory order. Harneys submit that the general test of whether leave to appeal should be granted is whether the appeal has a real (i.e. realistic, not fanciful) prospect of success but that in exceptional circumstances leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest. Harneys referred to and relied on *Telesystem International Wireless v CVC/Opportunity Equity Partners* [2001 CILR N-21] and *CVC Opportunity Equity Partners Limited v Demarco Almeida* [2001 CILR N-20] and the English Practice Direction *Court of Appeal: Leave to Appeal & Skeleton Arguments* [1999] 1 WLR 2 (the ***English Practice Direction***) which was referred to in and applied by these decisions.

5. In their skeleton argument Harneys submitted that it was clear from the English Practice Direction that leave to appeal on a point of law should not be granted unless the Judge considers that there is a real 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. They also submitted that three additional considerations were to be taken into account when dealing with an application for leave to appeal an interlocutory order: whether the point at

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issue is not of sufficient significance to justify the costs of an appeal; whether the procedural consequences of an appeal may outweigh the significance of the interlocutory issue and whether it would be more convenient to determine the point in issue at or after the trial.

6. Harneys submitted that I had made errors of law and that there is a real prospect of the Court of Appeal coming to a different view on one or more of four points of law that were part of my reasoning. The four points appear as the four grounds of appeal set out in the Draft Grounds of Appeal. The Applicant submitted that there is a real prospect that the Court of Appeal will conclude that:

(a). an interim payment order cannot be made by consent pursuant to GCR Order 42 rule 5A since the making of an interim payment order involves the exercise by the Court of a judicial discretion;

(b). the interim payment which was required to be paid by the Consent Order was not a "liquidated sum" within the meaning of GCR Order 42 rule 5A(2)(a)(i);

(c). the Court had no jurisdiction to dispense with the requirement of a summons and supporting evidence to be filed pursuant to GCR Order 29 rule 10; and

(d). the Consent Order was not a binding contract.

7. The Applicant also submitted that:

(a). the appeal involves an issue which should be examined by the Court of Appeal in the public interest, namely the procedure to be followed by the Grand Court in respect of consent orders; and

(b). none of the three additional considerations to be taken into account when dealing with an application for leave to appeal an interlocutory order justified or required refusal of the application for leave. The points in issue were significant (a successful appeal would result in the Respondents having to repay substantial sums to the Applicant and would have an impact on a related appeal which the Applicant

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wishes to pursue, relating to paragraph 2 of my order dated 8 August ordering the Applicant to pay the Respondents' costs of the proceedings relating to the winding up petition presented by the Respondents and of the Applicant's application to strike out the petition in Cause No: FSD 138 of 2017). The costs of an appeal will not be excessive; the appeal will not delay the progress of the main section 238 proceedings and there is no prospect, if leave to appeal is refused, of the challenge to the Consent Order being determined at or after the trial of the section 238 petition.

8. I also note that it appears that the Applicant is seeking to rely on a further and separate ground:

(a). at paragraph 20 of their skeleton argument Harneys, in the section of the skeleton dealing with the first ground of appeal (error of law as to the Court's jurisdiction under GCR Order 42, rule 5A to make consent orders), say that:

> *"Further, as referred to at paragraph 2 of the [Judgment] at the time the Consent Order was made the Court's jurisdiction to make interim payment orders in proceedings under Section 238 had been challenged in proceedings relating to Qunar and Eurasia. Following Hinde v Hinde [1953] 1 All ER 171 the parties could not by consent give the Court a jurisdiction which it did not otherwise possess. The Learned Judge therefore erred in failing to consider whether the Court had jurisdiction to make the order sought."*

(b). in their reply skeleton Harneys quote this paragraph and then say, in responding to Mr Levy Q.C.'s assertion that the argument based on the Court having no jurisdiction to make orders for interim payments in section 238 cases was bound to fail since this Court had already held in *Qihoo*, prior to the hearing of the Original Summons, that it did have jurisdiction, that:

> *"In fact, leave to appeal the Honourable Court's decision in Qunar has now been granted and the issue is therefore subject to appellate determination. On this basis alone leave to appeal should be granted – in the event the Court of Appeal determines that the Grand Court does not have jurisdiction to order interim payments in section 238 proceedings then per Hinde v Hinde ... the Consent Order will be ultra vires."* [Underlining added]

(c). accordingly, Harneys argue that the Consent Order must be set aside if in the *Qunar* appeal it is held that the Court is unable to make orders for interim payments in

section 238 proceedings. If the Court has no jurisdiction to order interim payments the parties cannot by agreement create and confer on the Court such a jurisdiction and the Court cannot order by consent what it cannot order on an *inter partes* application;

(d). I have said that this is a separate ground from the four grounds set out and summarised in paragraph 6 above because it relies on the absence of jurisdiction to make interim payment orders in all section 238 proceedings. This is not the basis of any of those four grounds. It is not, therefore, one of the grounds contained in the Draft Grounds of Appeal;

(e). I note that the application for leave to appeal in *Qunar* was not heard until (2pm on) 12 September 2017 with judgment delivered *ex tempore* by Justice Mangatal on the same day.

