2/5/08

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 478 OF 2004

BETWEEN: (1) WISTERIA BAY LIMITED
(2) UTTERTON LIMITED
(3) ABDALLAH IBRAHIM ABDALLAH AL-AYED

Applicants

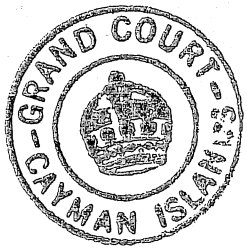
AND: (1) TASARRUF MEVDUATI SIGORTA FONU
(An entity Established Under Turkish Law)
(2) MAVI TURIZM YATIRIM TICARET A.S.
(3) RUMELI CIMENTO SANAYI TICARET A.S.

Respondents

Appearances: Mr. Robert Miles Q.C. instructed by Mr. Hector Robinson, Mr. George Keightley and Mr. Peter Hayden of Mourant du Feu & Jeune for the Applicants
Mr. Geoffrey Cox Q.C. and Mr. Richard Davison instructed by Mr. Alistair Walters and Miss Kirsten Houghton of Campbells for the Respondents

Before: Hon. Justice Henderson

Heard: May 22, 2008



RULING

The first three defendants ("the defendants") have applied to me, sitting as a single judge of the Court of Appeal, for leave to appeal and, whether or not I grant leave, for a stay of execution.

On May 6, 2008, the Chief Justice struck out the defendants' defences and counterclaims because of certain defaults which he found amounted to an abuse of the court's process. On May 13, 2008, he signed judgment for the plaintiffs expunging certain ships' mortgages and vacating the ships' registrations in the Cayman Islands.

The defendants applied to Smellie, C.J. for leave to appeal and for a stay of execution. Both were refused. The parties are agreed that an appeal can be brought only with leave.

The plaintiffs say that, in these circumstances, a single judge of the Court of Appeal has no jurisdiction to grant the relief sought. I now turn to that question.

The Court of Appeal Law (2006 Revision) provides only that a single judge may exercise any jurisdiction conferred upon him by rules of court (except the actual determination of the appeal itself): see section 31(2).

Section 24(1) of the Court of Appeal Rules (2004 Revision) confers jurisdiction upon a single judge to hear and determine three types of applications: for a stay; for an injunction; and for an extension of time. Notable by its absence is any reference to an application for leave.

That section reads:

> "In any case or matter pending before the Court, a single judge may, upon application, make an order for –
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> > (a) a stay of execution on any judgment appealed from pending the determination of such appeal;

(b) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject-matter of the appeal pending the determination thereof;

(c) extension of time,

and may hear, determine and make an order on any other interlocutory application."

In *Horvat Properties (Cayman Islands) Ltd. and another v. Brown*, [1994-95] CILR N-2, former Chief Justice Harre held that, where leave to appeal is required, there is no "case or matter pending before the court" until leave has been granted. The mere filing of a notice of application for leave to appeal, even if filed within time and in proper form, does not amount to the initiation of a case or matter in the court.

He said:

> "In my view the words "such appeal" and "the appeal" in subrule 24 (1) (a) and (b) are meaningless unless they refer back to the words "case or matter pending before the court" at the beginning of the rule. The whole of rule 24 refers, in my view, to a case or matter which is already pending before the Court of Appeal and not to any application for leave to take a case or matter before it. Such an application does not itself cause the case or matter to be pending before the Court. I am fortified in that view by looking at the powers of a single judge in criminal cases under section 26 (1) of the Court of Appeal Law. They include, among other things, power to extend the time within which notice of appeal or application for leave to appeal may be given but do not include the power to grant such an application. It would be an anomaly for that power to exist in civil but not in criminal cases."

The application made to Harre, C.J. was for leave, that application having already been brought unsuccessfully in the Grand Court. His Lordship held that any further leave application must be

made to the full Court of Appeal as provided for in section 32 of the Law. The result is that a single judge may never grant a stay or an injunction until leave to appeal has been obtained.

