CL-AP 03/2023

(on appeal from CL105/2019)

IN THE COURT OF APPEAL

OF THE TURKS AND CAICOS ISLANDS

Between

PATRICIA GRAND'LAIR **APPLICANT**

And

ETIENNE DEBLOIS

RESPONDENT

Coram: **The Honourable Mr Justice Adderley, JA, President (Ag.)**

The Honourable Mr Justice John, JA

The Honourable Madam Justice Cornelius Thorne, JA

Appearances: **Mr. John Rutley for the Applicant**

Hearing date: 17 May 2023

Delivery Date: 24 May 2023

JUDGMENT

CORNELIUS THORNE, JA

[1] Grand'Lair (the "Applicant") and Deblois (the "Respondent") are a divorced couple. They are also directors and 50% shareholders in the DGCL Consultation ("DGCL"), a Turks and Caicos Islands company, now in liquidation. Unhappy differences arose between them, and in the substantive matter, the Applicant brought a derivative action with respect to DGCL alleging unscrupulous dealing by the Respondent in the sale of a condo owned by DGCL. The sale proceedings (US $354,013.86) and other monies are subject to a freezing order, and held with CIBC First Caribbean International Bank (Bahamas) Limited. The Applicant sought 50% of the value of the company's assets as her entitlement.

[2] On 2nd February Agyemang CJ ordered the company to be wound up and a liquidator to be appointed. She struck out the Applicant's claim and awarded costs to the Respondent ("the first costs order"). No written decision was given. These proceedings were later stayed pending final determination of the related insolvency proceedings. The Applicant was ordered to pay costs in that application as well ("the second costs order").

[3] Thus the Applicant is liable for the Respondent's costs conservatively estimated at US $320,000.00, a sum which would wipe out the Applicant's claim for 50% of the value of the shares of the company. The Liquidator filed a summons for directions which was heard by Gruchot J, and the Applicant sought to have the costs orders overturned, unsuccessfully. He sought leave to appeal, also unsuccessfully. The decision of Gruchot J was made on the 27th February 2023, with reasons dated 8th March 2023.

[4] This is an ex parte application for leave to appeal Gruchot's J decision, and that if such leave be granted, execution of the costs orders be stayed pending the determination of the Applicant's appeal.

The Application

[5] Notice of the ex parte application was filed by counsel for the Applicant on 16th March 2023. Counsel relied on Order 59, Rule 14(2) of the English Civil Procedure Rules 1999 (as enacted). This court has a discretion to grant or refuse such an application, or direct that the application be renewed in open court either *ex parte* or *inter partes*.

[6] In accordance with the rules, the Applicant set out in the notice the reasons why leave should be granted.

THE JUDGE'S DECISION

[7] The matter came before the Learned Judge on 6th December 2022, and 27th February 2023 in respect of the summons for directions filed on 6th October 2022 by the Liquidator. That summons followed the 3rd report of the Liquidator to the creditors, in which the Liquidator raised serious concerns about the validity and credibility of the claims of the Respondent in the liquidation.

[8] The Liquidator sought the following orders:

> "1. That the Liquidator was correct in his assessment that the cost (sic) associated with this matter subsequent to the 9th March, 2020 cannot be claimed by the Defendant as an expense of the liquidation;

2. That sanctions may be imposed by the Liquidator upon the Defendant in respect of the actions of the Defendant and Mr. Can Gebes as detailed in the Liquidator's third report;
3. Whether in light of #2 above any of the Defendant's costs should be a cost of the liquidation;
4. Whether, in light of #2 above, distribution of the assets of the liquidation should be made equally between the first named Plaintiff and the Defendant;
5. Such further direction or other order as the court may deem fit;
6. That the costs of and occasioned by this application be awarded to the Liquidator out of the assets of the liquidation."

[9] At the hearing before Gruchot J, the Applicant's attorney-at-law sought an order that the costs orders should not be enforced or alternatively that they should be set aside, given the allegations of dishonesty which arose in the Liquidator's third report.

