Part in Binder 5 25/12/01

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS - Civil

CAUSE 205 OF 2001

BETWEEN:	PANIER S.A.	PLAINTIFF
AND:	MARGARET BURNS	DEFENDANT

Appearances:
Mr. Peter Broadhurst and Mr. Kyle Broadhurst of Broadhurst Dacosta for the plaintiff
Mr. James Chapman of Boxalls for the defendant

Before: Chief Justice Anthony Smellie

RULING

This is the defendant's application for leave to appeal from the judgment of Kellock J in which he reaffirmed an earlier ex parte order by which leave was granted to the plaintiff to serve the writ outside the jurisdiction upon the defendant. Leave was given on the basis that this Court is seized of jurisdiction over the subject-matter of the action and on the basis that the Cayman Islands is the proper forum.

The cause of action arises out of two payments of money in the amount of $100,000 each, which were paid from the plaintiff's bank account in the Cayman Islands to the defendant's bank account in the Cayman Islands. However, the defendant asserts primarily that because the arrangement by which the monies were paid was arrived at as between the parties outside the jurisdiction - while the plaintiff's principal was in New York and the defendant in Ontario - and the documents executed by the defendant in Ontario; Canada is the proper forum.

An initial question arose whether this application for leave to appeal was out of time for failing to comply with Court of Appeal Rules Rule 11 (5). That Rule allows 14 days from the date when the judgment or order is filed for the filing of an application for leave to appeal from an interlocutory order; such as that contained in the reasons for judgment of Kellock J..

His judgment was contained in reasons for judgment delivered on 12th October 2001, but no formal judgment or order has been extracted or filed.

Mr. Peter Broadhurst for the plaintiff took the early point that as more than 14 days have passed since Kellock J's decision, the defendant could no longer seek leave to appeal.

Mr. Chapman responded on behalf of the defendant, that time has not run against her for the bringing of this application for leave to appeal because the plaintiff has so far not filed the order arising from Kellock J's decision

In the absence of such a formal order or judgment, I thought that that must be right and at the commencement this morning, I suggested that on a careful reading of Kellock J's reasons for judgment, he could have decided only 3 things and that, on the agreed basis as to what those three things were, I could hear the arguments. This was with the further understanding, that a formal order in those or like terms would be extracted for the signature of Kellock J and filed.

The arguments before me proceeded on that basis until Mr. Broadhurst made it plain that he maintained his objection that Mr. Chapman was precluded for being out of time.

This then made it necessary for me to decide whether Court of Appeal Rule 11 (5) was mandatory in its requirement that a formal order or judgment be first filed, before time started to run against a defendant for seeking the necessary leave to appeal. If so, then as

no such formal order or judgment has been filed, the defendant's time would not yet have started to run.

I concluded that the Rules do indeed require the filing of a formal judgment or order and that this is by virtue of the application of the Court of Appeal Rule and Grand Court Rules Order 42 Rules 4 and 5.

Court of Appeal Rule 11 provides:

> "11. (1) An appeal to the Court shall be in Civil Form 1.
>
> (2) Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below.
>
> (3) Subject to rule 16, it shall not be necessary to serve the notice on any party not directly affected by the appeal.
>
> (4) For the purposes of section 20 (1) [(dealing with appeals where no leave is required)] time shall be calculated from the date upon which a judgment or order (whether final or interlocutory) is filed in accordance with GCR Order 42, Rule 5.
>
> (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 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".

GCR Order 42 Rule 4 provides:

Orders required to be drawn up.

4 (1) Subject to paragraph (2), every order of the Court shall be drawn up and filed unless the Court otherwise directs.

(2) An order –

(a) which –

(i) extends the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act; or

(ii) grants leave for the doing of any of the acts mentioned in paragraph (3); and

(b) which neither imposes any special terms nor includes any special directions other than a direction as to costs,

need not be drawn up and filed unless the Court otherwise directs.

(3) The acts referred to in subparagraph (2) (a) (ii) are –

(a) the issue of any writ, other than a writ for service out of the jurisdiction:

(b) the amendment of a writ or other originating process or a pleading;

(c) the filing of any document;

(d) any act to be done by the Clerk of the Court.

