IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN COURT

Before: The Hon. Justice Kawaley

Appearances:

Ms Katie Pearson, Claritas Legal Limited, for the Plaintiff

Mr Ben Tonner KC and Ms Sally Bowler, McGrath Tonner, for the Defendant

Heard: On the papers

Draft Ruling circulated: 9 October 2023

Ruling delivered: 10 October 2023

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Leave to appeal-stay pending appeal-extension of time for seeking leave to appeal-jurisdiction of Grand Court-Court of Appeal Act (2023 Revision) sections 31 (1) (a), 33-Rules of the Court of Appeal Rules (2014 Revision) Order 21 rule 4

RULING ON DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL AND STAY PENDING APPEAL

The applications

1. By a Summons dated 27 September 2023, the Defendant seeks the following principal relief:

> *"1. That the Applicant be granted leave to appeal from those parts of the order of the Grand Court dated 7 September 2023 that require the Defendant/Applicant to pay the cash sum of US$15,801,626.72 into an interest-bearing bank account held with a first-class bank in the Cayman Islands in the name of McGrath Tonner.*
>
> *2.That there be a stay of the requirement made pursuant to the order of the Grand Court dated 7 September 2023 that the Applicant/Defendant must pay US$15,801,626.72 into a bank account in the name of McGrath Tonner pending determination of the appeal.*
>
> *3.That there be a stay of the subsequent order of the Grand Court dated 25 September 2023 debarring the Defendant/ Applicant from filing any further summonses, applications or evidence.*"

The grounds of appeal

2. The Draft Memorandum of Appeal sets out the following grounds:

> "***Grounds of Appeal***

The Defendant/Appellant submits that the Court fell into error in making the 7 September 2023 Order (ancillary to the Restraining Order) because:

1. *There was no evidence, or insufficient evidence, that any ancillary order was necessary in circumstances where the Defendant had complied with the terms of the Restraining Order.*

2. *In the alternative, the Court's choice of ancillary order was not just and convenient because less oppressive, and more effective, measures were available to it in the event that the Court considered that the Defendant/ Applicant's compliance with the Restraining Order did not render the Restraining Order effective. The ancillary order chosen did not preserve the status quo, but rather it created a real risk that the value of frozen assets would be irreparably harmed (in circumstances where the Plaintiff/Respondent has not been required to give any undertaking as to damages and the contested quantum trial is yet to be heard).*

Furthermore, the Defendant/ Applicant seeks a stay of the 7 September 2023 Order (and of the subsequent debarring order dated 25 September 2023), pending the hearing of this appeal on the grounds that the Defendant/Applicant's appeal will be rendered nugatory unless a stay is granted."

The Defendant's submissions

3. Mr Tonner KC advanced the following concise submissions in relation to the leave to appeal principles:

"*5. Telesystem International Wireless Incorporated and T.I.W. Do Brasil Limitada v CVC/Opportunity Equity Partnerships L.P. and Three Others [2001 CILR Note 21] per Sanderson J confirms that the court which made the decision appealed from is usually best placed to judge whether an appeal should be permitted. This minimizes delay and expense.*

6. Telesystem further states:

a. The general test of whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? (Swain v. Hillman [1999] T.L.R. 745, dicta of Lord Woolf, M.R. applied).

b. In an appeal on a point of law (including on the ground that a finding of the lower court is unsupported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case.

c. 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 (e.g. when a public policy issue arises or a binding authority requires reconsideration). The relative significance of the issues and the costs necessary to examine them will be a relevant factor.

7. It is submitted that leave should be granted since the appeal, as set out in the Draft Memorandum of Grounds of Appeal, has Grounds of Appeal, has a real prospect of success."

4. As regards the stay application, Mr Tonner KC submitted most pertinently:

"*8. The application for a stay is made pursuant to the Court's inherent jurisdiction, Section 19(3) of the Act and Rule 24(1) (a) of the Rules…*

9. It is a settled principle that the mere filing of an application (of leave) to appeal does not operate as a stay of execution of a judgment or order.

10. As per section 19(3) of the Act, a stay may be granted for 'good cause':

'(3) No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the

other party or parties to the action, or upon good cause shown to the Court or to the Grand Court.'

13. In Wahr – Hansen v Bridge Trust Company Limited, Slatter, Attorney General and Compass Trust Company Limited [1994 – 95 CILR 435] this Honourable Court opined that a stay will only be granted if refusal would interfere with some substantive right of the party seeking the stay and thus render the appeal nugatory.

14. In this case it is submitted that if the Applicant were to comply with the 7th September 2023 Order and remain debarred pursuant to the Debarring Order, the appeal would be rendered nugatory."

