IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 325 OF 2014

BETWEEN:

KEVIN MILLIEN	**Claimant**
AND	
BT TRADING LIMITED	**1st Defendant**
GEORGE POPESCU	**2nd Defendant**
ALPHA SERVICES LIMITED	**3rd Defendant**

November 11 & 28, 2014.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Mr. Rodwell Williams SC for the Applicants/1st and 2nd Defendants.
Ms. Priscilla Banner for the Respondent/Claimant.

JUDGMENT

[1] The Applicants are BT Trading Limited and George Popescu, the 1st and 2nd Defendants in a suit brought by Claim Form by the Respondent, Kevin Millien, as Claimant. The Applicants applied by amended urgent notice of application dated November 11, 2014 for the following orders:

> "(1) An Order for leave to appeal the decision of the Honourable Chief Justice: (a) Omitting or refusing to hear, consider and determine the First and Second Defendant's application to stay all further proceedings in this claim pursuant to section 5 of the Arbitration Act (Chapter 125) of the Laws of Belize, 2000; alternatively, (b) having

heard and considered the First and Second Defendant's application, determining that the claim not arbitrable within the provision of the Articles of Association of BT Trading Limited; and (c) failing to give any or any proper or sufficient reasons for his decision; and

(2) An Order that all further proceedings herein be stayed pending the hearing of the appeal of the Order of the Honourable Chief Justice made on the 13th day of August 2014 by the Court of Appeal; and

(3) In the alternative, that time be enlarged for the Defendants to file their Defence.

(4) Costs of this application be in the cause; and

(5) Such further or other relief as may be just."

In support of the application, the Applicants relied upon the first and second affidavits of George Popescu. The application for the stay pending the hearing of the appeal was made pursuant to the inherent jurisdiction and the Court and the case management powers of the Court under Rule 26.1(2)(e) of the Supreme Court (Civil Procedure) Rules, 2005.

BACKGROUND

[2] On July 2, 2014, the Court heard an urgent application without notice by the Respondent, Kevin Millien, and made orders granting interim injunctive relief against the Applicants and Alpha Services Ltd ("Alpha"). The matter was heard *inter partes* and on August 13, 2014, it was ordered that the interim injunction granted without notice be discharged and that a new injunction order be granted in favour of the Respondent restraining the Applicants and Alpha until trial or further order of the court.

[3] The present application is in essence for leave to appeal against the decision of August 13, 2014, reasons for which have since been issued.

LEAVE TO APPEAL

[4] In cases where the decision is not a final decision, the intended Appellant must seek leave to appeal. The injunction proceedings being interlocutory in nature, the order is not final. The law is set out in section 14 of the Court of Appeal Act, Chapter 90. The entire section reads:

> "14.(1) An appeal shall lie to the Court in any cause or matter from any order of the Supreme Court or a judge thereof where such order is –
>
> (a) final and is not such an order as is referred to in paragraph (f) or (g);
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> (b) an order made upon the finding or verdict of a jury;
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> (c) an order upon the application for a new trial;
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> (d) a decree nisi in a matrimonial cause or an order in an Admiralty action determining liability;
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> (e) an order declared by rules of court to be of the nature of a final order;
>
> (f) an order upon appeal from any other court, tribunal, body or person;
>
> (g) (i) a final order of a judge of the Supreme Court made in Chambers;
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> (ii) An order made with the consent of the parties
>
> (iii) an order as to costs;
>
> (h) an order not referred to elsewhere in this subsection.
>
> (2) No appeal shall lie from any order referred to in paragraph (f) of subsection (l):-
>
> (i) upon a question of law;
>
> (ii) where such order precluded any party from the exercise of his profession or calling, from the holding

of public office, from membership of a public body or from the right to vote at the election of a member for any such body;

(b) in any other case, except with the leave of the Supreme Court or, if it refuses, of the Court.

(3) No appeal shall lie from any order referred to in paragraph (g) or (h) of subsection (l):-

(a) except –

(i) where the liberty or the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise;

(iv) in the case of an order on a special case stated under the Arbitration Act;

(v) in the case of an order refusing unconditional leave to defend an action;

(b) in any other case, except with the leave of the Supreme Court, or, if it refuses, of the Court.

[5] There is no difficulty with regard to the appeal against the grant of an injunction as section 14(3)(a)(ii) confers a plain right of appeal. With regard to the determination that the claim was not arbitrable under Article 21 of the Articles of Association of the First Applicant BT Trading Ltd and the refusal to grant a stay of proceedings pursuant to section 5 of the Arbitration Act, the Applicants contended that, by virtue of section 14(1)(a) or 14(3)(b), leave to appeal is required. It was reasoned that that aspect of the decision was in the nature of a final order of a Judge of the Supreme Court made in Chambers from which an appeal lies according to section 14(1(g)(i) but that leave of the Supreme Court in the first instance is required as per section 14(3)(b). The Respondent

disputed this reasoning and it was contended in the skeleton argument that contrary to the Applicant's assertion, the order was not a final order but an interlocutory order applying the application test. However, at the hearing, it was conceded that the order was interlocutory requiring leave to appeal.

THE TEST FOR LEAVE TO APPEAL

[6] This Court is guided as the test for the granting of leave to appeal an interlocutory decision by the Court of Appeal's decision in **Belize Telemedia Ltd v Belize Telecom Ltd et al** – Civil Appeal No. 23 of 2008. The principles therein set out by Carey, JA were restated by Hafiz, JA in **Karina Enterprises Ltd v China Tobacco Zhejiang Industrial Co Ltd** – Civil Appeal dated November 7, 2014. His Lordship adopted the following principles set out in the judgment of Sosa, J (as he then was) in **Wang v Atlantic Insurance Co Ltd** (unreported):

> "… leave will be granted by the English Court of Appeal in three categories of case, viz
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> 1. Where they see a prima facie case where an error has been made;
>
> 2. Where the question is one of general principle, decided for the first time; and
>
> 3. Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage."

Carey, JA went on to adopt the Practice Note (Court of Appeal Procedure) [1999] 1 All ER 186 by Lord Woolf, MR that addresses applications for leave to appeal from interlocutory orders. The Practice Note reads:

> "Appeals from interlocutory orders
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> An interlocutory order is an order which does not entirely determine the proceedings. Where the application is for leave to appeal form an interlocutory order, additional conditions arise: (a) the point may not be of sufficient significance to justify the costs of an appeal; (b) the procedural

> consequences of an appeal (e.g. loss of trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused."

In the recent **Karina** case, Hafiz, JA confirmed that the applicant was required to, firstly, satisfy the court that there existed a real prospect of success, then secondly, persuade the court that one or more of the three categories listed by Sosa, J applied and, thirdly, that, in the case of an interlocutory matter, none of the considerations in the Practice Note arose.

[7] Learned Counsel for the Respondent helpfully listed the questions at paragraph 17 of her skeleton argument as follows:

1. Whether the Applicants have a real prospect of success in respect of the intended grounds of appeal as appear from the application; and

2. Whether there is a prima facie case than an error has been made by the Court; or

3. Whether the question is one of general principle decided for the first time; or

4. Whether the decision is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage; and

5. Whether the point is of sufficient significance to justify the costs of an appeal; and

6. Whether the procedural consequences of an appeal (e.g. loss of trial date) may outweigh the significance of the interlocutory issue; and

7. Whether it may be more convenient to determine the point at or after the trial.

The submissions of the Applicants, to a large extent, addressed the foregoing questions as is reflected in paragraph 2.15 of the skeleton argument and supplemented by oral argument.

REASONABLE PROSPECT OF SUCCESS AND ERROR OF LAW

[8] The Applicants contended, by reference to the grounds of appeal contained in the Proposed Amended Notice of Appeal, that there was an omission to hear, consider and determine the application for a statutory stay or to render any reasons for the decision. Regrettably, at the time of argument, the reasons were not yet available; but had they been available this contention would probably not have been advanced. In any event, the Court's order reflected that the interim injunction order was discharged and a new order for an interlocutory injunction imposed. The clear conclusion ought to have been that the Court gave consideration to the issue of non-disclosure which was the only matter advanced to support the discharge of the interim order made without notice. Indeed, the material non-disclosure complained of was as to the failure of the Respondent to bring the arbitration clause in the Articles of Association of BT Trading Ltd to the attention of the Court at the *ex parte* hearing. As to the exercise of the discretion whether to order a fresh injunction, this matter entitled the Applicants to a right of appeal without a requirement to seek leave.

[9] The Respondent argued in response that there was no applicable arbitration agreement for the dispute between Kevin Millien and George Popescu to be referred to arbitration as was the finding of the Court. It was iterated that the Applicants had failed to discharge the burden of establishing that there was an existing applicable arbitration agreement to trigger the grant of a stay pursuant to section 5 of the Arbitration Act.

[10] The Court is empowered to make a determination as to whether there existed an applicable arbitration agreement (Russell on Arbitration, 23rd ed., paragraph 7-028). Such a determination was made against the existence of an applicable arbitration agreement after full argument on both sides. By way of reply, Learned Senior Counsel

sought to urge that the Company had been sued by the Respondent hence the arbitration clause had, in the alternative, been invoked, giving rise to an arbitration agreement. This argument was countered by the Respondent at the original hearing and debunked by the Court.