GCR ~~Order~~ 42 Rule 5 provides :Drawing up and filing of judgments and orders.

5 (1) The party seeking to have any judgment or order filed must draw up the judgment or order and present it to the Clerk of Court together with the number of copies required by paragraph (8) or (9), as the case may be.

(2) In the event that any judgment or order requires that any money be paid into or out of Court, the party seeking to have it filed must also draw up the necessary lodgment or payment schedule in accordance with Order 92. rule 10, and present it to the Clerk of Court at the same time as presenting the judgment or order.

(3) It shall be the duty of the Clerk of Court to provide at the request of any party a copy of any minute or order.

(4) A party presenting a judgment or order for filing (other than one in default or by consent) must identify to the Clerk of the Court the relevant cause number.

(5) Where more than one party has appeared in a proceeding in which a judgment or order has been made and all those parties are represented by attorneys, the attorney for the successful party shall draw up the judgment or order and circulate it to the attorneys for the other parties who shall indorse it "approved as to form and content".

(6) Upon being presented with a judgment or order complying with rule 5A or rule 6 or indorsed in accordance with paragraph (5), the Clerk of the Court shall sign it and file it by sealing it and placing it on the Court file.

(7) Upon being presented with an ex-parte order or an interparties order which has not been indorsed in accordance with paragraph (5), the Clerk of the Court shall present it to the judge for signature.

(8) The Clerk of the Court shall notify the party who drew up the judgment or order when it has been filed and shall provide such party with as many sealed copies as he may require upon payment of the prescribed fee.

(9) A party seeking to file a final judgment or order or a default judgment shall provide the Clerk of the Court with at least two copies, one of which shall be retained for filing.

(10) A party seeking to file an interlocutory judgment or order other than a final one shall provide the Clerk of the Court with at least two copies, one of which shall be retained for filing.

(11) An office copy of every judgment or order of the kind specified in paragraph (9) shall be placed by the Clerk of the Court on the Register of Judgments maintained in accordance with Order 63, rule 7".

There can be no differentiating for present purposes between Court of Appeal Rule 11 sub rules (4) and (5) on the basis that the former requires conformity with GCR Order 42 Rule 5, but the latter does not.

Where, as in this case what is required and sought is leave to appeal against an interlocutory order as distinct from an appeal against a final order, the requirement that there first be a formal judgment or order on the file must be a fortiori applicable. This is because it is in the nature of interlocutory applications that written judgments are very often not given. Thus if leave is refused or given to appeal from an interlocutory order, the only evidence of what it is that leave has been refused or given to appeal from, would be that formal order or judgment itself. As GCR Order 42 Rule 5 (11) shows, interlocutory orders are not kept in the permanent Register of Judgments. The only internal record of such an order is therefore often the copy retained pursuant to Rule 5 (10).

Primarily for that reason, I conclude that GCR Order 42 Rule 5 should be taken as applying to interlocutory orders; as it plainly does by virtue of Court of Appeal Rule 11 (4) in respect of judgments from which leave to appeal is not required by the Rules. Not only will the filed order serve as a record of what was decided upon the interlocutory hearing, its filing will also serve as an accurate reference for determining when time

begins to run for the making of an application for leave to appeal. The filing is therefore an essential trigger for the mechanism of the appellate rules.

On that basis, I regard myself – and so proceeded by hearing the arguments - as having been properly seized of Mr. Chapman's application for leave to appeal. The time for bringing it has not yet expired. On that basis I also identified the 3 main issues to be extracted from Kellock J's reasons for judgment of 12th October 2001 to be filed as the order and treated that as the order.

Those reasons show the 3 main issues which were addressed by the learned judge and which served as the basis for the arguments before me:

(i) whether this Court was properly seized of jurisdiction over the subject-matter of the dispute. This is the prerequirement for the purposes of GCR Order 11, by which leave to serve outwith the jurisdiction is granted;

(ii) if the answer to (1) was "yes" – whether, as a matter of the exercise of the discretion to give leave for service out, Cayman is the proper forum for the trial of the dispute;

(iii) the appropriateness of an order for indemnity costs against the defendant arising from her failed challenge before Kellock J to the earlier ex parte order, such costs having been ordered by him to be taxed and paid forthwith.