Since the Court of Appeal of the Cayman Islands is composed entirely of judges who do not reside within the country, significant delay will be experienced often before such a leave application can be heard. In the interim, no stay is available if a Grand Court judge has refused to grant one. A single judge of the Court of Appeal is powerless to intervene even where the result of the appeal could be rendered nugatory without a stay of execution.

All of this, says Mr. Miles, is anomalous and out of harmony with section 25 of the Law, which directs the court to construe the law liberally in favour of the right to appeal.

A different response is the one provided by Harre, C.J. in *Worldwide Financial Holding v. Citel* [1994-95] CILR N-2. He held there, in conformity with his earlier ruling, that a single judge has no jurisdiction to grant a stay and then remarked:

> "This conclusion raises difficulty in that the judges of the Court of Appeal are only intermittently resident in the Cayman Islands and an appeal may be rendered nugatory or prejudiced by delay in obtaining leave from the full Court. That is a matter which a Grand Court Judge should consider very carefully when deciding to grant or refuse leave to appeal."

I have no doubt that Smellie, C.J. would have had that comment firmly in mind when he refused leave here.

The applicants argue that the decision in *Horvat Properties* is clearly wrong and should not be followed. Mr. Miles also says that my jurisdiction to grant leave can be found in rule 11.

This rule was amended in 1999 by the addition of subsections (5) and (6) which read:

> "(5) In any case in which leave to appeal is required, an application for leave shall be made to the court below-
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> (a) at the time the judgment or order is pronounced; or
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> (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 filed.
>
> (6) An application for leave to appeal out of time shall be made by summons or motion to a single judge."

Before that amendment, only the full Court of Appeal could grant leave to appeal if the application was out of time. Rule 11(6) rectifies that difficulty by permitting a single judge to grant leave. Rule 11(5) had the effect of enlarging the time limit for a leave application to a Grand Court judge. The crux of Mr. Miles' argument is that rules 11(5) and 11(6) are not alternative procedures but provide a right to make two separate and independent applications. The first three defendants draw some additional support for their position from rule 21(4) which 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."

If this position is correct, every would-be appellant will have three opportunities to obtain leave. First, an application will be made to a judge of the Grand Court under rule 11(5). Then, after the time for making a leave application has expired, an application for leave out of time will be brought

before a single judge of the Court of Appeal. If that also is unsuccessful, a third application will be made to the full court.

Do our Court of Appeal Rules contemplate that every prospective appellant should have three chances to obtain leave? Such applications can impose significant additional cost and delay upon a respondent who may have waited years to obtain a judgment in the Grand Court.

I am happy to adopt the liberal and purposive approach to construction of the rules urged upon me by Mr. Miles, but it does not lead me to the result he seeks. Two opportunities to ask for leave are enough. I see no sound reason for allowing three and would not read the rules in this way unless the right to three successive applications is established in clear and expressive language. It is not.

Rule 11 establishes two alternate ways of seeking leave: to the Grand Court, if the application is brought in time; and to a single judge of the Court of Appeal, if it is not. The suggestion that an unsuccessful applicant at the Grand Court level need only wait a while and then apply again to a single judge is not logical. If the intent is to provide for a second application to a single judge, why require the prospective appellant to wait until the requisite number of days have past? Neither the language of rule 11 nor any implication which may arise fairly from it would compel such an artificial result. Rule 21(4) is of no assistance on this point.

My conclusion is that rule 11(5) and rule 11(6) establish mutually exclusive and alternative rights to apply for leave to appeal. An applicant should apply to the Grand Court for leave but, if the application is out of time, the Grand Court judge will sit as a single judge of the Court of Appeal to hear the application. In either event, a further appeal to the full court is possible.

I recognise that failure to obtain leave in the first instance may, in some cases, determine the outcome because no stay or injunction can be granted when leave is refused. This militates in favour of granting leave and a stay in close cases.

On balance, I find that a purposive approach to this question of construction leaves me with a preference for a regime where some unsuccessful litigants are confined effectively to one leave application over a regime where everyone is entitled to three.

For these reasons, both applications are dismissed for want of jurisdiction.

Dated this 22nd day of May, 2008

Henderson, J.

Henderson, J.
Judge of the Grand Court