17/8/06
22/8/06

IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO. 126 OF 2005

BETWEEN:	BRITCAY HOUSE LTD.	PLAINTIFF
AND:	INTERNET FINANCIAL SERVICES	DEFENDANT
AND BETWEEN:	INTERNET FINANCIAL SERVICES LTD.	
		Plaintiff by Counterclaim
AND:	(1) BRITCAY HOUSE (2) BRITISH CAYMANIAN INSURANCE CO. LTD.	
		Defendants by Counterclaim

CORAM: HON. CHIEF JUSTICE ANHTONY SMELLIE

Appearances:
Mr. Kyle Broadhurst and Mrs. Terri Cauderion of Broadhurst Barristers for the applicant IFS.
Mr. Ramon Alberga Q.C. instructed by Mr. Brian Ashenhiam for the plaintiff/first respondent.
Mr. Richard Annette of Stuart Walkers Hersant for the 2nd defendant to the Counterclaim/2nd respondent.

Date of hearing: 8th August 2006

Date of delivery:17th August 2006

RULING

1. This case arises out of lease arrangements relating to a building owned by the plaintiff (hereinafter "BHL") and which was damaged by hurricane Ivan in September 2005.
2. BHL's claim may be generally described as one for liquidated damages; being the non-payment of various sums alleged to be due for rent and by way of repayment of monies advanced to the defendant (hereinafter "IFS") for the physical fitting out and furnishing of that portion of the building which had been leased to IFS; all in the amount of CI$ 796, 798.52, plus continuing interest.
3. While admitting that very limited amounts may have been due for rent; IFS in its defence essentially denies that BHL is entitled to damages. It avers instead that

because of misrepresentations made by BHL as to the fitness for occupancy of the building, it was entitled to and did duly repudiate the lease agreement after damages from the hurricane proved that the building had not been built as specified in the lease.

4. IFS further avers to the effect that the costs of the fitting out and furnishings were for BHL's account, as the premises were leased on a "turn key" basis.
5. IFS also sues by way of counterclaim - the pleading which is the subject of the present application for leave to appeal out of time.
6. The counterclaim seeks damages claimed to have arisen as the result of BHL's misrepresentations as to the fitness for occupancy of its building, the resultant loss of virtually all of IFS' equipment and goods contained in the building and for business revenue alleged to have been lost due to the discontinuance of IFS' operations.
7. IFS also sues the 2nd defendant to the counterclaim ("BCIC") alleging nuisance. This is on the basis that substantial waters entered the demised premises through sliding doors on the 4th floor above, which are alleged by IFS to have been unsuitably installed by BCIC on that floor which BCIC occupied.
8. The foregoing, though a simplification of the pleadings in the case, suffices for the present purposes of framing the arguments on this application.
9. IFS applies for leave to appeal out of time against an order made by Levers J. on 11th August 2005 in which, among other things, she ordered to be struck a number of paragraphs of IFS' defence and required IFS to pay security for BHL's and BCIC's costs of defending its counterclaim. She had further ordered that the counterclaim be struck out in its entirety in the event of non-payment of the security, an event which did in fact occur.
10. A number of intended grounds of appeal have been articulated by Mr. Broadhurst for IFS, directed mainly against the order for security for costs and the ancillary peremptory order by which the counterclaim was ordered to be struck.
11. The application for leave comes before me as a single judge of the Court of Appeal and Mr. Alberga on behalf of BHL took the point, in limine, that there is

no jurisdiction in a single judge to grant such an application. In this he was supported by Mr. Annette on behalf of BCIC.

12. Mr. Alberga relied, in the main, on two earlier reported decisions of former Chief Justice Harre sitting as a single judge of appeal: H. Ltd and H v B and In Re C both reported at 1994 – 95 CILR Note 2. In those cases it was held that a single judge has no jurisdiction under the Court of Appeal Law, section 26 (A) [(as it then was, now section 30 (2)] to hear and determine an application for leave to appeal in a civil case, since his powers under the Court of Appeal Rules, 1987 Rule 24 (1); are confined to cases or matters already pending before the Court and an application for leave to appeal does not cause the case to be so pending. Such an application should therefore be made to the full Court of Appeal.

13. The Court of Appeal Rules were, however, subsequently amended in August 1999 when, among other things Rule 11 (6) was added.

14. The clear purpose of that amendment is in my view readily apparent from a reading of Rule 24 (1) with Rule 11 (6) as vesting the jurisdiction in a single judge which had hithertofore been lacking:

> "24 (1) 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; or
>
> (c) extension of time,
>
> and may hear, determine and make an order on any other interlocutory application".
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> Rule 11 (6) comes under the heading "Civil Appeals" in Part 11 of the Rules and reads:
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> "An application for leave to appeal out of time shall be made by summons or motion to a single judge".