As to (i) the plaintiff's case is put by Mr. Peter Broadhurst as pleaded in the alternative.

In the first alternative; it is that the plaintiff seeks to recover upon 2 promissory notes the two amounts of $100,000 cash advanced to the plaintiff as a loan, said to be repayable by the plaintiff under the terms of the Notes as such.

The plaintiff avers that the Notes were executed in Canada by the defendant, delivered to the plaintiff in the Cayman Islands, that the monies were - this is indisputable - paid from the plaintiff's bank account into the defendant's bank account in the Cayman Islands and that for those reasons, among others, Cayman is the proper forum.

In rebuttal on this pleading Mr. Chapman says that the learned judge failed to address his mind to the crucially important matter of the plaintiff needing to establish that there is in this Court, subject-matter jurisdiction over the Notes. This is because on the defendant's case, the Notes were prepared in Canada, offered to the plaintiff (through the person of its principal Mr. Alfred Billes) while he was in New York and accepted by him there and that that acceptance was communicated to the defendant in Canada. Further that Mr. Billes subsequently came to the Cayman Islands where he keeps a second or third home. That while here he, on behalf of the plaintiff, informed the defendant that he had not brought the Notes with him and needed others for presentation to the bankers here. That it was on that basis the defendant faxed further copies to Mr. Billes in Cayman. This she avers was all after the Notes had been executed by her in Canada.

While the defendant thus maintains that there was never any formal execution of the Notes in the Cayman Islands, she acknowledges however that the 2 sums of $100, 000 each were paid into her bank account in the Cayman Islands.

Another issue on the defendant's case is her assertion that although the plaintiff through Mr. Billes did express a preference while in New York for the version of the Notes which

carried interest - the version the defendant says he directed the plaintiff company Panier SA to accept and to pay out the monies upon - that election and acceptance of the promissory notes was never communicated to the defendant in Ontario, where she was at the material times.

On that basis Mr. Chapman also argues that the learned judge was wrong to conclude, if conclude he did, upon the Promissory Notes as having been executed in Cayman.

A promissory note takes effect Mr. Chapman argues, where communication of its acceptance takes place. That was in Ontario where the defendant was at the time when Mr. Billes was in New York and they both agreed on the telephone. If that is so, he says then the subject-matter jurisdiction is in Ontario and the Court there would be the proper forum for the trial of the dispute..

I must acknowledge that I do not see specific references to a finding on this first issue in the reasons for judgment of Kellock J.

Instead, the learned judge chose to focus on the plaintiff's alternative pleading: This is that the documents which are said to comprise the promissory notes also comprise agreements for a loan of the sum of $200 000 which was advanced. He accepted for the purposes of the forum issues, that there is clearly subject-matter jurisdiction in the Cayman Islands over those agreements so regarded, because the parties were both resident here (the defendant has permanent residence here and like Mr. Billes, keeps a home here). He found that there was credible evidence that she was resident here at the time the agreements were entered into and the monies paid from the plaintiff's bank account here and received into her bank account here.

Those latter findings of fact are indeed independently established in the evidence. The fact that the defendant resides here is not accepted by her, notwithstanding that she admittedly has Cayman Islands permanent residence and owns an expensive condominium here.

I conclude that there can be no tenable argument that the learned judge was wrong in concluding that this Court had jurisdiction over the subject-matter of the dispute, viewed in the alternative as a contract between the parties for a loan.

I also note here, that Mr. Chapman did admit in his arguments that the arrangement was one also to be regarded as a loan; albeit subject to the jurisdiction of the Ontario Court. He said nonetheless that it is in that jurisdiction that the parties are domiciled and ordinarily resident and, even so regarded, the subject-matter dispute should be tried there. The learned Judge disagreed and relied upon what he regarded as clear evidence of the defendant's residence also in Cayman.

Issues of law as to the acceptance of promissory notes aside, a proper finding of subject-matter jurisdiction is available on the basis of there being a loan arrangement which was made within this jurisdiction. See GCR Order 11 Rule 1 (1) (d) (i) and (e).

