

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0070
BVIHCMAP2022/0071
BVIHCMAP2022/0072

BETWEEN:

[1] GREATER SAIL LIMITED
[2] LI JIANPING (ALSO KNOWN AS GIGI LEE)
[3] MAI FAN

Appellants/Applicants

and

[1] NAM TAI PROPERTY INC.
[2] NAM TAI GROUP LIMITED
[3] NAM TAI INVESTMENT (SHENZHEN) CO. LTD

Respondents

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal
The Hon. Mr. Robert Levy	Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington KC with him Mr. Andrew Emery for the Appellants/Applicants
Mr. David Chivers KC, and with him, Mr. Nicholas Burkill and Mr. Rondelle Keller for the Respondents

2023: October 3;
2024: February 12.

Application for extension of time for leave to appeal – Court’s general discretion to extend time to comply with Civil Procedure Rules – Leave to appeal applications of trial judge – Finding by the Court of Appeal of apparent bias on the part of the learned judge in lower court proceedings – Whether decisions of the learned judge should be allowed to stand in light of findings of apparent bias – Whether notwithstanding the delay in seeking leave to appeal the findings of apparent bias warrant leave being granted

In October 2021 proceedings BVIHMAP2021/10, the Court of Appeal ordered the issue of further shares by the first respondent, Nam Tai Property Inc. to Greater Sail Limited. ("GSL") in September 2020 was void as having been carried out by its directors for an improper purpose and in breach of fiduciary duty. The Court also ordered that a general meeting be held on 30th November 2021. Affidavit evidence of Mr. Andrew Emery states that the meeting was held and the majority of the directors of the first respondent were replaced. He continued by asserting the third respondent, Nam Tai Investment (Shenzhen) Co Ltd. had not returned the sum of \$46 million that GSL had paid for the shares it had been issued, and that it had started arbitration proceedings in Hong Kong for the return of those monies.

In the proceedings below, Jack J [Ag.] initially granted *ex parte* prohibitory and mandatory injunctions against the appellants on 27th and 31st January 2022 *inter alia* for document preservation and to compel the appellants to send letters to the Chinese Administrative Authorities reversing the letters previously sent by its lawyers in protection of its rights. These orders were appealed but dismissed by this Court. On 8th March 2022, Jack J [Ag.] heard two applications, an application for contempt of court in Suit BVIHCOM2022/042 against the appellants, and the application for his recusal brought by GSL. By his written judgment dated 14th March 2022, the judge dismissed the recusal application and made findings that the appellants were in contempt of paragraph 6 of his order of 31st January 2022 in the proceedings below.

On 31st May 2022, the respondents applied for summary judgment in relation to paragraph 74A of their amended statement of claim which sought certain declaratory relief concerning the constitution of the board of directors in December 2021 and the validity of decisions made in the general meeting of the respondents convened on 30th November 2021. The learned judge made the orders of summary judgment as prayed by the respondents and ordered that the appellants pay the costs of the summary judgment application.

On 20th September 2022, the learned judge continued the mandatory and prohibitory orders made previously in January 2022.

The Court of Appeal heard the appeal from the dismissal of the recusal application and allowed the appeal ordering that Jack J [Ag.] be recused from hearing further proceedings in the court below. The written reasons for the decision were delivered on 11th November 2022 which contained a finding by this Court that there was a real possibility of apparent bias on the part of the learned judge in the proceedings below. The appellants therefore seek to appeal the orders of Jack J [Ag.] in light of the findings of the Court of Appeal delivered on 11th November 2022.

By notices of application issued on 9th December 2022 (GSL) seek: (1) an extension of time to appeal the order of Jack J [Ag.] dated 14th March 2022 by which the judge found the appellants to be in contempt of paragraph 6 of an order dated 31st January 2022 in Suit BVIHCOM2022/016 (the "Contempt Extension Application"); (2) an extension of time, and if granted, leave to appeal the order of Jack J [Ag.] dated 6th July 2022, by which the judge granted summary judgment on paragraph 74A of the amended statement of claim in Suit BVIHCOM2022/016 making certain declarations and ordering the respondents to pay costs occasioned by those declarations and the application for summary judgment ("the SJ Leave Application"); and (3) an extension of time to appeal

the order of Jack J [Ag.] dated 20th September 2022 by which the judge continued various injunctions against GSL in Suit BVIHCOM2022/016 (the “Injunction Extension Application”).

With regard to the Contempt Extension Application, the appellants contend that the decision on the committal application cannot stand in the light of this Court’s finding on the recusal appeal “that the learned judge may have predetermined the contempt application”. The appellants further state that the judge misconstrued the January 2022 Injunction by finding that the order did not require GSL’s Chinese lawyers to do anything (because by requiring the letter to Chinese authorities to ‘bear the chops’ of the law firm sending the letter, the judge was ordering a non-party do something and in doing so, made it impossible for the appellants in that proposed appeal to effect full compliance). The appellants suggest that the judge erred in law and principle in placing the burden of proof on the appellants to satisfy him that they were not in contempt, rather than on the respondent to satisfy him that they were. The grounds of appeal assert that it was wrong to draw adverse inferences from the absence of cross-examination, and that the judge having said that no inference could be drawn from the appellants’ silence, proceeded to draw adverse inferences from the lack of cross-examination. Finally, the appellants assert that there was no basis for the finding that the evidence of Mr. Mai Fan was “most improbable” in the absence of evidence of law or practice in China in relation to the critical issue of the affixation of chops by law firms led by the respondents.

With reference to the SJ Leave Application, the notice of application asserts that the declarations sought by way of the order granting summary judgment were ‘purely academic’. The appellants contend that the order for summary judgment cannot stand in light of the judgment on the recusal appeal, that the judge erred in law in granting summary judgment where there was no genuine dispute as to the subject matter in relation to which it was sought, that the judge erred in law and principle, such that the exercise of his discretion was “blatantly wrong”, where the motive for seeking the relief was to resolve “by the back door” an issue which was to be resolved by the Chinese courts, and that the judge incorrectly made an order for costs against the appellants. The appellants state that his error arose from (a) the assertion that the appellant had never disputed the subject matter of the declarations, (b) that the respondents had not pleaded that the Chinese proceedings were part of a relevant conspiracy, (c) that the declarations sought were ‘manufactured’ in order to pre-empt a decision of the Chinese Courts and (d) that the judge failed to have regard to the relevant provisions of the CPR.

The appellants’ sole ground of appeal with reference to the Injunction Extension Application is that the decision of Jack J [Ag.] cannot stand in light of this Court’s finding on the recusal appeal. The appellants aver that there should be little prejudice to the respondents in all the applications as they could be compensated in costs.

Held: making the orders at paragraphs 69 and 70 of this judgment, that;

1. The Court has a general power to extend or shorten the time for compliance with any rule, practice direction, order or direction, even if any application for an extension is made after the time for compliance has passed. The grant of an extension of time is a discretionary power. The Court will consider in the exercise of its discretion: (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding if the extension is granted and (4) the

degree of prejudice to the respondent if the application is granted. These considerations, however, are not cumulative and the applicant does not have to establish each of these four elements.