15. Mr. Alberga nonetheless submitted that Rule 11 (6) ought not to be construed as vesting any new jurisdiction when read with Rule 24 (1). Given the strictures of the latter confining jurisdiction in a single judge only to such matters already pending before the Court even when - as by subrule 24 (1) (c) - extensions of time

are sought; it would be anomalous he submitted, to construe Rule 11 (6) more broadly as vesting jurisdiction to grant leave to appeal out of time which itself necessarily involves the grant of an extension of time.

16. Instead Mr. Alberga sought to advance a meaning for Rule 11 (6) as to be construed only as enabling applications before a single judge to grant leave for the filing of a notice to appeal out of time, leave to appeal out of time having already been granted by the Grand Court (in the case of an interlocutory matter) or by the full Court (in other cases where such leave may be required).
17. Such an application would come about he argued, in a situation where leave to appeal having been granted, the notice of appeal is not filed within the deadlines stipulated by the Rules and so an extension of time for so doing is required.
18. I was unable to accept that construction mainly for three reasons.
19. First, the plain words of Rule 11 (6) are not limited in that way, a limitation which would involve the implication of the further words "to file notice" after the word "leave" as it appears in the Rule in order to arrive at that meaning.
20. Second, no such implication is necessary for the purposes of construction because no anomaly necessarily arises when Rules 11 (6) and 24 (1) (c) are considered in their respective contexts. This is demonstrable by the fact that other kinds of applications for extensions of time – such as for the filing of a respondent's notice or a notice of cross-appeal out of time – could ordinarily arise under Rule 24 (1) (c) when matters are already pending before the Court.
21. Finally, construed as implicitly contemplating only applications for leave to file notices of appeal out of time, instead of applications for leave to appeal out of time; Rule 11 (6) would equally appear to be "anomalous" with Rule 24 (1) (c) for the same reason argued by Mr. Alberga ie: upon either of those constructions of Rule 11 (6) there would have been as yet no matter pending before the Court. This is because even in a case where leave to appeal out of time is already granted, the appeal does not become "pending" before the Court until the notice of appeal is filed.

22. At all events, as I have explained, any such "anomaly" is more perceived than real. I was satisfied that Rule 11 (6) vests jurisdiction to hear the present application by IFS for leave to appeal out of time and so I proceeded to hear it.

23. The factors to be considered as to whether an application for leave to appeal out of time should be allowed were set out by this Court in Streeter and K Coast Development v Immigration Board and Governor in Council 1999 CILR 264 at 269; as being:

> "(a) the length of the delay; (b) the reasons for the delay; (c) the likelihood of success on appeal and (d) any prejudice to the respondents in allowing the proposed application".

24. No argument was advanced against this application under heads (a), (b) or (d). The application was filed out of the time allowed by only one day for the reason given in the affidavit of the former attorney of record; that a clerical error had been made within his office. No prejudice to BHL or BCIC could be said to arise from that short delay.

25. That left for my consideration the question whether IFS had a realistic prospect of success on appeal against the order striking out certain paragraphs of its defence, the counterclaim and requiring the payment of security for costs. This was not a question that could involve me in this application in any detailed assessment of the merits or otherwise of the appeal. The question was whether the applicant has an arguable case: Smith v Cosworth Casting Process Ltd (Practice Note) 1997 4 All. E.R. 840

26. It was also submitted on behalf of IFS in support of the proposed appeal against the order for security for costs, that there is a general question of importance which requires clarification by the Court of Appeal in any event as to the power of the Court to make such orders. This is whether it is permissible to do so where, as here, there is already in place an injunction restraining the known assets of a foreign plaintiff within the jurisdiction. See Hitachi Shipbuilding and Engineering Co. Ltd v Viafel Compania Naviera [1981] 2 Lloyds Rep 498 C.A.

27. In the Hitachi case the defendant Viafel was treated as a plaintiff by virtue of its counterclaim in which it alleged negligence by Hitachi in respect of ships

contracted to be built for Viafel. Those were the contracts in respect of which Hitachi had instituted its action alleging wrongful breach by Viafel. Hitachi had obtained an injunction restraining a vessel owned by Viafel as the asset of a defendant outwith the jurisdiction of the Court and against which it might later be able to enforce a judgment. The vessel was however released when bank guarantees and other securities in the total sum of U.S.D 4 million were provided.