5. My preliminary view was that I should accept the legal test proposed for granting a stay pending appeal, which would only come into play if leave was granted. I was instinctively inclined to accept the legal test for granting leave, subject to considering whether a narrower test applicable to the appellate review of exercises of judicial discretion ought to apply in relation to the discretionary aspects of the decision to grant injunctive relief. As Moses JA opined in *Re Nanfong International Investments Limited* [2018 (2) CILR 330] in relation to the basis for impugning the discretionary decision to grant a stay:

"*25. If the judge exercising his discretion adopted that approach, his decision cannot be impugned provided that (*per *Lord Bingham in* Reichhold *(6) ([2000] 1 W.L.R. at 186)):*

'. . . he left nothing out of account, took account of nothing of which he should not have taken account, and gave a fair and judicious summary of all the matters properly to be considered."

6. It also seemed right that if leave was granted a stay should follow to avoid the appeal being rendered nugatory. However, these legal niceties appeared to be academic, because the two grounds of appeal presently articulated appeared at first blush to be hopeless. No attempt was made in the Defendant's Submissions to embellish these grounds with any further elaboration. This was perhaps unsurprising as:

(a) the averment that there was no or insufficient evidence that any ancillary order was necessary because the Further Freezing Order[1] had been complied with appears to assume (1) that the Defendant's non-compliance with the earlier Information Order is irrelevant, and (2) that the Defendant acted properly in contesting the application to freeze the Treasury Bill and disposing of it before the Court granted the Further Freezing Order. Viewing the Defendant's litigation conduct through a traditional legal lens, there was in fact compelling evidence of the need for an ancillary order; and

(b) the averment that the 7 September 2023 Restraining Order was oppressive and ineffective and/or inappropriate is only intelligible if viewed in an entirely decontextualized manner which fails to take into account the fundamental rationale for the Order. Again, it presupposes that the Court was not entitled to have regard to (1) the Defendant's non-compliance with the Information Order (i.e. failure to confirm the existence of assets it claimed to hold) and (2) the Defendant's disposing of an asset the Plaintiff was seeking to freeze.

The Plaintiff's submissions

7. The Plaintiff, unsurprisingly, submitted that neither proposed ground of appeal was arguable. As regards Ground 1, the no or insufficient evidence to justify the Order complaint, the relevant evidence was referred to and the following conclusory submission was made:

> "*5.4. On the basis of the evidence before him, the Judge was entitled to conclude that FDL's case was 'factually unanswerable' (Judgment, paragraph [40]).*"

8. This submission was entirely consistent with my own provisional view and was not difficult to accept it in light of the quoted finding recorded at paragraph 40 of the Judgment. As regards Ground 2, the Plaintiff's counsel most pertinently submitted:

> "*6.1. No challenge is made to the Court's jurisdiction to make such an order.*
>
> *6.2. This ground is tantamount to an argument that the Judge erred in the exercise of his discretion, an exercise which the Court of Appeal will only interfere with where: the Judge has (i) erred in principle or (ii) left out or taken into account something which he should,*

[1] This the term used in earlier judgments for the 17 August 2023 Order.

or should not, have considered or (iii) reached a decision which was wholly wrong: Phonographic Performance Limited v AEI Rediffusion Music Limited [1999] 1 WLR 1507, p.1523 per Lord Woolf MR [3/109]. In the context of the discretion to grant (or not grant) an injunction, see also Hadmor Productions Ltd v Hamilton [1983] 1 AC 191 at 220 per Lord Diplock (emphasis added): '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'.

6.3. The Draft Grounds are wholly incoherent in that they fail to address the requisite test for interfering with the exercise of a judicial discretion, as set out above."

9. These submissions were also entirely consistent with my own provisional views (set out above) and were accordingly not difficult to accept. Since in the context of an oral hearing the Defendant/Applicant would have had a right of reply, on 4 October 2023 I invited the Defendant's counsel to submit any reply submissions by 4.00pm on 6 October 2023. Two days appeared to me to be sufficient bearing in mind the main points to reply to were short, obvious and (in my by now very strong provisional view) incontrovertible.

10. The Plaintiff made a somewhat unconvincing jurisdictional challenge to the power of the Court to extend time for filing of the application for leave to appeal which appeared to me at first blush to be misconceived. The Plaintiff also made a jurisdictional objection to the Defendant's application for an ancillary stay of the 25 September 2023 Debarring Order, which also appeared to me at first blush to be misconceived:

"*24. So far as the jurisdiction to grant a stay of the 25 September Order is concerned, s. 19(3) of the Act only confers a jurisdiction on the Grand Court to grant a stay of 'any judgment appealed against'. Neither the 25 September Order nor the 25 September Ruling are under appeal. Therefore, the Court has no statutory jurisdiction to grant a stay of the 25 September Order.*

25. If FDL is wrong about jurisdiction, there is no 'good cause' to grant a stay of the 25 September Order. In particular, the rationale behind the Order was to compel CSL to comply with the 7 September Order. CSL has not advanced any reason, let alone a good one, why that provision, designed to protect FDL (as well as other court users) should be stayed. CSL cannot be allowed to seek the assistance of the Court while at the same time simply ignoring Orders made against it."

