Action No: CL 130/2013

IN THE SUPREME COURT OF

THE TURKS AND CAICOS ISLANDS

CIVIL

BETWEEN:

1. AYSE ERGEN
2. MELREX (TC) LTD.

Applicants

and

1. SOUTHAVEN LIMITED
2. ADAMSNAMES LIMITED
3. MICHAEL ULTSCH

Respondent

BEFORE the Hon Mr. Justice Carlos Simons QC (Acting

Wage

)

Ms. Lara Maroof for the Applicants

Mr. Craig Oliv

er for the Respondents

Heard on 4 March 2020

RULING

Material Referred to and Considered

(a) Applicants' Summons and Grounds in Support, Affidavit in Support and Exhibits filed on behalf of the Applicants; and

(b) Indexed Bundle of Written Submissions and Attachments filed on behalf of the Respondents. I am most grateful to both Counsel for the invaluable assistance this material has afforded me, as well as for their very lucid and structured oral submissions.

Application and Jurisdiction

1. This is a contested application for leave to appeal out of time. Both Counsel agree that the jurisdiction to grant such leave is vested solely in the Supreme Court by s. 5 (a) of the **Court of**

Appeal Ordinance and s. 3 (1) of the **Supreme Court Ordinance** on the analysis constructed in the judgment of the TCI Court of Appeal in CL-AP 3/2015 AG v. Robinson and Bishop. Given Counsel's agreement that this case is good law and their reliance on it in argument, there is no need for me to discuss it further for the purposes of this Ruling. I am in any event bound by it.

The Discretion and Its Exercise

2. The grant of leave to appeal out of time is discretionar

y. However, that discretion as in all cases must be exercised judicially, i.e. in accordance with principles established and guidance given or adopted by judges of superior courts in similar cases. To quote the White Book at note 59/4/17: "*it is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are:*

(1) the length of the delay; (2) the reasons for the delay; (3)

the chances of the appeal succeeding if time for appealing is extended; and (4) the degree of prejudice to the potential respondent if the application is granted."

3. Mr. Oliver also referred me to the cases of R (Hysaftv. Home Secretary 120141 EWCA 1 WLR 2472 (CA) and Mitchell v. News Group Newspapers Ltd. 120141 1WLR 795. These cases were decided under the post Wolf Reforms CPR regime in England and Wales but Mr. Oliver submits that they provide "strongly persuasive authority" as to how I should consider the application and "that the principles applied therein ought to apply to cases in this jurisdiction to ensure there is uniformity in decisions on such matters here in the Turks and Caicos Islands." Of course decisions of the English Court of Appeal are highly persuasive, however l decline to follow the "relief from sanctions" approach taken in these cases in the face of the 1999 White Book upon which our own Rules of the Supreme Court are based; though in the end it might come to naught since the White Book guidance, whilst expressed differently, is substantially similar as Mr. Oliver notes.

Measuring the Application against The White Book "factors"

Delay

4. The first factor to be considered is delay — length and reason. The history of the matter is referred **to** in the documents of both Counsel and is clearly set out in Ms Ergen's Affidavit in Support of the Application. There were two separate instances of delay. The first instance occurred after 31 August 2016, by which date the Applicants' Notice of Intention to Appeal, required by section 15(1) of the **Court of Appeal Ordinance** ought to have been filed, being 28 days after the handing down of the former Chief Justice's judgment on 3 August 2016. Nothing was filed until 12 September 2016, when the Applicants filed their Notice of Appeal, which Notice was served on the Respondents' Attorneys on 16 September 2016'. The Court of Appeal found the Applicants' appeal to be 'void ab (according to Mr Oliver's submissions) as the Notice of Intention to Appeal was not filed within the 28 day time provided by statute, and declined to hear it, following AG v Robinson. The Applicants then filed the Application for leave to Appeal out of time currently before me.

5. The period of delay here was just over three years. The Applicants explain this first period of delay as being due a genuine misunderstanding of when time to appeal began to run, beginning their calculation from the date of the perfected Order (18 August 2016) rather than the handing down of the Judgment (3 August 2016).

6. The second occasion of delay occurred between 25 September 2019 when the Court of Appeal shut out the Applicants as described above, and 29 January 2020, the date of the filing of the instant Application for Leave to Appeal out of Time. The period of delay here was just over four months, yielding a cumulative delay of almost three and a half years and marking the first time the Applicants had managed to put this appeal process on the right footing. Ms. Maroof explained this instance of delay as being due to the fact that her client resides in London (presumably affecting taking instructions and turning around documents) coupled with her (Ms. Maroof's) own work load.

Service of the Notice of Appeal is required by section 11(4) of the **Court of Appeal Ordinance.**

7. Mr. Oliver says that this length of delay is excessive and that the reasons given are not good enough. Consequently, the Applicants ought to be refused the relief they seek. In other circumstances **I** would have felt compelled to agree with Mr. Oliver. However I take into account the fact that both the Applicants and the Respondents changed attorneys at critical points immediately following the conclusion of the trial before Chief Justice Ramsay-Hale and there would naturally have been some disruption in the taking of instructions and the giving of advice in both camps during the hand-over periods. There is also this note at 59/4/17 of the White Book: "*An extension of time can be granted...even though the failure to appeal in time was due to a mistake on the part of a legal adviser.*"

8. As to the second occasion of delay, given that the Applicants were already out of time, the intervening holidays and the quarterly sittings of the Court of Appeal, I do not consider it to be disqualifying, especially when weighed against the fact that the Respondents were always aware of the Applicants' wish to appeal...once they got it right. This is a point that was pressed repeatedly by Ms. Maroof and that I accept.

Prejudice

9. The third factor listed in the White Book at note 59/4/17 is the chances of the appeal succeeding if time for appealing is extended. However, for convenience in the structure of this discussion I will consider next the fourth factor — the degree of prejudice to the potential respondent if the application is granted. In this respect, I accept Mr. Oliver's submission that the Respondents to this Application have suffered and will continue to suffer prejudice from the uncertainty attendant upon this state of affairs.

10. At paragraph 22 of his submissions Mr. Oliver says that the "*Respondents have for nearly 4 years been deprived of any income from Melrex (TC) Ltd. (Melrex) which is received from the administration of the .tc domain address. There has been no certainty in this matter for the Respondents, and they ought to be entitled to know where they stand. Further, it is unknown if the First Applicant, who resides outside the jurisdiction, has even the means to settle the Respondents' claim for costs at first instance, or indeed the costs of the Appeal, should the matter proceed and they are unsuccessful once again.*"

11. In reply, Ms. Maroof pointed out that there has been no stay of the order of the Chief Justice and none has been applied for. The Respondents are therefore at liberty to have the register of shareholders of Melrex rectified in accordance with that order. In my judgment that is not good enough. It would be entirely reasonable for prudent businessmen to be wary in their dealings with property, the title to which is being so hotly disputed and might change in the course of litigation, thereby giving rise to retransfers, refunds, accounting and the like. Uncertainty of ownership goes to the root of entitlement and prejudices the ability to negotiate contracts, raise financing, deal with banks, attract new investment etc., all of which are vital to the commercial success of any business.

12. I am therefore not satisfied that the Applicants have met the "no-prejudice to the Respondents" threshold that they must meet if their application is to be granted. Nor have the Applicants

shown any ability to meet a claim for damages that might arise from such prejudice. **Indeed,** Ms Maroof s response to Mr. Oliver's worry about the costs of a potential appeal was an invitation to apply for security **for** costs, the principal Applicant being resident outside the jurisdiction. In my view an order for security for costs simply does not answer the concern as regards potential prejudice to the Respondents.

Chances of Success

13. Finally, under the White Book's "four factors" approach, **I** must assess the chances of the appeal succeeding, and in doing so **I** remind myself I am not to conduct a mini appeal. I have read the Judgment of then Chief Justice Ramsay-Hale that the Applicants wish to appeal against. It is focused and well-reasoned. The following two points, that appear to me to be pivotal are not in my view answered adequately in the Applicants' Amended Notice of Appeal; nor do I consider they were addressed adequately in Counsel's submissions on behalf of the Applicants. (This is not a criticism of Counsel — lawyers like tradesmen can only do their best with the material to hand). The points are these:

(i) First, the Respondents contended before the Chief Justice that the First Applicant's name had been incorrectly entered ("without sufficient cause", in the language of the statute) in the register of members of Melrex in circumstances where the **Respondents** might well have charged fraud had the history of the pleadings proceeded differently, but in the event ended up serving a Notice to Prove (see generally paras. 35 to 42 of the Judgment, but in particular paras. 35 and 36).

I say that only to underline the potential seriousness of the matter. The Applicants' Amended Notice of Appeal, at paragraphs (i) and (ii), merely asserts that the learned Chief Justice erred in her findings of fact but does not recite any contrary factual narrative that it is contended she failed to take into account;

(ii) Secondly, the relief sought by the Respondents before the learned Chief Justice was rectification of the register of members of Melrex under section 51 of the Companies Ordinance. This is a procedure that in law could only affect the legal, as opposed to the beneficial ownership of the shares in question.

The Respondents **say** that the instructions to the bare trustee to enter the name of the First Applicant on the register as the legal owner of the shares were given by a person who was not the beneficial owner and had no authority to do so. The First Applicant says otherwise. It is therefore the beneficial interest in the shares that is effectively in issue between the parties and it is difficult to see how the appeal as presently framed, and given the procedure under which the litigation issued and has been conducted, can resolve that issue.

The matter of beneficial ownership was never before the learned Chief Justice except in a tangential way and remains to be litigated at the instance of the First Applicant, if she is so advised. Paragraph 51 of the Judgment is very clear as to the interplay

between legal and beneficial interests arising from the circumstances of this case, and the limited utility of an appeal even if it is successful.

As the Chief Justice said at para. 56 of her Judgment: "*Ms. Ergen's claim to be beneficially entitled to the shares is not a matter that can be determined in the summary proceedings set out in section 51*" [of the Companies Ordinance].

14. Based on these two points (in gaming parlance), I would not bet on the appeal being successful if I were to grant the leave sought. Besides, even if it did succeed, of what use would it be when the issue of the beneficial ownership of the shares in question remains unresolved and still in need of being litigated? This was the rhetorical question posited by Mr. Oliver at the conclusion of his submissions and the futility of which I accept.

Decision and Costs

15. In all the circumstances, and for the reasons I have enumerated, I refuse the application for leave to appeal out of time. Unless I can be persuaded otherwise at the delivery of this Ruling, I order that the First Applicant shall pay the costs of the Respondents, such costs to be taxed if not agreed.

Dated 10 March 2020

Carlos W. Simons **QC**

JUDGE (Ag)

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