Rule 26(1)(k) of the **Civil Procedure Rules (Revised Edition) 2023** applied; **John Cecil Rose v Anne Marie Uralis Rose** SLUHCVP 2003/0019 (delivered 22nd September 2003, unreported) followed; **Joseph Hyacinth v Allan Joseph** GDAHCVAP2015/0025 (delivered 20th June 2016, unreported) followed.

2. In the Contempt Extension Application, the delay is around six months, in the SJ Leave Application it is around five months and in the Injunction Application it is about two months. The delays vary from inordinate (in the Contempt Extension and SJ Leave Applications) to serious, in the Injunction Application. The appellants do not offer any explanation for the delays or any reason why the appeals could not have been filed in the time afforded by the rules other than describing the delays as 'not unduly significant'. As for the chances of success of the proposed appeals, the common ground running through the applications is that the decisions cannot stand because there was a real possibility that the learned judge may have predetermined the underlying applications. It is noted however, that at no point during the applications did the appellants raise the issue of actual or apparent bias when they had every opportunity to do so. Failure to make any application arising out of the then recusal appeals lends itself to the determination that this proposed ground has no reasonable chance of success (the sole ground in the Injunction Application).
3. In relation to the SJ Leave Application, an extension of time, and leave to appeal should also be refused. The delay is substantial and unexplained. As to the proposed grounds of appeal (including the previously dismissed catch-all ground concerning recusal), the grounds fail as the judge correctly exercised his discretion to grant relief despite the appellants' assertions. Further, overturning an injunction is not something that can simply be compensable for in costs and neither is the reversal of an order granting summary judgment on an issue in proceedings.
4. A distinction should be drawn however with reference to the Contempt Extension Application and the other applications. That is because the finding of bias occurred in and about the committal application whereas the applicants barely mentioned it at all in the other applications and made no steps in those applications arising from the allegation of bias. Justice does not demand that those applications be re-opened and poured over on appeal in circumstances where the merits of any proposed appeal are such that the inevitable conclusion on appeal would be the same as the conclusion below. Justice however may demand that an extension of time be granted when public confidence in the administration of justice is engaged where an allegation of apparent bias has been made out. Even where the appeal lacks merit, the delay is not properly explained and the applicant has taken no steps to assist itself, the Court can still grant an extension, not because the applicant deserves it, but rather because the proper administration of justice demands that an appellate court exercises proper scrutiny over proceedings below and can demonstrate, with a view to

preserving confidence in the administration of justice, that the Court's processes and procedures are fair and just.

JUDGMENT

- [1] **LEVY JA [AG.]** : As Farara JA [Ag.] observed in paragraph 18 of an earlier judgment in these proceedings:¹

“There is a presumption in law of impartiality in relation to a judge or court. This presumption is a cornerstone of the rule of law, the administration of justice, and independence of the judiciary.”

That judgment addressed the approach a judge should take on a recusal application and found that the actual approach taken by the first instance judge on an earlier application was “wholly incorrect ... leading to him committing a fatal error of law.” Having considered the various complaints made against the judge, Farara JA [Ag.] went on to find that there was:

“evidence upon which it could be concluded, objectively, that there was a real possibility that the judge was not impartial and/or might be biased towards GSL in the proceedings. They are also indicative of a closed mind. They may aptly be classified as premature expressions of legal and factual conclusion indicative of a closed mind.”

In paragraph 63 of that judgment, this Court found “it is clear that the fair-minded observer would also conclude that there might be a real possibility of apparent bias on the judge's part, warranting the making of a recusal order.”

- [2] By paragraph 3 of the Certificate of Result of Appeal it was ordered “that the learned judge Jack J, is recused from presiding or adjudicating over any further applications and/or further hearing in the proceedings below in this claim ...”.
- [3] The issues in the applications addressed in this judgment arise from the fact that in the period between the judgment that was successfully appealed to this Court and disposed of in the judgment referred to above, and this Court's judgment and Order on that appeal (i.e. between 14th March 2022 and 4th

¹Greater Said Limited (a company incorporated in the British Virgin Islands) v Nam Tai Property Inc. et al BVIHCMAP2022/0025 (delivered 4th October 2022, unreported).

October 2022), Jack J [Ag.] heard a number of applications (the “Intervening Applications”). Of course, had the appeal referred to above been determined immediately after the judgment complained of then Jack J [Ag.] would not have heard the intervening applications. However, that was not practical.

[4] On the applications before this Court, there was no evidence before the Court that the first applicant/appellant, Greater Sail Limited (“GSL”), a British Virgin Islands Company, despite having started the process of appealing the judge’s refusal to recuse himself, and having obviously formed the opinion that the judge had demonstrated actual or apparent bias (which was subsequently confirmed by this Court), and was/should be disqualified from further involvement in proceedings in which GSL was involved, seriously protested against the judge hearing/disposing of the Intervening Applications; (I say “seriously” because, as appears in paragraph [14] below, on one of the applications the appellant’s written submissions did invite the judge to adjourn the hearing until after the outcome of the recusal appeal. I deal with that more fully below). Whilst it is, thankfully, (exceptionally) rare for counsel to have to invite a judge to recuse on the basis of bias, and such an invitation is challenging (particularly in a small jurisdiction), the best traditions of the bar demand a fearless approach in such a situation. GSL had the great benefit of representation by Mr. John Carrington KC on the Intervening Applications. Mr. Carrington KC is a very senior, able, respected, and fearless member of the bar.

[5] In the circumstances explained below, I find it surprising that there was no material before the Court on the instant appeal to suggest that GSL seriously protested at Jack J [Ag.] hearing and disposing of the Intervening Applications. There was no evidence that GSL participated in those applications subject to any form of protest or reservation about the judge’s prior conduct; no relief was sought from Jack J [Ag.] or this Court, about him dealing with the Intervening Applications. Yet at the time the Intervening Applications were being conducted, GSL was pursuing its appeal to this Court on the grounds of Jack J’s apparent bias (the inevitable consequence of which is that he should not be involved in the proceedings). I return to this issue below.

The Applications before the Court

[6] By Notices of Application issued on 9th December 2022 (the “Notices of Application”), GSL seek:

- (1) An extension of time to appeal the Order of Jack J [Ag.] dated 14th March 2022 (in Suit BVIHCOM2022/042), by which the judge found GSL, Li Jianping and Mai Fan to be in contempt of paragraph 6 of an Order of 31st January 2022 in Suit BVIHCOM2022/016 (the “**Contempt Extension Application**”).
- (2) An extension of time, and, if granted, leave to appeal from the Order of Jack J [Ag.] dated 6th July 2022, by which the judge granted summary judgment on paragraph 74A of the Amended Statement of Claim in Suit BVIHCOM2022/016. By that Order, the judge made certain declarations and ordered GSL to pay the respondents’ costs of and occasioned by the claim for those declarations and the application for summary judgment (the “**SJ Leave Application**”).
- (3) An extension of time to appeal from the Order of Jack J [Ag.] dated 20th September 2022 by which the judge continued various injunctions against GSL in Suit BVIHCOM 2022/016, the original ex parte injunction having been granted on 31st January 2022 (which was subsequently unsuccessfully appealed to this Court) (the “**Injunction Extension Application**”).

[7] The notices of application were supported by a short affidavit from Mr. Andrew Emery, the BVI attorney for GSL (and Li Jianping and Mai Fan in the Contempt Extension Application). Affidavit evidence in opposition came from Michael Cricenti, a director of the First and Second Respondents.

Some background

[8] Mr. Emery’s affidavit gave a brief history of the long litigation history. He explains that in an October 2021 judgment in proceedings BVIHCOMAP2021/10, the Court ordered that the issue of further shares by the first respondent to GSL

in September 2020 was void as having been carried out by its directors for an improper purpose and in breach of fiduciary duty. The Court ordered that a general meeting be held on 30th November 2021. Mr. Emery says that the meeting was held and the majority of the directors of the first respondent were replaced. He continued by asserting the third respondent had not returned the sum of \$46 million that GSL had paid for the shares it had been issued, and that it had started arbitration proceedings in Hong Kong for the return of those monies. He referred to “protective relief” sought in the courts of Hong Kong and China.

- [9] Mr. Emery deposed to the proceedings, commenced in January 2022 by the respondents, in which the respondents sought relief arising from a letter from GSL to the Chinese Administrative Authorities in Shenzhen, objecting to the registration of changes of administration of the third respondent and one of its subsidiaries (the “**2022 Proceedings**”). In short, the respondents allege that the letter was wrongful, in contravention of Chinese law, and that GSL had conspired with others to cause harm to the respondents.
- [10] By an Order in the 2022 Proceedings (the “**January 2022 Injunction**”), made ex parte on notice to GSL on 31st January 2022, Jack J [Ag.] ordered, inter alia, that GSL should not, until the return date thereunder, do any act that might delay or hinder the first respondents’ board, as elected at a meeting on 30th November 2021, taking control of the first respondent or its subsidiaries and any of its, or their subsidiaries. That Order also required GSL, by 4 p.m. Beijing time on 8th February 2022, to write to various Market Supervision Branches in China, in the form of a draft letter appended to that Order bearing the chop of the law firm sending that letter (and send copies to the respondent’s lawyers in Shenzhen). The appended letter explained that contrary to the terms of an earlier letter, the dispute in that earlier letter was not relevant to the respondents’ application to register changes to the third respondent’s legal representative and general manager, and that the previous letter was withdrawn. The appended letter explained that the previous letter was withdrawn, that GSL withdrew all objections in relation to the registration of changes of the officers, and that there

was no dispute between GSL and the third respondent that would affect the registration of the change of officers.

[11] GSL appealed the January 2022 Injunction. Its appeal, heard on 11th May 2022, was dismissed by Order of this Court on 21st June 2022. In his judgment Smith JA [Ag.] noted that the retraction letter had not been sent by 8th February 2022, and that in consequence on 22nd February 2022 the respondents applied to commit GSL and its directors for contempt of court. He noted that GSL subsequently sought to purge its contempt by belatedly sending the relevant letter. The Court found it unsatisfactory and improper to permit GSL to appeal to this Court without giving the judge an opportunity of reviewing the *ex parte* order in the light of full evidence and submissions at an *inter partes* hearing. This Court also found that the appeal served no real purpose as GSL had belatedly complied with the requirement to send the letter.

[12] This Court's judgment on the injunction appeal does not record any submission on behalf of GSL relating to concerns that GSL may have had as to whether Jack JA's [Ag.] had demonstrated any form of bias at hearings that were, at that stage, still recent. I appreciate that as that appeal was formulated, it may not have been directly relevant. However, it would have been open to GSL to have applied to amend its grounds of appeal to include a ground to the effect that Jack JA [Ag.] had recently demonstrated bias against GSL and that such bias somehow infected the January 2022 hearing and resultant order. I make no assumptions regarding the absence of such an application; it may well be that GSL does not consider that Jack J [Ag.] demonstrated any bias in the January 2022 hearing.

[13] The return date of the *ex parte* on notice injunction was on 20th September 2022, and by Order of that date, Jack J [Ag.] essentially continued the relief previously granted. Mr. Chivers KC for the respondents points out that GSL did not file any evidence for the return date. He referred to GSL's written submissions which explained that GSL had complied with the mandatory provisions of the *ex parte* order, and that, so far as the prohibitory provisions were concerned, GSL was required "in any event" to preserve relevant documents and had not taken steps

to delay etc. the appointment of officers. They continued that on that basis “GSL has not applied to set aside the January injunctions (although it reserves its right to do so) nor has it filed any evidence objecting to the continuation of the injunctions prior to this hearing.”

- [14] I have read GSL’s submissions filed for the 20th September 2022 hearing. They start by explaining that GSL filed them without prejudice to its position that the BVI did not constitute the proper forum for the proceedings, and continued by asserting that the applications before the court on that day were not urgent “and should be stood over pending the hearing of the Recusal Appeal” which was listed for two weeks later. There was no formal application for Jack J [Ag.] to recuse himself. The transcript of the 20th September 2022 hearing records Mr. Carrington KC agreeing with the judge that his clients did not vigorously oppose the application and saying that there was no evidence that his clients had been doing anything to interfere in the relevant companies. Mr. Carrington KC further said, “we remain neutral with respect to the continuation of the injunction, but of course reserve our position to apply to set it aside in the future if there’s been a change of circumstances.” The transcript does not record Mr. Carrington KC asking the judge not to hear the applications before him, or even mentioning the then forthcoming recusal appeal. It seems to me that if GSL considered that the judge’s earlier bias affected the propriety of his dealing with the return date, or was of the view that he should not deal with the application, then GSL should have made that point, whether or not GSL vigorously opposed the continuation of the relief. It does not seem to me appropriate for a party who has a good claim that a judge should be recused by reason of bias should take an approach whereby it does not oppose that judge from dealing with some applications, whilst permitting the judge to deal with others. As GSL would have known, the invariable consequence of a finding that a judge has demonstrated bias, be it actual or apparent, is that the judge will be removed from all further hearings on that matter. It is not merely in the interests of the parties that such an order is made, but also in the interests of the administration of justice and confidence in the judicial system.

- [15] Returning to an earlier stage of the narrative, on 22nd February 2022, GSL applied under CPR Parts 9.7 and 9.7A for orders that the BVI was not the proper forum for the determination of the claims made in the 2022 Proceedings. That application came before Jack J [Ag.] who, on 14th March 2022, dismissed it. Mr. Emery deposed that this Court had granted leave to appeal that decision, but that that appeal had not yet been heard. His affidavit sought leave to amend the grounds of appeal in that appeal. However, that application was not moved before the Court at the hearing on 3rd October 2023.
- [16] Turning to consider the proceedings for alleged contempt of the January injunction, on 22nd February 2022, the respondents commenced proceedings for contempt against GSL and Ms. Li and Mr. Mai. At an *ex parte*, “in private” hearing, on 24th February 2022, Jack J [Ag.] granted the respondents permission to serve the contempt proceedings on Ms Li and Mr. Mai out of the jurisdiction. That order directed that the application to commit Ms. Li and Mr. Mai would be heard on 11th March 2022, so just over two weeks later. (I note in passing, that Mr. Cricenti explains that it was only with the contempt proceedings hearing approaching, that GSL sent the letters to the Chinese authorities referred to above.) In my view, despite what appeared to be an obvious failure to comply with the January 2022 Injunction, the setting of such a short period between the application and the hearing was odd; two of the defendants had to be served out of the jurisdiction and were entitled to file evidence. Given the importance of a contempt application, I should have thought that a longer period would have been appropriate, whatever the CPR said. That said, provided the period allowed was one permissible by the rules then its length would be within the wide discretion afforded to a judge when making a case management decision. There is, however, no appeal from the judge’s decision regarding the length of time afforded to respond to the application.
- [17] On 8th March 2022, GSL filed an amended application for a retrospective extension of time for compliance with the January 2022 Order and relief from sanctions.