11. It seemed obvious to me that that if leave to appeal the 7 September 2023 Order were granted, the Court could in its inherent jurisdiction stay the relevant portions of the 25 September 2023 Order to prevent the Defendant's appeal being rendered nugatory. The Plaintiff's submission appeared to illogically assume that a freestanding stay of the 25 September 2023 Order was being sought even in circumstances where the leave to appeal and stay applications had been refused.

The Defendant's reply submissions

12. The Defendant's Reply Submissions combine a reiteration of the opening submissions with a specific reply to points made in response to them by the Plaintiff.

Jurisdiction

13. As regards the jurisdiction to entertain the application, it is submitted:

"*23. In reply, the Respondent/ Plaintiff observes that the extension application was made, and granted, in accordance with the overriding objective to avoid possible wastage of time and costs.*

24. The Court having granted the extension, it was perfectly proper of the Applicant/ Defendant to apply to the Grand Court for leave, not least because The Court of Appeal Rules (2014 Revision), r. 21 (4) provides: 'Wherever, under the Law or these Rules, an application may be made either to the court below or to the Court, it shall be made in the first instance to the court below.'…

27. FDL contends that the Applicant/ Defendant's leave application should have been made to a single judge of the Court of Appeal in accordance with Rule 11 of the Court of Appeal Rules (2014 Revision). It relies upon Wisteria Bay Limited v TMSF [2008 CILR 285], in which Henderson J was sitting as a single judge of the Court of Appeal. The Applicant/ Defendant submits that Henderson J did not say in that case that a Grand Court judge could not grant leave to appeal beyond the normal 14-day period.

> *28. Moreover,* [it is] *potentially relevant that in Wisteria Bay, Henderson J concluded as follows (para 15):*
>
> *'My conclusion is that r.11 (5) – (6) established mutually exclusive and alternative rights to apply for leave to appeal. An applicant should apply to the Grand Court for leave but, if the applications is out of time, the Grand Court Judge will sit as a single Judge of the Court of Appeal to hear the application.'*
>
> *29. Although it is less common in 2023 than it was in 2008 for a Grand Court judge to sit as a single judge of the Court of Appeal, if Hon. Justice Kawaley determines that the Respondent/ Plaintiff is correct in its submission that the Grand Court does not have jurisdiction to hear the leave application, the learned judge is invited to consider whether he can hear this leave application as a single judge of the Court of Appeal. If the learned judge concludes that he does have such power, the learned judge is invited to exercise and to proceed to determine this application.*
>
> *30. If, on the other hand, Hon. Justice Kawaley concludes that he does not have jurisdiction, or that he should not use any such jurisdiction, without prejudice to the submissions made immediately above regarding this Honourable Court's power to extend the time to apply for leave to appeal, the Applicant/ Defendant will apply for leave to appeal (out of time) to a single judge of the Court of Appeal.*"

14. This confirmed my provisional view that if this Court could entertain an application for leave to appeal, it must also be able to extend the time for so doing. As regards the jurisdiction to grant a consequential stay of the Debarring Order, Mr Tonner KC made the following anticipated and compelling responsive submission:

> "*43. In reply, the Applicant/ Defendant submits that the 25 September 2023 Order is premised on the 7 September 2023 being valid. It follows that if the 7 September 2023 Order is successfully challenged, or successfully stayed pending appeal, that consequential order in relation to the 25 October Order must logically follow.*"

Grounds of appeal

15. As regards Ground 1, the Defendant pivotally reiterated its central thesis that selling the Treasury Bill before it could be frozen was not evidence of a risk of dissipation:

> "*10. The Applicant/ Defendant was therefore on notice from 9 August 2023 of the order which FDL sought, namely that the freezing order (if granted) would apply to the Treasury Bill or any assets that replaced it. There was nothing preventing the Applicant/ Defendant from dealing in its own asset(s) pending an order of the Court.*" [Emphasis added]

16. As regards Ground 2, the Defendant again essentially repeats its initial counterfactual narrative to the effect that it has given the Court no cause to be concerned about a risk of dissipation. It is argued:

> "*16…It would have been far less oppressive, and no less effective, for the Court to order that the identified and frozen assets (shares) be delivered up to McGrath Tonner rather than the Court making an order that a cash sum be delivered up to McGrath Tonner.*"

17. The oppression argument is inappositely raised for the first time in support of an application for leave to appeal. The application for the Restraining Order was opposed (so far as I could elicit from the Defendant's evidence and submissions) on the grounds that it was not justified on the merits, not that it was oppressive. Equally new, and even more tenuous as an appeal point, is the complaint that the Plaintiff should have been required to give a cross-undertaking in damages, an issue which I did not address because the form of Order submitted by the Plaintiff was not challenged in this regard. The argument that the Court ought to have as a matter of standard practice required a cross-undertaking would have had considerable force if the impugned order was a standard pre-judgment interlocutory injunction. The Order under appeal was not a standard pre-judgment injunction.