9. Mr Levy Q.C. on behalf of the Respondents submitted that leave should be refused. Mr Levy Q.C. submitted that:

(a). the Applicant had relied on precisely the same points and arguments as I had rejected when disposing of the Original Summons and that I had been correct to reject these arguments then and should decline to alter my view now. Mr Levy Q.C. accepted that the principles to be applied were those as summarised by Harneys and set out in the dicta of Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91, the judgment of Sanderson J in *CVC/Opportunity Equity Partners LP supra* and the English Practice Direction. The appeal cannot, he submitted, claim even a fanciful let alone a realistic, prospect of success;

(b). granting leave was not justified on public interest grounds and furthermore the Court should have regard to the need to avoid unfairness to the Respondents that would flow from requiring them to defend an appeal that was unjustified and unappealable (citing the passage from the judgment of Malone CJ in *In the matter of Universal and Surety Company Limited* [1992-93 CILR 157] at 158);

(c). the appeal was academic since the Applicant has made the interim payments in

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accordance with the 19 July Order and since it had failed to seek and obtain a stay of the enforcement of that order pending its appeal, it was now inappropriate to revisit the issue in the proposed appeal; and

(d). the conduct of the Applicant in applying for leave is unreasonable and the Court should order that the Applicant pays the Respondents' costs of dealing with the Leave Summons on an indemnity basis, to be taxed forthwith if not agreed.

10. I have carefully considered the Applicant's application for leave to appeal including the Draft Grounds of Appeal and the submissions made by Harneys in their skeleton and reply skeleton and have concluded that, I should not grant leave to appeal. My reasons, in brief, are as follows:

(a). applying the principles (which are not in dispute) established by the authorities cited to me and the English Practice Direction, it seems to me that the appeal has no realistic prospect of success.

(b). the Applicant has sought to revisit and repeat the arguments I rejected when disposing of the Original Summons. I see no reason for changing my view. The Applicant has not persuaded me that my views, as briefly explained in the Judgment, need to be revisited or revised.

(c). it remains my view that it was appropriate for a consent order to be made administratively using the procedure set out in GCR 42, rule 5A and that, even if that procedure was unavailable, a Judge of the Grand Court is able to make an order for the making of interim payments (assuming that the Court otherwise has jurisdiction to make an interim payments order in section 238 cases) where the parties have agreed to its terms without the need for a summons to be issued with supporting evidence and that is what was done here. The Applicant's arguments and its attempt to extricate itself from the obligations to make interim payments which it had voluntarily assumed and agreed to incorporate into a Court order, seemed to me at the time of the hearing of the Leave Summons and still appear to me to be unmeritorious.

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(d). it also does not appear to me that the Applicant should have leave to appeal on the ground that the Court does not have jurisdiction to make interim payment orders and that therefore there was no jurisdiction to make the Consent Order. This argument is not covered in the Draft Grounds of Appeal. Furthermore, the issue of whether the Court has jurisdiction to make interim payment orders in section 238 cases was not raised in support of and was not an issue on the Original Summons. The Applicant proceeded without reference to this issue and the Original Summons was dealt with on the assumption that the Court did have jurisdiction to make an order for interim payments. As I said at paragraph 9 of the Judgment:

> *"... I make no comment on the validity of the challenge made ... in Qunar and Eurasia to the jurisdiction of the Court to make interim payment orders in section 238 cases. That issue is not before me."*

(e). I also do not consider that leave to appeal should be granted on the public interest ground. While I have noted (in paragraph 8(a)(ii) of the Judgment) that, in cases before the Financial Services Division, the FSD Users' Guide confirms the practice that all consent orders must be reviewed and approved by a Judge rather than being dealt with administratively (and therefore without the need to rely on GCR 42, rule 5A) it does not seem to me that the Applicant's appeal raises issues of sufficient importance to justify taking up the time of the Court of Appeal. Of course, if the Court of Appeal, when the application for leave is made to the Court of Appeal, have a different view on this issue (and in relation to the prospects of success of the proposed appeal) they can grant leave.

11. I do not, in these circumstances, need to deal with Mr Levy Q.C.'s argument that the Applicant's failure to apply for and obtain a stay of the 19 July Order justifies a refusal of leave. However, I would say that I am not persuaded that it would be right to refuse leave just on this ground.

12. I also do not consider that the Applicant's conduct in applying for leave to appeal is unreasonable such that they should be ordered to pay the Respondents' costs on an indemnity basis. I consider, as I have said, that the Applicant's position is unmeritorious and that its legal arguments are bad but in this litigation which has been hard fought on both sides I do not

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consider it right to penalise the Applicant for pursuing all its remedies and an appeal (although I would remind the attorneys and counsel on both sides that they need on occasions to reduce the volume of their cross-complaints, made against each other's conduct and motives, and manage the litigation in a way that avoids unnecessary rhetoric and focuses on the needs and interests of their respective clients).

The Hon. Justice Segal
Judge of the Grand Court