[10] The Learned Trial Judge pointed out that no such application was before the court and denied the Applicant's attorney's application to grant an adjournment so that such application could be filed, on the grounds that nothing would be gained by granting an adjournment other than wasted costs.

[11] He refused to consider the costs orders further, on the grounds that the Court was *functus officio* and could not subsequently overturn, vary or make alternative orders. He rejected the argument that the second costs order (dated 9 March 2021) varied the first, and also was not persuaded by

the argument that the first costs order (dated 2 February 2021) was obtained by fraud. Even if it were, he was of the view that the proper course of action for the Applicant was to appeal the order of the Chief Justice within the stipulated time.

[12] The Learned trial judge observed

> "43. …In the absence of any written decision or reasons for the striking out of the claim, I concluded that the judge formed a view that the claim was hopeless and that what needed to happen was that the second Plaintiff needed to be wound up."

[13] The Learned Trial judge made the following orders:

1. The Defendant may not claim his costs associated with this matter as an expense of the Liquidation;
2. The claims of the Defendant and Mr. Can Gebes in the liquidation having been disallowed by the Liquidator , and subject to the payment of the costs orders of 2nd February, 2021 and of 9th March 2021, a distribution of the net assets of the liquidation by the Liquidator be made equally between the shareholders, namely the First Plaintiff and the Defendant;
3. The payment of the Liquidator's …invoices be approved by the court.

4….

5…..

[14] With regard to the order at paragraph 2 the Learned Judge found:

"47. In dealing with the 2nd issue, I raised the question as whether I had any jurisdiction to order that the costs orders should not be enforced. Mr Rutley argues that the Defendant should not benefit from the costs orders, in essence repeating what has been dealt with above. Mr. Dempsey submitted that the issue was only being raised by the Liquidator in order that the Court had the full picture.

48. I was not of the view that there should be any departure from the normal rules on the distribution of the assets of the 2nd Defendant in the Liquidation process."

THE GROUNDS OF APPEAL

[15] Counsel for the Applicant filed the following grounds of appeal and the Applicant will seek the following relief, if leave is granted:

"1. The the Learned judge erred in law in failing to overturn the order dated second February 2021 on the grounds that there had been a material change in circumstances since it was made (namely the liquidator and then, on 17th February 2023, the Learned Judge himself, deciding that the appellant was in fact entitled to 50% of the company's assets, which had been the basis of her original claim).

2. The Learned Judge erred in:

a. Failing to find that pursuant to the common law jurisdiction to set aside judgments procured by fraud, as described in *Takhar v Gracefield Developments Ltd* (2020) A.C. 45 (from paragraph 43 onwards) he had the power to set aside the costs order dated 2 February 2021;

b. Failing to conclude that this jurisdiction should be exercised in the present cade to set aside the costs order dated 2 February 2021;

3. If the Learned Judge considered that an application was required for the Court to assess the impact of the dishonesty on the order dated second February 2021, he erred in finding that "nothing would be gained" if the Appellant were permitted to make such an application, and therefore not adjourning the hearing so as to allow such an application to be issued.

4. The Learned Judge erred in assuming that the 2nd February 2021 order was made without regard the debts which the respondent alleged the company owed.

5. The Learned Judge erred in failing to have regard to the Respondent's failure to provide honest and truthful evidence, and the impact of that failure on the court's costs jurisdiction under the Rules of the Supreme Court 2000, O. 62 r. 3 and r. 10.

6. The Learned Judge misinterpreted the facts of the fraud perpetrated by the respondent that was uncovered by the liquidator and provided to the Court.

7. The Learned Judge failed to give due consideration to the conclusions of the liquidator that sanctions against the respondents dishonesty and fraud be determined.