Disposition of application for leave to appeal and a stay pending appeal

Jurisdiction of the Grand Court to extend time for seeking leave to appeal to the Court of Appeal

18. I accept Mr Tonner KC's central jurisdictional submission that I had possessed the power to extend time for seeking leave to appeal either as a Grand Court Judge or as a single Judge of the Court of Appeal. I do not consider here whether or not the application I summarily granted was made in a formally correct manner; it probably was not. The relevant statutory provisions can be briefly considered. Section 31 of the Court of Appeal Act (2014 Revision) firstly provides as follows:

> "*(2) Any jurisdiction exercisable in any proceedings incidental to any civil case and not involving the hearing or determination of an appeal may, so far as may be prescribed by*

rules of court, be exercised by a single Judge in the same manner as it may be exercised by the Court and subject to the same provisions."

19. Section 33 then provides:

"***Powers exercisable by a Judge of the Grand Court***
33. All the powers conferred by this Act, any other law or rules of court on a single Judge may, for all purposes, be exercised by a judge of the Grand Court in the same manner as they may be exercised by a single Judge and subject to the same provisions and such exercise shall, for all purposes, be as valid as if that power had been exercised by a single Judge:

Provided that, on the application of a party aggrieved by it, the Court, as duly constituted for the hearing and determination of appeals under this Act, may review and discharge or vary any exercise of any of such powers by a judge of the Grand Court under this section."

20. Rule 11 of the Court of Appeal Rules (2014 Revision) provides:

"*(5) In any case in which leave to appeal is required, an application for leave shall be made to the court below-*

(a) at the time the judgment or order is pronounced; or

(b) by summons or motion issued within fourteen days from the date on which the judgment or order is filed, and if leave is granted, the appellant's notice of appeal shall be lodged within fourteen days of the date upon which the order giving leave to appeal is made.

(6) An application for leave to appeal out of time shall be made by summons or motion to a single judge." [Emphasis added]

21. In my judgment the most sensible way of construing this procedural regime is that the Grand Court Judge entertaining an application for leave to appeal can also deal with extension of time applications as a single judge of the Court of Appeal. I therefore reject the Plaintiff's argument that leave to appeal should be refused on the grounds that the application was out of time. In the event, this point is not dispositive.

Merits of application for leave to appeal

22. The Defendant has been unable to formulate arguable grounds of appeal in respect of this Court's decision on 7 September 2023 and so its applications for leave to appeal and a stay pending appeal must be refused. In summary:

(a) it is not arguable that there was no or insufficient evidence to justify the Restraining Order[2] in light of the Defendant's failure since 16 June 2023 to confirm that the funds it has represented to the Court it is preserving as security for any judgment the Plaintiff obtains actually exist (as required by the Information Order) and its disposal of a specific asset the Plaintiff was seeking to freeze while it was actively contesting the application; and

(b) contending that the Court could have exercised its discretion to grant injunctive relief in a different manner is not an arguably viable basis for challenging the validity of the exercise of a judicial discretion.

Stay of the Court's own motion to facilitate a renewed application to the Court of Appeal for leave to appeal and a stay pending appeal

23. It is possible that the Defendant may wish to renew its present applications to the Court of Appeal. Notwithstanding my robust rejection of the Defendant's application for leave to appeal and for a stay pending appeal, my provisional view is that it would be appropriate in principle, of the Court's own motion, to summarily grant a short stay of seven days from the date when the Order giving effect to this Ruling is perfected in the exercise of the Court's inherent jurisdiction. This Court frequently grants such stays to avoid the efficacy of the further pursuit of appeal rights being undermined in any way.

[2] This is the term used herein and in the judgment in relation to the 7 September 2023 Order for that Order, which was ancillary to the Freezing and Further Freezing Orders.

Summary

24. For the above reasons, the Defendant's application for leave to appeal and a stay pending appeal in respective of this Court's decision dated 7 September 2023 herein is refused. Unless any party applies by letter to the Court within 14 days of the date of this Ruling to be heard as to costs, the costs of the present application shall be paid by the Defendant to be taxed if not agreed on the standard basis.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT