IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 726 OF 2018

BETWEEN

(CARENSO TRADING LIMITED	**CLAIMANT/RESPONDENT**
(	
(AND	
(	
(CINSTEN INVESTMENTS LIMITED	**DEFENDANT/APPLICANT**

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

HEARING: February 09, 2021

Written Submissions 2021
8th February 2021 – Defendant/Applicant
8th February 2021 – Claimant/Respondent

APPEARANCES: Mr. Nigel Ebanks for the Defendant/Applicant
Mr. Allister Jenkins for the Claimant/Respondent

DECISION

1. The Applicant is Cinsten Investments Limited, the Defendants in a suit brought by the Respondent, Carenso Trading Limited, as Claimant. The Applicant has applied by urgent notice of application dated January 19th, 2021 and the Application is supported by the Third and Fourth Affidavits of Chelsea Gentle for the following orders:

    1. *That leave be granted to appeal the decision of the Honourable Justice Shoman made on 5 December, 2020 and entered on 30 December, 2020;*

    2. *That the whole of these proceedings be stayed until the Court of Appeal has finally and conclusively determined the said appeal;*

3. *That costs of this Application be costs in the Appeal;*

4. *Such further or other relief as the Court deems just.*

2. The Grounds of the Application are set out as follows:

(1) The Application is made pursuant to sections 13 and 14(1)(h) of the Court of Appeal Act and rule 2 of Order II of the Court of Appeal Rules. The decision which the Applicant wishes to appeal is an interlocutory order, which can only be appealed with leave of the Supreme Court pursuant to section 14(3)(b) of the Court of Appeal Act.

(2) The Application is also made pursuant to the inherent jurisdiction of the Court, rule 19 of Order II of the Court of Appeal Rules and rules 26.1(d), (e) and (u) of the CPR which empower this Court to stay the whole of these proceedings pending the determination of the appeal.

(3) The intended appeal is arguable with a real prospect of success, and there is a prima facie case that the learned trial judge erred in her decision.

(4) The appeal will involve questions of significant importance to be decided for the first time as it relates to the nature and effect of Supreme Court Orders for Specific Disclosure in the context of litigation having cross-border elements and implications. Also, the questions and issues of law for consideration on appeal are of importance to the public and the proper development of the law and are of sufficient significance to justify costs of the appeal.

(5) There is no procedural consequence of the appeal which may outweigh the significance of the issues to be raised on appeal, and it is inconvenient and indeed improper for the interlocutory issue to be determined at or after trial.

(6) The appeal would be stifled or rendered nugatory unless these proceedings are stayed.

(7) Were the court to grant a stay of these proceedings, there is no prejudice to the Claimant/Respondent that could not be remedied by appropriate orders for costs and case management directions.

(8) For the above reasons, it is just and proper and in the interest of good administration of justice for leave to appeal to be granted and for the proceedings to be stayed pending appeal.

3. The Applicant also submitted that ***"This application ought to be heard on an urgent basis so that the parties may save the costs of taking further steps in these proceedings, which costs may ultimately prove wasted if the appeal succeeds and this claim is stayed. Furthermore, it is in the interests of the justice that the parties proceed to engage in the appeal as expeditiously as possible so that the interlocutory matter on appeal, and by extension the broader dispute between the parties, may ultimately be determined as soon as possible."***

ISSUES

4. The issues for the Court's determination are:

   a. whether the Application meets the criteria for leave to appeal and permission ought to be granted; and

   b. if so, whether a stay ought to be granted in the court's discretion.

A. LEAVE TO APPEAL

5. The present application is for leave to appeal, and a stay of proceedings pending appeal against the decision of December 5th, 2020, the reasons for which were issued on that date, and perfected on December 30, 2021.

6. In cases where the decision is not a final decision, the intended Appellant must seek leave to appeal. The proceedings in this claim are interlocutory in nature and the order is not final. The applicable law is set out in section 14 of the Court of Appeal Act, Chapter 90. The entire section reads as follows:

"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);

(b)an order made upon the finding or verdict of a jury;

(c)an order upon the application for a new trial;

(d)a decree nisi in a matrimonial cause or an order in an Admiralty action determining liability;

(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;

(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 4 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.

THE TEST FOR LEAVE TO APPEAL

7. The test for the granting of leave to appeal an interlocutory decision is that which was set out by the Court of Appeal's decision in **Belize Telemedia Ltd v Belize Telecom Ltd et al –** Civil Appeal No. 23 of 2008.

8. The principles which must guide the Court on an application for leave to appeal are those which are stated by Carey, JA, and which were restated by Hafiz, JA in **Karina Enterprises Ltd v China Tobacco Zhejiang Industrial Co Ltd** – Civil Appeal dated November 7, 2014.

9. Justice of Appeal Carey 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

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."

10. Mr. Justice of Appeal Carey 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 as follows:

"Appeals from interlocutory orders

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 6 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."

11. In the **Karina c**ase, 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.

12. The Applicant must satisfy this Court that one of the categories set out in the Wang case is applicable and that the additional conditions which are set out in the Karina Enterprises case have been considered and are in favor of the Application.

13. The Applicant submits that the the relevant criteria for both obtaining leave to appeal interlocutory orders and obtaining stays of proceedings were adopted by the Bahamas Supreme Court in **The Queen v The Hon. Frederick A. Mitchell, et al.** [2015] 3 BHS J. No. 34 (Ruling No. 4).

14. Counsel for the Applicant submits that this case ***"similarly concerned alleged non-compliance with obligations regarding discovery of documents***" and says that after reviewing various seminal English authorities and Bahamian authorities following them, Justice Rhonda Bain granted the applicant permission to appeal and a stay of proceedings. Counsel posits that **"like our rules, the Bahamian rules are based on the English position, decisions on which are therefore helpful."**

15. Counsel points out that among the authorities which are cited and relied upon by Bain J in the **Mitchell** case is the:

"Noted to Order 59/14/7 of the White Book 1997" which ***"outlines the test for the grant of leave to appeal to the Court of Appeal -***

> ***'The Court of Appeal will grant leave if they see a prima facie case that an error has been made (see (1907) 1231 T.J. 202) or if the question is one of general principle, decided for the first time (Ex p Gilchrist The Armstrong (1886) 179 BD 521 per Lord Esher MR at 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes LJ in Buckle v Holmes [1926] 2 KB 125 at p.127). Generally, the test which the Court applies is whether the proposed appeal has a reasonable prospect of success.' "***

16. Counsel for the Applicant points out that in making the decision to grant leave to appeal, Bain J: ***"generally adopted a cautious approach demonstrating her sensitivity to the delicate nature of deciding whether she ought to grant permission to appeal her own ruling. To that end, the learned judge also relied extensively on authorities making these points to the effect that leave ought to be granted except, in some circumstances, if it is demonstrated that the prospects of the appeal would be hopeless, while being careful to come to that conclusion for the same reasons. Further, even where the appeal would have no reasonable prospect of success or be weak, the court may still grant leave for many, non-exhaustive, reasons."***

17. A careful review of the line of authorities reviewed in the **Mitchell** case by Madam Justice Baines, which are provided by Counsel for the Applicant is of great interest and the Applicant submits that we ought to follow an approach which is similar to that utilized by Madam Justice Bain in granting leave to appeal under our rules.

18. The approach employed is in some respects quite similar, but it also relies on considerations which do seem broader than those which apply in Belize, and this Court is guided and constrained not only by the Belizean authorities cited above, but also by the Applicant's own grounds which set out at (3) and (4) in paragraph 2 above.

PRIMA FACIE CASE OF ERROR

19. The Applicant, at Ground 3 states that:

> ***"(3) The intended appeal is arguable with a real prospect of success, and there is a prima facie case that the learned trial judge erred in her decision."***

20. This is the first of the tests in the **Wang** case and the Applicant relies on the draft of the Notice of Appeal that it intends to file exhibited to the 4th affidavit of Chelsea Gentle, to show that the Applicant can succeed on this ground. The Applicant says that

> ***"(i) The learned trial judge erred in law and misdirected herself in finding that the Claimant had fully complied with the earlier order of Honourable Madam Justice Griffith made on 11 December, 2019 that "the Claimant do make specific disclosure of the original of that document referred to in its Statement of Claim as the 'Loan Agreement'" (the "Specific Disclosure Order").***
>
> ***(ii) The learned trial judge erred in law and misdirected herself in finding that the nature and effect of the Specific Disclosure Order was such that it enabled or facilitated the Claimant's compliance with it by way of the Claimant's disclosure of an alleged counterpart of the Loan Agreement.***
>
> ***(iii) Consequently, the learned trial judge erred in law and misdirected herself in denying the Defendant/Appellant's application for an unless order.***
>
> ***(iv) In coming to the above conclusions, the learned judge failed to take into account and/or to give sufficient weight to relevant considerations, including:***
>
> ***(a) that the Claim could not proceed fairly or in a just manner without the Claimant's precise, full and proper compliance with the Specific Disclosure Order;***
>
> ***(b) that the matter of the Claimant's compliance was so integral to the proceedings that the justice of the Claim could only be***

achieved if the court ensured that the appointed experts are facilitated with the correct document for their examination;

(c) that the Specific Disclosure, by its very nature and effect, required specificity in terms of how the Claimant could comply with it;

(d) that in law and in every material respect, the Honourable Judge was required to approach her assessment of whether the Claimant had complied with the Specific Disclosure Order by considering that compliance with the same required specificity and precision in accordance with its terms;

(e) Conversely, that the same Order did not allow for any, or any such degree of, actual or constructive flexibility in the way that the Claimant approached the matter of its compliance with the Order and in the way that the Honourable Judge approached the issue of whether the Claimant had complied with the same.

(f) in assessing the Defendant's application, the Honourable Judge was obliged to factor in all elements of the Overriding Objective of the Civil Procedure Rules, including especially that the outcome of her deliberation had to be just and result in the parties being placed on equal footing as far as practicable; and

(g) that the outcome of her deliberation did not so comport since it may or may tend to frustrate and/ or undermine the conduct of the Defendant's case by unduly, and in any event without any basis in law, affording the Claimant undue latitude in terms of how it could have complied with the Specific Disclosure;

(v) In all material respects, the decision of the Honourable Judge is therefore unreasonable and against the weight of the evidence, including in the ways that:

(a) prior to the Claimant's filing of its answer to the Defendant's application for the Specific Disclosure Order, the preponderance of the evidence was, or at least strongly suggested, that only one (1) version of the Loan Agreement existed, a copy of which was annexed to the

Statement of Claim, and which was the only version that the Claimant relied upon and that the Claim concerned;

(b) although the terms of the Loan Agreement arguably could facilitate the existence of a counterpart, there was no evidence that any such counterpart of the Loan Agreement ever actually existed; and

(c) prior to the Claimant's filing of its answer to the Defendant's application for the Specific Disclosure Order, there was no suggestion or evidence that the Defendant was in possession of any such alleged counterpart.

(vi) In assessing whether the Claimant had complied with the Specific Disclosure Order, the learned judge gave undue weight to the Claimant's argument that the Loan Agreement allowed for a counterpart to exist, leading to the perverse result that the Claimant's disclosure of such an alleged counterpart was assessed to constitute full compliance with the Specific Disclosure Order.

21. In addition, the Applicant felt obliged to caution the Court both orally and in writing that it was to ***"adopt a cautious approach as to its consideration of whether leave to appeal ought to be granted"*** given what is referred to as ***"the delicate nature of the issue"*** and urged that the Court's consideration of the "rightness of its decision" is not the proper measure. I agree.

22. The Applicant argues that ***"On a proper approach, it is for the court to decide whether there is sufficient substance and bases on which an appeal might be allowed to proceed, despite the conviction of the parties and the court in any particular direction."*** I do not disagree.

23. The Applicant says that ***"an objective weighing by this court of the merits of the proposed appeal will show that the intended appeal is, when taken at its least, not hopeless".*** This however, is not the yardstick which I am obliged to employ in deciding if the Applicant passes the first **Wang** test.

24. The requirement in the Rules that an Application for leave to appeal must go to the same Judge that has just issued the order, seems on the face of it, an awkward proposition, but the Rules are formulated thusly and the Court is guided by the cases already cited.

25. The yardstick on the **Wang** test is that which was articulated with care by Hafiz Bertram JA in the **Karina** case at Paragraph 11 ***"[11] Therefore, in order to obtain leave to appeal, the applicant had to (i) satisfy the court that it had a real prospect of success as stated by Lord Woolf MR (ii) satisfy the court on either one or more of the three categories, as stated by Sosa J (as he was then) at paragraph 7. (iii) Additionally, since this was an interlocutory matter, the applicant had to satisfy the court that none of the additional considerations arose as stated by Lord Woolf MR at paragraph 8 above."***

26. At Paragraph 8 of the same decision, Hafiz Bertram JA cited Lord Woolf MR as follows: ***"In Practice Note (Court of Appeal: procedure) [1999] 1 All ER 186, where Lord Woolf MR set out the 5 practice in relation to applications for leave to appeal. At paragraph 10 of the Directions, page 187, he states: "....The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court. Examples are where a case raises questions of great public interest or questions of general policy.."***

27. Having carefully reviewed the Applicant's proposed grounds of Appeal, and the reply of the Claimant/Respondents in respect thereof, this Court accepts that in the present Claim, it cannot be said that the appeal would have no realistic prospect of success, nor can it be said that the prospect is fanciful. The Applicant therefore passes the first Wang test.

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

28. The Applicant submits that the refusal of this Court, to exercise its jurisdiction in declining to make an unless order in the current case which would result in the Claimant's claim being struck out for alleged non-disclosure is a question of general principle which is being decided for the first time.

29. The Applicant says that the appeal will involve questions of significant importance to be decided for the first time as it relates to the nature and effect of Supreme Court Orders for Specific Disclosure in the context of litigation having cross-border elements and implications. Accordingly, it is submitted that:

i. ***The crux of the appeal would center around the fact that this court ordered the Claimant to specifically disclose the original of a precise document.***

ii. ***The Claimant does not disclose the original of that document.***

iii. ***Instead, the Claimant files a list of documents disclosing two documents, one of which it says is a counterpart to the document that was to be disclosed.***

iv. ***The Claimant says that it has thereby complied with the Specific Disclosure order, including by way of disclosing that counterpart.***

v. ***There is no authority from this court or our court of appeal on whether the law is that one can comply with an order for specific disclosure of the original of a precise document by purportedly disclosing a counterpart of that document.***

vi. ***The question is important to the practice and procedure of our court as disclosure is an integral part of proceedings.***

30. Despite the peroration provided for the particular facts of this case, the matter is actually one that has been ventilated and decided at the Caribbean Court of Justice, Belize's apex court in the case of **Barbados Redifusion Services Limited v Asha Mechandani et al** [2005] CCJ 1 (AJ).

31. In that case, which is binding on the Supreme Court and the Court of Appeal of Belize, the CCJ reviews the power of a Court to strike out a statement of claim where there is such non-disclosure as undermines the principles of fairness and the prospect of a fair trial. The matter is therefore one which has already been decided in an appeal, and as such, in my view, the Applicant does not satisfy the second **Wang** test.

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

32. Although the Applicant avers gamely that the Claim in which more than $5 Million is at stake, " ***arises from a cross-border context"*** and submits that this litigation has "***cross-border elements"*** that should be ventilated and determined. The matter is stated as follows:

> ***vii. "A perusal of the case will show that this Claim arises from a cross-border context. It is the context in which these questions arise and fall to be determined. In this case, more than US$5 million is at stake. The Applicant submits that the correctness of the decision in this case will hinge heavily on whether this issue has been properly determined since, as acknowledged in the same ruling, the main basis of the Defence is that the Loan Agreement was forged.***
>
> ***viii. Furthermore, like this litigation, litigation with cross-border elements is a consistently emerging area of our law. It is important that the issue be ventilated and determined."***

33. The Companies that are parties in the Claim are in fact both IBCs, duly incorporated in Belize, with registered office situate at 303 Newtown Barracks, Belize City, Belize.

34. In fact, there are no "cross border elements" involved in this suit which involves a Loan Agreement allegedly made between the parties which the Defendant alleges is a forgery. The closest that the claim comes to crossing any border is the various principals of the Parties are swearing and deposing to Affidavits in countries other than Belize.

35. There is no conflict of laws or other cross-border context to the current litigation, and in my view the Applicant does not satisfy the third **Wang** test.

ADDITIONAL CONSIDERATIONS IN RELATION TO INTERLOCUTORY ORDERS

36. There are other considerations that the Court must balance carefully when the matter is an interlocutory order. These include:

"(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."

37. The Applicant submits that there is ***"no procedural consequence of the appeal which may outweigh the significance of the issues to be raised on appeal, and it is inconvenient and indeed improper for the interlocutory issue to be determined at or after trial."***

38. The Interlocutory Order granted is one which permits the Claimant to produce the Loan Agreement for examination as to whether it is a forgery. The matter is contested as to which Loan Agreement is to be produced by the Claimant for examination by the experts appointed by the Court. The issues are ones, in the circumstances that should be raised on appeal before

the trial is conducted in this claim, and that therefore, the Applicant has a basis for obtaining leave in respect of the particular Interlocutory Order.

STAY OF PROCEEDINGS

39. The Applicant submits that the appeal would be stifled or rendered nugatory unless these proceedings are stayed and that if the Court were to grant a stay of these proceedings, there is no prejudice to the Claimant/Respondent that could not be remedied by appropriate orders for costs and case management directions. I agree with the Applicant.

ORDERS

40. I therefore grant leave to the Applicant to appeal the decision made by this Court on 5th December 2020 and entered on 30th December 2020; and I order that the whole of these proceedings be stayed until the Court of Appeal has finally and conclusively determined the said appeal. I also order that costs shall be costs in the Appeal.

DATED FEBRUARY 22, 2021

LISA M SHOMAN
JUSTICE OF THE SUPREME COURT