28. In respect of Hitachi's further application for security for its costs of defending Viafel's counterclaim; Donaldson LJ made the following general and persuasive pronouncements:

> "I now turn to Hitachi's application for security for costs Contrary to the conclusions which I have already indicated, I assume for this purpose that they are throughout or quoad the nuts and bolts issue [(ie: the counterclaim)] in the position of defendants and the buyers (Viafel) in that of plaintiffs and that Hitachi can show that they are faced with the prospect of incurring U.S. $1 million in legal costs as a result of the buyer's allegations. It is well settled that an order for security for costs will not be made against a foreign plaintiff who has substantial property within the jurisdiction, provided that the property is permanently here and will be available to satisfy any order for costs which is made against the plaintiff (Re Apollinaris Company's Trade Mark [1891] 1 Ch. D).
> The bank guarantees amounting to U.S. $3 million are available to meet any order for costs and the US $800,000 on deposit is so available, subject to the claims of other creditors.
> - - -
> The Mareva injunction does not have the affect of securing Hitachi's claims, leaving no assets available to meet a liability for costs. It merely puts Hitachi in the same position as they would have been if they had been sued by a United Kingdom resident or company or by a foreigner who had permanent assets in this country to a value which far exceeds the amount of any costs which they were likely to incur. In such a case no order would be made giving Hitachi security for costs. By parity of reasoning, no order should in my judgment be made in this case"
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> In agreeing Lord Justice Ackner (as he then was) stated on this issue simply that: "In view of the existence of the Mareva injunction I would not be prepared to order security of costs in regard to that part of the Counterclaim which relates purely to the assessment of the question of the respondents alleged loss".

29. Here, the first ground of appeal is that IFS is not susceptible to an order for security for costs as it is a defendant and the fact that it sues also by counterclaim

does not cast it in the mould of a plaintiff for the purposes of Grand Court Rules Order 23. GCR Order 23 provides in relevant part as follows:

> "1. (1) Where, on the application of a defendant to an action or other proceedings it appears to the Court –
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction;
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> - -
>
> Then if, having regard to all the circumstances of the case, the Court thinks it just to do so it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just
>
> - -
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> (4) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (however described on the record) who is in the position of the plaintiff or defendant, as the case may be, in the proceedings in question, including a proceeding on a counterclaim".

30. The point of principle for which reliance is placed on the Hitachi case – whether a further order for security is permissible where significant assets are already restrained - is one which in my view provides an arguable ground of appeal.
31. The decision whether IFS should in the first place be regarded as being in the position of a plaintiff in respect of its counterclaim, was one resolved by way of factual assessment by Justice Levers.
32. She so concluded having regard to the issues raised for trial in the counterclaim, such issues found by her to be going beyond what may have been necessary to raise by way of defence to BHL's claim. My own view is that she could hardly be faulted in that assessment of the nature of the counterclaim so as to regard IFS as being in the position of a plaintiff and on that view of the matter alone would not see an arguable case for appeal on the ground. But the matter of the extent of the issues raised in the counterclaim does not end there. Justice Levers also ordered to be struck certain aspects of IFS's pleading and it is said also that there may well be an arguable appeal against that aspect of her order.
33. At one and the same time as she ordered the payment for security for costs, Justice Levers also ordered that, in default, the counter-claim should be automatically struck out. As events transpired that did happen and, given what IFS describes as the pre-emptive nature of that aspect of the order, forms another

ground of appeal. It is said that preemptory as it was, it was in the nature of an "unless order" and was unfair in not allowing IFS an opportunity to explain its default. Such an explanation is said to have been available from the fact that the resources from which the security was to be met – proceeds of an insurance claim – were paid only shortly after the deadline imposed by the order.

34. The striking out of the counterclaim is itself therefore to be another ground of appeal which I am persuaded meets the standard of arguableness.

35. I do not see the need to reflect upon the remaining grounds; there being already identified sufficient to justify the grant of leave to appeal out of time. I so order. Having so decided, I should note that I have not overlooked the different and separate position of BCIC. For instance, there can be no question that as 2nd defendant to the counterclaim it is being sued by IFS entirely as a stranger to BHL's claim against IFS. Thus IFS can be regarded only as being in the position of a plaintiff vis-a-vis BCIC on its counterclaim and there can be hardly be an argument about that.

36. Nonetheless, the existence of the injunction over the insurance proceedings (IFS' only known assets within the jurisdiction) must be seen as operating as much in favour of securing BCIC's contingent claim for costs against IFS; as it would BHL's if either or both are successful in defending IFS' counterclaim.

37. I therefore see no basis, looking at the matter from BCIC's position, for denying IFS leave to appeal out of time in respect of that relating to security for costs or any of the other arguable grounds of appeal.

Hon. Anthony Smellie
Chief Justice

GRAND COURT - CAYMAN ISLANDS