Such a decision is also permissible where relief is sought against a person who has the right to reside permanently within the Islands. See GCR Order 11 Rule 1 (1) (a) (i).

The second issue was whether leave to serve outwith upon the defendant was appropriate as a matter of the exercise of discretion.

Here again, while Mr. Chapman criticizes the learned judge for not having directed his mind to the proper principles, it is plain, from page 23 of his reasons for judgment, that in his references to the Spiliada case ([1986] 3 A.E.R. 843) he had them firmly in mind.

The learned judge then proceeded to discuss some of the important, albeit not all, of the guiding principles.

He appeared to be particularly concerned about the matter of convenience – in particular whether it would be more convenient to try this matter here or in Ontario (or elsewhere). In concluding that Cayman is the more convenient forum, he rejected the suggestion of the defendant that she would need to call one or more expert witnesses who are available in Canada and who would come to Cayman only at great expense.

He also rejected the suggestion that she would lose the juridical advantage of applying for oral discovery which is available only in Ontario. As the learned judge noted, that is an order which will be available in this jurisdiction and certainly can now be made by consent where the witnesses to be examined are the parties themselves.

In the application of the Spiliada principles, these appeared to be the issues which most significantly occurred to the judge's mind.

In the circumstances of this case, I cannot see that he could be properly criticized for that.

He was also criticized for going too far in some of the adverse findings or observations of fact which he made in relation to the evidence and case of the defendant.

While some of those adverse findings and observations may be regarded as being strictly obiter - as not going to the rationale of his judgment to reaffirm leave to serve outwith - he was nonetheless required to make findings of fact in order to express a view on whether the Court had jurisdiction over the subject-matter – whether viewed as agreements or as promissory notes.

I do not see how any of those observations could be regarded as colouring his findings on the two main issues, so as, as Mr. Chapman complains, to have invalidated his decisions as tainted by bias and as necessitating an appeal against them.

Sometimes a party carries away from a dispute before the Court observations on his or her conduct about which he or she has every good reason to be concerned or upset. Even observations about which - it may properly be said - that the judge need not have made in order to arrive at his decision.

That sort of concern or upset, is not, however, in and of itself, good ground for leave to appeal.

Put in terms of what the respondent needs to show, I can see no basis for a case on appeal here - no arguable case for appeal against the decision that this Court is seized of jurisdiction and that Cayman is the proper forum. I am satisfied that the respondent has no realistic prospect of succeeding on an appeal. I therefore refuse the application for leave to appeal against the judgment of Kellock J. See Practice Note: Smith v Cosworth Casting Processes Ltd [1997] 4 A.E.R 840 and Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999], 1.W.L.R. 2.

I also refuse the related application for a stay of the proceedings pending appeal.

The plaintiff will be at liberty to proceed with its application already filed for summary judgment. If the defendant files a defence before that application is determined, it will no doubt be taken into consideration by the judge hearing the application for summary judgment.

There is also the third issue which has to do with the order for indemnity costs in which the defendant was condemned by Kellock J. Whether such an order is just or appropriate

upon an interlocutory application, can be the basis for an appeal, says Mr. Chapman. He says it might not be a proper order to make upon such an application, without at least the defendant having first been given notice by the judge of his intention so to order and an opportunity to argue against it. Mr. Chapman is therefore also saying that he should be allowed to appeal the costs order on grounds of breach of natural justice.

But an order for costs is par excellance a matter for the discretion of the judge hearing the matter in which the order falls to be made. Kellock J took a firm and clear view of the nature of the defendant's arguments and felt, as a matter of discretion, that such an order for indemnity costs was appropriate. Costs follow the event and are often defined, not only by the merits, but also by the manner of the conduct of proceedings. I see no basis for an appeal here – either on grounds of principle as to the appropriateness of such an order in interlocutory proceedings or on grounds of breach of natural justice.

The application for leave to appeal against the cost order is also refused.

I direct that the defendant (as this was her summons) extracts the order from the reasons for judgment of Kellock J in terms of the 3 issues identified. It is to be signed by the Clerk of Courts dated today's date and filed.

Anthony Smellie
Chief Justice
Dated this 5th day of December 2001