Relief Sought From the Court of Appeal is:

1. An order that is tainted by fraud cannot stand;

2. An order that would respondent who has made false representations and who has falsified documents in breach of the insolvency ordinance 2017 should not benefit but should be sanctioned;

3. An order that the respondent pay the cost of the applicant on an indemnity basis."

The Jurisdiction of the Court

[16] The Turks and Caicos Islands Civil Rules 2000 omit any mention of what would be the equivalent of Order 59 of the English Civil Procedure Rules which governs leave to appeal.

[17] Section 23 of the Court of Appeal Ordinance provides:

> "23. Where in any case no special provision is contained in this Ordinance or any other law, or in rules of court, with reference thereto any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the court as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal."

[18] In *The Palms Resort Limited v PPC Limited* CL 31/07, [2008] TCASC 19, 25 June 2008, Ward CJ accepted that for the purpose of deciding whether a judgment was interlocutory or final, the local rules being silent on the issue, he was bound to follow the practice set out in the UK rules under Order 59. The Supreme Court Ordinance CAP 2.02, section 3(2) (now section 3(3)), in contrast to section 22 of the Court of Appeal Ordinance CAP 2.01 (now section 23), provides that the Supreme Court is bound by "the practice and procedure in similar matters in the High Court of Justice in England...so far as local circumstances permit." He referred to the 1999 White Book which was current at the time the local 2000 rules came into effect.

[19] However, he noted that there was an "unfortunate distinction" in the fact that the Court of Appeal was bound by the "law and practice for the time being observed in England", with the result that a Court of Appeal would be equally bound, but that "the wide ranging changes in the English rules in the last decade mean that the basis upon which leave may be granted may differ substantially depending on the Court to which application is made." This suggests that the current UK rules apply.

[20] Counsel for the Applicant drew our attention to what he regarded as the relevant provision in the UK, found in Order 59. r 14, of the then UK Civil Procedure Rules 1999. Order 59 r (14) 2 at the time provided:

> "14.(1)…
>
> (1A)…
>
> (2) An application to the Court of Appeal for leave to appeal shall –
>
> (b) be made ex parte in writing setting out the reasons why leave should be granted and, if the time for appealing has expired, the reasons why the application was not made within that time;
>
> and the Court may grant or refuse the application or direct that the application be renewed in open court either ex parte or inter partes."

[21] However, following Ward CJ in ***The Palms Resort*** case, the actual relevant rule would be that "as nearly as would be in conformity with the law and practice for the time being observed in England by the Court of Appeal." (section 23 of the Court of Appeal Ordinance). As Ward CJ pointed out, this is an unfortunate distinction, but a distinction nonetheless. The point is further fortified by Mottley JA in ***Joseph v Regina*** CR-AP 32 of 2016 [2019] TCACA 2 (22 March 2019), where the court distinguished the

applicability of "the law for the time being in force in England" as found in section 19 (3) of the Control of Drugs Ordinance Cap. 3.14 with "under the laws of England" in section 3 of the Offences Against the Person Ordinance. The first referred to the current laws of England, while the second referred to the law which was in force at the time the Ordinance was passed. At paragraph 16, the Court quoted Lord Nicholls of Birkenhead in Department of the Environment, Food and Rural Affairs v ASDA Foods [2004] 1 All E.R 268 with approval:

> "… the phrase "for the time being" envisages and is intended to encompass a changing state of affairs."

[22] Thus the law and practice for the time being observed in England by the Court of Appeal may be found in the current Order 59 r 14 which, although no different in substance is correctly expressed as:

> "Rule 14-(1) unless otherwise directed, every application to the Court of Appeal, a single judge or the registrar must be made by application notice in accordance with CPR part 23.
> (2) An application to the Court of Appeal for permission to appeal shall-
>
> (a) include where necessary any application to extend the time for appealing; and
>
> (b) be made in writing without notice being served on any other party setting out the reasons why permission should be granted and, if the time for appealing has expired, the reasons why the application was not made within that time unless the court otherwise directs,

and the Court may grant or refuse the application or direct that the application be renewed in court citing in public either with or without notice being served on any other party."

[23] Counsel also directed the Court to Rule 52.6 of the current UK Rules regarding appeals. That rule states:

"52.6 ...permission to appeal may be given only where-

(a) the court considers that the appeal would have a real prospect of success; or

(b)there is some other compelling reason for the appeal to be heard."

Has the Appeal a real prospect of success?

[24] The accompanying commentary in the White Book is instructive, and the parameters of this Court's discretion may be easily distilled. First of all, the Court observes that it is required to apply the rule "as nearly as would be in conformity" with current UK practice. Since the current UK practice is guided by the overarching "overriding objective", a concept not present in the Turks and Caicos Islands Civil Rules 2000, this Court is not bound to apply that.

[25] The rule provides that permission to appeal may be given only where (a) the appeal appears to have a real prospect of success, or (b) there is some other compelling reason for the appeal to be heard. Since the test is disjunctive, the court may focus on either (a) or (b).

[26] A real prospect of success is one that is realistic as opposed to fanciful (*Swain v Hillman* (2001) 1 All E.R 91, C.A per Lord Woolf MR). In *Smith*

v Cosworth Casting Processes Ltd (Practice Note) [1997] WLR 1538 CA, referred to us by the Applicant's attorney, Lord Woolf MR gave guidance particularly as to applications for leave to appeal under the previous iteration of the rules, but his guidance remains instructive:

> "1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant there's no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient."

[27] The second ground of "some other compelling reason" is more difficult. It often (but not invariably) arises for consideration if the proposed appeal has no real prospect of succeeding, and includes cases where some important point of law requires clarification, or there is a point of general application requiring an authoritative decision. I do not consider it applicable here.

[28] In this case the proposed appeal has reached the threshold of a real prospect of success. The decision of the Learned Chief Justice to strike out the claim and to award costs to the Defendant was given without reasons, at a point where the only evidence which had been heard was that of the First Plaintiff. Gruchot J came to the conclusion that the inference to be drawn was that the Chief Justice had formed a view that the claim could not possibly succeed, and that it was hopeless. In my view, that is not necessarily the inference to be drawn and the Learned Judge did not demonstrate that he exercised his discretion in drawing that particular

inference, which, if he had done so might have led him to a different conclusion.

[29] The real crux of the proposed appeal is ground one, that the Learned Judge erred in law in failing to overturn the costs orders. The Learned Judge took the view that the Court was *functus officio*, and further, that the costs orders could not be reopened. However, a full examination of the basis on which costs orders may be set aside where evidence of fraud is subsequently discovered, should not be easily dismissed. The Liquidator made serious findings of dishonesty against the Respondent, and in those circumstances there is a valid question as to whether such orders should stand, albeit not appealed at the time of making, and two years later. The consequences of the costs orders to the Applicant are severe.

[30] In the ***Palms Resort*** (supra, at paragraph 21), Ward CJ identified the "overriding principle" as being that the court should not lightly deprive a dissatisfied litigant of his right to appeal, since the aim of requiring leave is to screen out appeals which will inevitably fail. He quoted Lord Donaldson in *The Iran Nabuval* [1990] 3 All ER 9 with approval:

> "The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to be determined by the Court. The bias must always be towards allowing the Full Court to consider the complaints of the dissatisfied litigant and the justification for leave to appeal…must be that it is unfair to the respondent that he should be requested to defend the decision below…and unfair to the appellant himself who needs to be saved from his own folly in seeking to appeal the unappealable."

[31] I am satisfied that the chances of success of the Applicant's proposed appeal are neither fanciful nor unrealistic.

[32] For the above reasons, the Court makes the following orders:

1. The Applicant is granted leave to appeal against the order of the Honourable Mr. Justice Gruchot made on the 27th day of February, 2023 with reasons dated 8th March 2023.
2. Execution of the said order is stayed pending the determination of the Applicant's appeal.
3. Costs of this Application are awarded to the Applicant to be taxed if not agreed.

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CORNELIUS THORNE JA

I agree.

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ADDERLEY JA, (President, (Actg.)

I also agree.

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JOHN JA