[11] The Court elected to deal with the question whether the Applicants have a real prospect of success and whether there is a *prima facie* case as to an error made by the Court together. On both points, the Applicants laid great store upon the absence of reasons and of a specific ruling as to the grant or refusal of a stay. The reasons being available and the obvious rejection of the contention as to the existence of an arbitration agreement lead the Court to conclude that the Applicants do not have a real prospect of success and have further failed to show a *prima facie* case for an error by the Court.

IS THE QUESTION ONE OF GENERAL PRINCIPLE DECIDED FOR THE FIRST TIME?

[12] The Applicant urged that the questions to be explored on appeal may be of general principle not decided before. It was said that the novel point is where an *ex parte* injunction is set aside on the ground of material non-disclosure a new injunction continuing same ought not to be granted in the absence of additional or new facts and/or circumstances.

[13] Such a question, if well-founded so as to be novel, will engaged the attention of the Court of Appeal in the appeal as of right in respect of the interim injunction. Accordingly, it is not germane to the application for leave to appeal.

IS THE QUESTION ONE OF IMPORTANCE UPON WHICH FURTHER ARGUMENT AND A DECISION OF THE COURT OF APPEAL WOULD BE TO THE PUBLIC ADVANTAGE?

[14] The Applicants rested their argument on a determination of the question of where, as between parties, there is a contract for mandatory arbitration to resolve a

dispute between them, whether the Court ought to give way to such contractual arrangement and stay a claim by one of the parties pursuant to section 5 of the Arbitration Act. It must, at once, be pointed out that this principle was never in dispute at the interlocutory hearing. Indeed, as Learned Counsel for the Respondent pointed out, what was before the Court was an issue as to the interpretation of the arbitration agreement embodied in Clause 21 of the Articles of Association. The specific issue was whether or not the arbitration clause governed the dispute between Kevin Millien and George Popescu as set out in the substantive claim.

[15] I wholly agree with Learned Counsel and I wish to add that both sides fully accepted that, in the event the Court had found that there was an applicable arbitration agreement, the Claim ought properly to be stayed as per statute. There is therefore no question of public importance to excite the attention of the Court of Appeal.

IS THE POINT OF SUFFICIENT SIGNIFICANCE TO JUSTIFY THE COSTS OF AN APPEAL

[16] The Respondent says that the point is not of sufficient significance to justify the costs of an appeal and that in any event none of the three grounds set out in the **Telemedia** and **Karina** cases have been fulfilled. The Applicants did not elaborate on this point except to state the requirement as one arising from the Practice Note.

[17] In the premises, the Court can find no reason having regard to its earlier findings, to justify the expending of costs on an appeal.

LOSS OF TRIAL DATE

[18] The substantive matter is at the preliminary stage of case management and the pleadings are yet to be closed. Meanwhile, the subsidiaries of BT Trading Ltd and the satellite company, Boston Technologies, are commercially active entities and time is of the essence in the resolution of the dispute between Mr. Millien and Mr. Popescu as to their respective true shareholding in the First Applicant, BT Trading Ltd.

[19] Although no trial date has been affected, the Respondent is correct is pointing out that an appeal that has no reasonable prospect of success would operate to hinder the resolution of the dispute between members of the Company.

SHOULD THE PROCEEDINGS BE STAYED?

[20] The plain answer has already been foretold by the findings of the absence of any reasonable prospect of success or any *prima facie* error of law in respect of the issue of the arbitration agreement for which leave has not been given. The proceedings ought not to be stayed in respect of the appeal as of right as no useful purpose would be served thereby. The matter ought therefore to in preparation for trial.

ENLARGEMENT OF TIME TO FILE DEFENCE

[21] The Applicants have sought, in the alternative, an order that time be enlarged for the Defence to be filed. The Respondent has opposed this application; it was said that the Respondents have been allowed sufficient time by the Court to do so.

[22] On August 13, 2014, the Applicants and the 3rd defendant were allowed an extension of time up to September 30, 2014 to file their Defence. However, the present application arose before the time expired and indeed further time was sought in contemplation of a failure to secure leave and a stay.

[23] It is, in my view, not unreasonable for the Court to allow time for the Defence to be filed. It is understandable that the Applicants relied on the success of the present application as obviating the incurring of costs in filing a Defence.

CONCLUSION

[24] For the reasons set out before, it is ordered that:

1. Leave to appeal be refused;
2. A stay pending the hearing of the appeal be refused;
3. The time for filing of the Defence be extended to December 15, 2014.
4. The costs of this application shall be the Respondent's in the cause.

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KENNETH A. BENJAMIN
Chief Justice