[18] A hearing took place before Jack J [Ag.] on 11th March 2022, following which, on 14th March 2022, he handed down a written judgment.² That judgment recorded that he heard three applications on 11th March 2022, namely an application by GSL dated 28th February 2022 that he should recuse himself, the amended application to extend time, and the respondents' applications for contempt declarations (and appropriate relief, namely sequestration, committal, and fines). At paragraph [7] of that judgment, the judge noted that at the hearing on 24th February 2022, "Mr. Carrington QC was visibly shocked when I indicated that I would list [the] ... contempt application for 11th March. He wanted it after 15th March, when the Court of Appeal were (at least potentially) going to deal with his stay application." He went on to note a submission from the applicant for contempt that it was the early listing of the contempt application that secured compliance with the January 2022 Order. Whilst the judge did not find that the listing had actually caused compliance with the Order, he noted that insofar as it did, "that was in my judgment a good thing."

[19] The judge went on to dismiss the recusal application (wrongly as this Court subsequently found), and deal with the contempt declarations. At [33] of his judgment he said:

"The law in relation to contempt was largely agreed. The burden of proof is on the applicant. A respondent has no burden of showing a defence; it is for the applicant to disprove any defence advanced. A respondent bears no burden of showing his, her or its innocence. The standard of proof is the criminal standard. The Court can only find a respondent guilty of contempt if it is satisfied so that it is sure that that respondent is guilty. Another way of putting this is that a respondent must be acquitted if the Court has a reasonable doubt as to that respondent's guilt. The Court has to examine the evidence on each allegation of contempt separately and needs to consider the evidence on each count against each respondent separately. I must determine the application on the evidence which has been adduced. I must not speculate on evidence which has not been given. A respondent can only be convicted of contempt if both the actus reus of the contempt is proven and the mens rea of the respondent is proven to the criminal standard."

[20] He went on to note submissions by GSL's leading counsel, namely that "GSL accepts that it did not comply with the 31st January Order in the three respects

² BVIHC(COM) 2022/0016 (delivered 14th March 2022, unreported).

alleged” but that its breach of that Order did not constitute a breach because it lacked mens rea, due to the alleged fact that it was reliant on the actions of others, namely its Chinese lawyers and “those on the ground in China”, and therefore its breaches were not contumacious. The learned judge noted the submissions made in that regard on GSL’s behalf. He held that he could not draw adverse inferences from the alleged contemnors’ exercise of their right to silence but went on to find himself sure that there was no substance in the alleged contemnors’ evidence concerning the failure to send the relevant letters to the Chinese Authorities, but did not find two other allegations of contempt made out. He adjourned sentencing. The judge also dismissed GSL’s application for a retrospective extension of time for compliance with the January 2022 injunction order.

[21] A sentencing hearing occurred on 12th April 2022, and on 4th May 2022. Jack J [Ag.] handed down a written judgment, in which he fined Mr. Mai US \$10,000.00, Ms. Lee US \$4,000.00, and GSL US \$125,000.00 and ordered them all to pay costs. By an Order of 4th May 2022, the judge ordered GSL, Mr. Mai and Ms Lee to pay US \$12,688.03 on account of costs within 14 days. That Order recited the party’s agreement to the amount of costs payable (albeit not the time for payment and the Order does not appear to be a “consent order”). Mr. Cricenti explains that the costs have already been paid.

[22] I now turn to consider the chronology in relation to summary judgment. On 31st May 2022, the Respondents issued an application for summary judgment against GSL on one paragraph only of the Amended Statement of Claim. That paragraph asserted (a) that resolutions put to a special general meeting of the first Defendant were validly passed, with the effect that certain individuals were validly appointed (and others removed) from office; (b) that a board resolution of that company was validly passed; (c) the composition of the board, and (d) that one person was validly removed from the office of chief executive officer from 1st December 2021.

[23] That application came before Jack J [Ag.] on 6th July 2022, and, on the following day, he handed down a written judgment. The judge recited the evidence in

support of the application for summary judgment and held, at paragraph [6], that GSL had no defence to that issue. He found that GSL made no case contrary to the assertions made (which were in line with earlier judgments of both Jack J [Ag.] and this Court in related proceedings). Accordingly, having noted that there was no dispute on the facts stated in the declarations sought, and that GSL had no defence to that issue, it followed that summary judgment was, in principle, available.

[24] The judge went on to note Mr. Carrington KC's arguments on behalf of GSL to the effect that it was not appropriate to grant the declaratory relief sought in the summary judgment application (and other arguments), but ultimately, in a short judgment, concluded that it was an appropriate case in which to grant the relief sought.

[25] In the concluding paragraph of his judgment, Jack J [Ag.] dealt with the costs of the summary judgment application. He noted that whereas in a letter before the hearing, GSL indicated that it would take a neutral stance, in what the judge described as a volte face, GSL presented a "vigorous defence" to the application. It appears that but for that vigorous defence he might have made no order as to costs, but that as a result of the volte face, he applied the usual order that costs should follow the event.

[26] Mr. Cricenti's evidence exhibited GSL's submissions for the summary judgment hearing. They start by explaining that they were without prejudice to GSL's case that the BVI was not the appropriate forum for the claims in those proceedings, and its application to the Court of Appeal for a stay of the proceedings pending appeal (which application had been heard, with the judgment pending – the stay application was subsequently dismissed by Webster JA [Ag.] around a week before the summary judgment hearing before Jack J [Ag.]). The submissions vigorously opposed the Court's dealing with the summary judgment application, alleging that to do so would be "highly improper and indeed a wrongful trespass on the jurisdiction of the Court of Appeal." They went on to submit that it was not a proper case for summary judgment. Despite the robust language of those submissions, they did not suggest that it was inappropriate for the judge to hear

the application in view of the (then) impending hearing of the recusal appeal, or that the judge should recuse himself because he had previously demonstrated any form of bias. Again, it strikes me as odd that a party that considers a judge to have recently demonstrated bias, and whose appeal on that issue was to be heard just two weeks later, should not invite the judge to recuse himself from hearing an application that that party vigorously opposed. GSL did not do that.

The Contempt Extension Application

[27] I now turn to consider the applications before this Court, starting with the earliest in time, namely the Contempt Extension Application. As noted above, this application seeks an extension of time to appeal the Order of Jack J [Ag] dated 14th March 2022,³ by which the judge found GSL, Ms Li and Mr. Mai to be in contempt of paragraph 6 of an Order of 31st January 2022 in Suit BVIHCom 2022/016. The Notice of Application recites a brief history of the contempt application, and then states, at paragraph 5, that by its decision of 5th October 2022, this Court upheld the recusal appeal and found that “there was a real possibility that the learned judge may have predetermined the contempt application.” It continues by asserting that “the applicants are aggrieved by the finding of contempt and the fines imposed” and that they had good prospects of success on an appeal against the finding of contempt. It explained that whilst the appeal was around six months out of time, the finding of this Court was not made until 4th October 2022. It asserts that there would be no prejudice (in extending time) “due to the nature of the proceedings for contempt and the fact that the contempt was purged ... prior to the hearing of the contempt proceedings,” and that any prejudice could be compensated for in costs.

[28] The draft notice of appeal challenges the judge’s finding that the Mr. Mai’s account of the reason for the failure to send the relevant letter (namely the Chinese lawyer’s refusal to send it) was improbable, that the relevant order did not require a Chinese law firm to do anything, but rather only ordered GSL to do something, and various other findings (including that little weight should be placed on Mr. Mai’s evidence due to his failure to attend for cross-examination).

³ In Suit BVIHCom 2022/042.

[29] The grounds of appeal set out in the notice of appeal, start by asserting that the decision on the committal application cannot stand in light of this Court's finding on the recusal appeal "that the learned judge may have predetermined the contempt application." It continues, and I summarise, by asserting that:

- (1) The judge misconstrued the January 2022 Injunction by finding that the Order did not require DHH (GSL's Chinese lawyers) to do anything (because in requiring the letter to the Chinese authorities to bear the chops of the law firm sending the letter, the judge was ordering a non-party to do something, and made it impossible for the appellants in that proposed appeal to effect full compliance).
- (2) The judge erred in law and principle in placing the burden of proof on the appellant to satisfy him that they were not in contempt, rather than in the respondent to satisfy him that they were. The grounds of appeal assert that it was wrong to draw adverse inferences from the absence of cross-examination, and that the judge having said that no inference could be drawn from the appellant's silence, proceeded to draw adverse inference from the lack of cross-examination;
- (3) There was no basis for the finding that the evidence of Mr. Mai was "most improbable" in the absence of evidence of law or practice in China in relation to the critical issue of the affixation of chops by law firms led by the respondents.

The SJ Leave Application

[30] This notice of application, dated 9th December 2022, seeks an extension of time to appeal, and leave to appeal (if an extension is granted) the Order of Jack J [Ag.] by which he granted summary judgment (as explained above). The notice of application recites the facts of the Order of 6th July 2022 granting summary judgment and asserts that the declarations sought by way of that order were "purely academic". It goes on to recite this Court's decision on the recusal of

Jack J [Ag.], asserting that the applicants are aggrieved by the Summary Judgment Order, noting that the appellants were five months out of time to appeal, and asserting that there should be little prejudice to the respondents if leave to appeal is granted because they could be compensated in costs “as there was no lis between the parties in relation to the subject matter of the declarations.”

[31] The draft grounds of appeal in the notice of appeal asserts:

- (1) That the Order for Summary Judgment “cannot stand” in the light of the judgment on the recusal application.
- (2) That the judge erred in law in granting summary judgment where there was no genuine dispute as to the subject matter in relation to which it was sought.
- (3) That the judge erred in law and principle, such that the exercise of his discretion was “blatantly wrong”, where the motive for seeking the relief was to resolve “by the back door” an issue which was to be resolved by the Chinese courts; and
- (4) That the judge incorrectly made an order for costs against the appellant. His error is said to arise from the assertion that the appellant had never disputed the subject matter of the declarations; that the respondents had not pleaded that the Chinese proceedings were part of a relevant conspiracy; that the declarations sought were “manufactured” in order to preempt a decision of the Chinese Courts, and that the judge failed to have regard to the relevant provisions of the CPR.

The Injunction Extension Application

[32] By a notice of application dated 9th December 2022, GSL seeks an extension of time to appeal, and leave to appeal (if an extension is granted) the Order of Jack J [Ag.] by which Jack J [Ag.] continued injunctive relief. The grounds of the application recite this Court’s judgment on recusal, explain that the applicants are aggrieved by the Injunction Order, explain that the application is two months

out of time, and asserts that there should be little, if any, prejudice to the respondents that cannot be compensated in costs “as there was no lis between the parties in relation to the subject matter of the declarations.”

- [33] The sole ground of appeal in the grounds of appeal is that the decision of the Jack J [Ag.] cannot stand in light of this Court’s finding on the recusal appeal.

Extension of Time and leave to appeal

- [34] Both parties refer to CPR rule 26 (1)(k) , to the effect that the Court has a general power to extend or shorten the time for compliance with any rule, practice direction, order or direction, even if an application for an extension is made after the time for compliance has passed. Likewise, they both refer to the decision in **John Cecil Rose v Anne Marie Uralis Rose**.⁴ In that case Byron CJ noted that the grant of an extension of time is a discretionary power, which will be exercised for “good and substantial reason”, adding that:

“The matters that the court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the respondent if the application is granted.”

In that case, the Chief Justice noted that the delay was more than three months and that “in my view such a delay would be inordinate if there was no acceptable reason for it.”

- [35] Mr. Carrington KC also referred to **Joseph Hyacinth v Allan Joseph**,⁵ in which Webster JA [Ag.] cited the passage from **Rose** above. In **Hyacinth**, the delay was around 20 months. The Court did not consider that the reason given for the delay (that the appellant believed that his attorney had filed the appeal) was sufficient to justify the long delay. However, Webster JA [Ag.] went on to hold that even though the reason was insufficient the court nonetheless had a wide discretion to extend time where the prospects of success are good, and that an application to do so should be dealt with in accordance with the overriding objective. However, in that case, the appeal was from an order that the judge

⁴ SLUHCVP2003/0019 (delivered 22nd September 2003, unreported).

⁵ GDAHCV2015/0025 (delivered 20th June 2016, unreported).

below had, as this Court found, no jurisdiction to make, and it followed that the appeal had good prospects of success because the judgment was irregular. (see paragraphs 13 and 14). The essence of the decision in that case appears to be that an applicant does not have to establish each of the four matters mentioned in **Rose**, much less to any particular degree; they are not cumulative.

[36] Mr. Chivers KC referred to a number of other authorities, including **Candey Ltd v Russell Crumpler**⁶ in which Michel JA found that a period of 11 weeks' delay in filing an application which should have been issued within two weeks was "inordinate". However, as Michel JA noted at paragraph 32, that was not determinative and the reason for the delay had to be considered (which the judge then did and found it to be neither a good nor satisfactory reason for the inordinate delay).

[37] Mr. Chivers KC drew our attention to authority touching upon the impact of the important principal of finality in litigation on delayed applications for permission to appeal and referred us to the Bahamian decision in **Elizabeth Diane Collie v Lady Henrieta Fortune Doreen St. George**.⁷ In that case the appeal was filed nearly one year after the (six week) time limited for appealing had expired. Barnett P cited the Irish decision in **Seniors Money Mortgages (Ireland) DAC v Derek Gately, Administrator ad litem and Jacqueline McGovern**⁸ where the Court referred to the desirability of finality in litigation, the avoidance of unfair prejudice and the orderly administration of justice. The court suggested that "the threshold of arguability may rise in accordance with the length of the delay" and that "long delays should ... require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed."⁹

[38] We were not referred to any other decision in which it was suggested that the threshold of arguability may be higher if the delay is long (or indeed vice versa) and it seems to me to be counterintuitive that any such principle should be

⁶ BVIHMAP2020/0021 (delivered 21st September 2021, unreported).

⁷ SCCIV App No 133 of 2021.

⁸ [2020]IESC 3.

⁹ Ibid at paragraph 69.

applied. The logical result would be that if the delay was short, but the proposed appeal poor, then the court should be more inclined towards granting an extension. Rather, in my view, the considerations should be those referred to in **Rose** and that there should be no gloss on that. The Court should not apply a rigid test that requires an applicant to meet a certain threshold under each head. The correct approach is to consider the application in the round and determine whether, taking all relevant considerations into account, it is appropriate to extend time.

[39] Turning to consider leave to appeal, Mr. Carrington KC notes, correctly of course, that a finding of apparent bias is of the utmost seriousness. (I would add that an allegation of apparent bias is also of the utmost seriousness, and that if a party feels it appropriate to make it, it should act accordingly in the course of the litigation.) He relied very heavily on the decision of the Caribbean Court of Justice in **Ward v Walsh**.¹⁰ That was an odd, and perhaps extreme and obvious case, in which counsel for the appellant invited two members of the Court of Appeal to recuse themselves on the basis of their apparent bias against him personally. It was an obvious case because the judges in question had actually contemplated instituting legal proceedings against counsel. Mr. Carrington KC referred us particularly to paragraph 101 of the judgment in that case, which I set out, in full below:

“When counsel wishes to allege that a member of the Court of Appeal is disqualified by reason of bias or an appearance of bias, if possible, an application should first be made to the individual judge or judges to recuse. This should be a summary application made in Chambers before, and determined by, the judge concerned. If the judge opts to recuse then s/he must naturally be replaced. If the judge denies the application, then it may be renewed in open court before the entire appellate panel. The renewed application must be a formal procedure and must be supported by an affidavit setting out in full the material supporting the recusal. The renewed application must be heard and determined by the entire appellate panel prior to the hearing of the underlying substantive appeal. If the panel unanimously rejects the application, the panel may proceed to hear the substantive appeal unless counsel indicates an intention to seek special leave to appeal to this court. Reasons in writing denying the application for recusal must be given as soon as possible and no later than the time when the judgment on the substantive matter is delivered. Where convenient, the

¹⁰ 87 WIR 101.

two judgments may be rolled into one. If, on the hearing of the renewed application, a member of the appellate panel agrees that the application should succeed, then that panel may not hear the substantive appeal. The appellate panel must forthwith be re-constituted so as to exclude the challenged judge(s). A litigant who is dissatisfied with the order made on the application to recuse, may file an application before this court for special leave to appeal and the filing of that application will operate as a stay on the hearing of the merits by the Court of Appeal. For this reason, the dissatisfied litigant should lodge the application for special leave quickly, within at most one week. This court will deal swiftly with such applications.”

[40] In particular, Mr. Carrington KC focussed on the pre-penultimate sentence to the effect that a litigant who is dissatisfied with the order made on the recusal application may file an application to the Court of Appeal and that the filing of that application operates as a stay of the hearing of the merits of the appeal. In my view, that passage relates solely to the circumstances under consideration on the special facts of that particular case, namely an application to an appellate court that one or more of its members should recuse themselves. It is of no broader application and certainly not to a situation where a first instance judge hears and refuses a recusal application, and the dissatisfied party then seeks to appeal that refusal. To be very clear, the commencement of an appeal process does not operate as a stay, and a party that wants a stay must apply for one in the usual way. On Mr. Carrington KC’s logic, it would be open to a party to make an entirely meritless recusal application in order to achieve a stay of a substantive application. The effect of such a failed application resulting in an automatic stay pending a further application is wrong in principle, would open up the possible abuse of “judge shopping”, and impede the progress of the proceedings.

[41] Mr. Carrington went further. When it was put to him that his clients should have taken the point about the recusal appeal in the course of the Intervening Applications (inviting the judge not to deal with those applications) he suggested that it was wrong to ask this solely of his clients, and suggested that because the point was one that related to the administration of justice, all counsel, and the court itself should have taken it. With the greatest of respect to Mr. Carrington KC, I have no doubt that is wrong. It is, of course correct that

this Court found that the judge should be recused (and have recused himself). However, judges do err, and appellate courts put them right. In an adversarial system, in hard fought commercial litigation, the party objecting to the recusal application is by no means bound, as servants in the administration of justice, to agree to the staying of proceedings pending an appeal of a point, even a recusal point, with which they disagree. There may be the potential for cases of bias that are so clear and obvious that even the most hard-nosed of commercial litigators would be hard pressed to progress an application following a failed recusal application; but it seems to me that the judge's conduct would have to have been extraordinary in order to require an opposing litigant to take such a course. I do not consider this to be such a case.

[42] Accordingly, I do not consider that **Walsh** assists the appellants.

[43] Mr. Carrington KC also relied upon the decision in **R v Bow Street Metropolitan Stipendiary Magistrate & Ors ex parte Pinochet Ugarte (No 2)**.¹¹ He drew our attention to a citation from **Sellar v Highland Railway Co**¹² in the speech of Lord Hope at page 140F of **Pinochet** emphasising the importance of preserving the administration of justice from anything which could, “by even remote imagination infer a bias or interest of in the judge” and repeatedly pointed out the passage that the “solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured.” I do not doubt the correctness of that statement. Lord Hope cited that passage when explaining the fundamental importance of judicial independence. It was not used in the context of what a party who considers a judge to have demonstrated bias should do (other than draw Lord Buckmaster's dicta to the judge's attention on an application to recuse).

[44] None of the authorities to which we were referred addressed what I consider to be the central issue in this appeal which, to my mind, arises from the fact that the court operates on the basis of applications and arguments. Litigants apply

¹¹ [2000] 1 AC 119.

¹² 1919 SC (HL) 19.

to the Court and, following argument, the Court will apply the law as it understands it, without fear or favour; the Court can be expected to do that even in the face of what might be considered to involve a degree of personal embarrassment or difficulty such as may arise on a recusal application. But the Court only acts if invited to by a litigant making an application. Only in the most exceptional case (such as a case where a judge finds herself hearing a matter where a family member or friend is involved, or has a personal financial interest, or has a personal antipathy to one of the parties/witnesses), can a judge be expected simply to refuse to hear a matter. In such a situation the judge would doubtless inform the parties as soon as the position becomes apparent, and they will all act appropriately, with the assistance of the Court's administrative staff.

- [45] However, I fail to see how, no matter the importance of judicial independence, a judge can be expected, without an application, to refuse to act on applications pending a recusal appeal, simply because the judge has dismissed a recusal application, and an appeal has been filed. There are procedures that could be adopted to prevent a judge from hearing applications in such a situation, namely an application to the judge, or an appellate court, for an adjournment of the application, or stay or other relief. As I said earlier, such applications may be difficult to make, but it is counsel's duty to advise the litigant and, if so instructed, make the application.

Should the Court grant an extension of time?

- [46] I turn now to consider the applications to extend time. I have in mind the various issues that fall for consideration under **Rose** and deal with each in turn.
- [47] The first consideration is the length of the delay. In the Contempt Extension Application, the delay is around six months; in the SJ Leave Application it is around five months, and in the Injunction Application it is around two months. I consider that the delay varies from inordinate (in the Contempt and SJ Leave Applications) to serious, in the Injunction Application.

[48] As to the reasons for the delay, Mr. Emery's affidavit in support of the applications deals with this in a manner I find surprising. All he says is this:

"In each case the time that had been lapsed [sic] is not unduly significant, varying from approximately 6 months from the expiry of time from the date of sentencing in the case of the contempt orders, shortly less than 5 months in the case of the summary judgment Order, to just over 2 months in the case of the injunction continuation orders."

He explains the timing of the recusal appeal, and that;

"the finding of the possibility of apparent bias goes to the very heart of the administration of justice in relation to the proceedings below and calls into question all the Orders made by the learned judge in those proceedings."

[49] I am afraid that these short paragraphs do not begin to offer any explanation at all for any of the delay (even if were to accept his characterisation of any of the periods of delays as "not unduly significant" which I do not). It does not tell the Court why, to the extent that the draft grounds of appeal do not rely solely on this Court's finding on the recusal application (which is only the case in relation to the SJ extension application), they could not have been lodged within the time afforded by the rules. It does not suggest that the applicants wanted to appeal but, by way of example, had funding difficulties, or communication difficulties, or that their lawyers did not follow instructions, or that the applicants or their lawyers delayed in giving or taking instructions etc.. Those are the types of explanations that one might expect to see on an application to extend time. But there is no attempt to explain the delay. Mr. Emery knew it was an issue that needed to be addressed, and he did so. Assuming as one must that he put his clients' best case forward, he was unable to come up with anything, let alone anything persuasive to explain the delay.

[50] Accordingly, if it was the correct test to score the explanation for the delay, I would award it "nul points". However, that is not the correct test, and I merely say that whilst I am enjoined to take into consideration the reason for the delay, none has been offered and, when weighing it up with the other relevant considerations, it is impossible to afford it any significance. Of course, I fully accept that this Court's finding of apparent bias goes to the very heart of the administration of justice, but to my mind it is not good enough for a party having

formed the view that the judge was apparently biased at a particular hearing, and who has appealed on that basis, to engage in subsequent applications before that same judge without raising the point squarely and making an appropriate, timely, application to protect its position whilst that appeal proceeds. It may be that such an application will go nowhere; however, the litigant should, in my view, raise the point squarely, firmly, and politely.

[51] Considering the chances of success of the proposed appeals, in my view it is correct to start with the catch-all ground of appeal in the Contempt Extension Application and the Injunction Application, and the sole ground of appeal in the SJ Extension Application, namely that the relevant decisions cannot stand because there was a real possibility that the learned judge may have predetermined the underlying applications.

[52] What I find surprising about this allegation is that at no stage, save obliquely in relation to the Injunction Application, did the applicants invite the Court not to hear the applications because of their view that the judge was actually or apparently biased. As noted above, the only place in which I can see such a point having been made was in counsel's written submissions in the Injunction Application, but the applicants did not apply for the judge to recuse himself, and the transcript does not show Mr. Carrington KC inviting him to do so. So far as I am aware, there was no application for an adjournment, and, of course, in the period between the hearing which resulted in Farara JA's judgment on recusal, Jack J [Ag.] had heard another application in the same proceedings, the Summary Judgment application, without any mention, let alone protest, concerning bias. Yet, by the time the SJ and the Injunction Applications were heard there can be no doubt that the applicants had formed the view that the judge should be recused by reason of his conduct of the hearing some months earlier; they had appealed and were progressing the appeal on that very basis. It therefore occurs to me that like any other reasonable litigant they should have invited the judge to have recused himself, or for an adjournment pending the recusal appeal, or for those matters to be heard by another judge, or for a stay of the proceedings pending the appeal. Alternatively, they could have applied to this Court, possibly on an urgent basis. There were many things they could,

and to my mind, should, have done. In my opinion, their failure to take any steps tells against them significantly. It may well be that the applicants did not take any active step because they consider that Jack J [Ag.] would have rejected it, however, that does not meet the point that difficult or otherwise, litigants have charge of their own litigation and cannot warehouse applications simply because they believe (quite possibly correctly) that the judge will reject them.

[53] In addition, whilst I accept that draft grounds of appeal are not final grounds of appeal, and that they are not a full statement of the applicants' case in relation to the issues under appeal, we did have the benefit of Mr. Emery's evidence and Mr. Carrington KC's helpful written submissions. Neither of these documents point to any material, at all, that suggest that in his handling of, or judgments in the Injunction Application or the SJ Application Jack J [Ag.] exhibited any actual or apparent bias. The applicants had every opportunity to do so. So, it seems to me that what their argument boils down to is that because the judge was found to have exhibited apparent bias, anything that he did subsequently must be set aside because it is tainted.

[54] However it is at this stage that the analysis breaks down. If subsequent decisions were so tainted then why did the applicants not either invite the judge to recuse himself from hearing those applications, or immediately appeal them? Why did they just go along with them? I appreciate there may have been procedural difficulties in arranging for a number of other appeals to be dealt with at the principal recusal appeal, but with active case management that could have been achieved, had it been sought, which it was not.

[55] Turning to consider the chances of the appeals proceeding, I start with the Injunction Appeal. The sole ground of appeal in the draft notice of appeal is that the judge's decision cannot stand in light of this Court's finding that there was a real possibility of apparent bias in the proceedings below. In paragraph 14 above I have referred to the transcript of the hearing of the Injunction Application. The transcript shows Mr. Carrington KC saying, "we remain neutral with respect to the continuation of the injunction." It also shows Mr. Carrington KC agreeing with the judge that his clients did not vigorously oppose the application. Those

do not strike me as a particularly happy submission to be on the record on an appeal against the resulting order. In view of the failure to make any application arising out of the then pending recusal appeal, I am forced to the view that there is no basis to extend time on the Injunction Extension Application. I do not consider that the proposed appeal has a reasonable chance of success.

- [56] As to the Summary Judgment appeal, in my opinion, but for the recusal aspect of the proposed appeal, that appeal does not stand reasonable prospects of success. As Mr. Chivers KC pointed out in his appeal submissions, the applicant's notice of application for extension of time to seek leave to appeal and for leave to appeal, expressly states, at paragraph 2:

“The declarations sought were purely academic in the context of the proceedings and not determinative of any rights asserted by the Respondent against the Applicant as the Applicants had never indicated any position far less on contrary to the Respondents in relation to the subject matters of the proposed declarations.”

I consider it odd that in one breath GSL should assert that the declarations sought were purely academic, yet in another, assert that it is aggrieved by the decision. I suppose it is possible that GSL is taking the principled point that the Court should not grant declarations that are purely academic. I also note that GSL does not assert that the substance of the declarations was wrong. Furthermore, GSL does not seek to appeal the learned judge's finding, noted above, that in a letter of 23rd June 2022, before the hearing, GSL indicated that it would take a neutral stance on the Summary Judgment Application, and that it would be for the applicants “to satisfy the Court that they are entitled to the relief sought.” However, at the hearing just a couple of weeks later, GSL vigorously opposed the application.

- [57] All told, in relation to summary judgment, I am of the view that an extension of time, and leave to appeal, should also be refused. The delay is substantial, and unexplained. As to the proposed grounds of appeal, there are only in fact three such grounds of the merits (the others go to costs). The first is the catch-all ground that the decision cannot stand in view of this Court's subsequent finding of apparent bias. That does not seem to me to be valid for the reasons I have

outlined above, namely GSL's failure to take any steps arising from its conclusion that the judge had demonstrated bias at an earlier hearing. I therefore do not consider that ground of appeal to have any prospect of success.

[58] The second ground of appeal is that the learned judge erred in granting summary judgment where there was no genuine dispute as to the subject matter of the declaratory relief. It does not seem to me that that forms the basis for the refusal of relief; rather it might go to the question of costs. If a judge considers there is no lis between the parties as to an issue on which summary judgment is sought, s/he might refuse relief, but if he or she considers there are compelling reasons to do so, then the discretion to grant relief undoubtedly exists. It seems to me an overly pedantic point for GSL to seek to take on appeal so significantly out of time, and I do not consider that it has any prospect of success.

[59] The final ground of appeal on the merits was that the judge should not have granted relief where the motive for seeking it was "to resolve by the back door an issue which was to be resolved by the Courts of a friendly foreign power, namely China and thereby seem to pre-empt those courts from reaching their decision based on evidence of foreign law by making a declaration of such law." However, it seems to me that the judgment below dealt with these points properly (see paragraphs 9 to 11), and that it was well within the broad ambit of his discretion to have acted as he did. I therefore do not consider that this ground of appeal has a realistic prospect of success.

[60] The balance of the grounds of appeal relate to the judge's costs order. Once shorn of any realistic appeal on the merits, that would leave a proposed appeal on costs alone. Without delving into the learning on such appeals, in my view the judge was entitled to make the order he did. He addressed the volte face and, in my view reached a correct conclusion.

[61] As to the degree of prejudice to the respondent if the Court was minded to extend time, I do not accept that this would merely be compensable in costs. The overturning of an injunction is not something that can simply be compensable for in costs, likewise the reversal of an order granting summary

judgment on an issue in proceedings (though I note that the applicants say, amongst other things that there was, strictly, no lis on the point upon which summary judgment was granted).

[62] So I turn finally to the proposed contempt appeal. This is the one application I find troubling. I start by noting that the applicants did not appeal the Orders within time; indeed, they waited an exceptionally long period of time to do so. I also point out that it appears to me that no attempt was made to appeal the substance of the judge's decision as part of the substantive recusal appeal, yet those decisions were made as part and parcel of the committal application from which the recusal appeal arose. There is no explanation for that failure.

[63] I would also add that I do not find the proposed grounds of appeal particularly compelling. As to the first, namely that the judge erred in his understanding of his Order of 31st January 2022 because he was actually ordering the Chinese law firm to affix its chops, rather than ordering GSL to do anything, I consider this ground of appeal without any real merit. He was plainly ordering GSL to do something and if there was any difficulty in having the chops applied by the named law firm then the party enjoined, GSL, could have applied to the Court.

[64] The second ground of appeal has three limbs. It asserts that the judge placed the burden of proof on the appellants to satisfy him that they were not in contempt rather than on the respondents to satisfy him, on the criminal standard, the applicants assert that the judge was "blatantly wrong" for three reasons, first because it was incorrect for the judge to draw adverse inference from the fact that there had been no cross-examination; secondly, because the judge, having stated that no adverse inferences should be drawn from the silence of the applicants, proceeded to draw such inferences from the lack of cross-examination, and thirdly that there was no basis for finding that Mr. Mai's evidence was most improbable where there was no evidence of law or practice in China relating to the affixing of chops, I do not find these grounds compelling. However, for the reasons that follow, I do not deal with them in any detail.

[65] I have referred above to the discretionary considerations that the Court will consider in granting an extension of time. None of the cases to which the Court was taken include a further element, namely, whether or not all or any of the four considerations in **Rose** are satisfied to any degree, a Court may extend time if the justice of the case requires it. It occurs to me that in an exceptional case (and only in an exceptional case) in which the public confidence in the administration of justice is engaged then the Court has jurisdiction to grant an extension of time where, absent that issue, the Court would not do so. In my view, where, in and about a particular application, an allegation of apparent bias has been made out, then the cornerstone of the administration of justice, namely that justice is done, and seen to be done by an impartial tribunal, can require that an extension of time could be granted. In my view this is so even where an appeal may lack obvious merit, where the delay in seeking an extension is extensive and not properly explained, and the applicant has taken no steps to assist itself. I am of the opinion that in such circumstances the Court can nonetheless grant an extension not because an applicant deserves it, but rather because the proper administration of justice demands that an appellate court exercises proper scrutiny over proceedings below and can demonstrate, with a view to preserving confidence in the administration of justice, that the Court's processes and procedures are fair and just.

[66] In my view a distinction can and should be drawn between the Contempt Extension Application on the one hand and the SJ Leave and Injunction Extension Applications. That is because the finding of bias occurred in and about the committal application whereas the applicants barely mentioned it at all in the other applications and certainly took no steps whatsoever in those applications arising from the allegation of bias. It does not seem to me that justice demands that those other applications be re-opened or poured over on appeal in circumstances where the merits of any proposed appeal are such that even with a biased judge the inevitable conclusion on appeal would be the same as the conclusion below.

[67] I would add two points, one directed to the proposed appellants and the other for general consumption. The first is that merely because I would be minded to

grant an extension of time on the Contempt Extension Application, then even if my fellow Justices of Appeal agree with me so that such an order is made, the applicants need not take up the appeal. I have not dealt with the grounds of appeal in any detail, however they strike me as being very far from solid grounds. That might explain why no appeal was made within time. I would grant an extension of time because I consider that public confidence in the administration of justice could be dented by the notion that the findings involved in the contempt application (in which an allegation of apparent bias was made out) could not subsequently be scrutinised by this Court as part of an appeal. A cynical view of this case would be that all the applications before this Court are opportunistic, and that none would have been made but for Farara JA's judgment. I do not need to express a view about that as I would refuse relief in all but the Contempt Extension Application; but in that one I am very concerned that the applicants failed to appeal in time and seek to have the appeal dealt with at the same time as the recusal appeal. That failure is far from impressive; I overlook it solely because considerations of the public perception of the administration of justice are to my mind engaged in the handling of the committal application.

[68] The second point I would add is that my views should not be read as a broadening of the circumstances in which an extension of time will be granted. Fortunately, cases of judicial bias, of any description, are exceptionally rare. In those rare cases, vital considerations in the administration of justice, far beyond the "normal" **Rose** considerations are potentially engaged. Putative applications for an extension of time in other cases by reference to exceptional circumstances should be very few and far between; this judgment should not be taken as the introduction of a fifth general consideration; it is not.

[69] Accordingly, I would:

- (1) Grant the Contempt Extension Application, and provide that the Notice of Appeal should be issued within seven days of the handing down of this judgment; but
- (2) Dismiss the SJ Leave and Injunction Extension Applications.

[70] As to costs, I would invite the parties to exchange and file short written submissions within two weeks of the handing down of this judgment, with each party to have permission to exchange and file responsive submissions one week thereafter. The incidence of costs will be decided on the papers in light of those submissions.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar