

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0061

BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Appellant

and

VON DER HEYDT INVEST S.A.

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor Ward
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Hodge Malek KC, with him Mr. Caley Wright and Mr. Oliver Clifton
for the Appellant
Mr. Alexander Cook KC and Mr. Alex Hall Taylor KC with them
Mr. Simon Hall for the Respondent

2023: June 7;
July 5.

Interlocutory appeal – Appellant’s reliance on grounds not mentioned in notice of appeal – Whether MBFX can rely on its fresh submissions – Appeal against case management decision – Appellate court’s exercise of discretion – Whether the Court should overturn the trial judge’s decision to list one application before another

The appellant, Multibank FX International Corporation (“MBFX”) and the respondent, Von Der Heydt Invest S.A (“VDHI”) have been involved in lengthy and complex disputes which have resulted in numerous applications and appeals before the court below and this Court.

In April 2022, this Court held a special sitting in which a number of appeals brought by MBFX were heard ("Special Sitting Appeals"). These appeals were against certain interlocutory orders of Jack J [Ag.] made in proceedings between MBFX and VDHI. At the end of the Special Sitting Appeals, this Court ordered that Jack J [Ag.] be recused from hearing the case, vacated an expediated trial, and reserved judgment on the remainder of the Special Sitting Appeals ("Reserved Judgments").

Preceding these appeals was an application made on 24th June 2021 by MBFX for security for costs ("SFC Application") to be given by VDHI in the court below. This application, together with an application filed by VDHI on 14th July 2022 to strike out parts of MBFX's statements of case or, alternatively, for summary judgment in relation to those parts of the statement of case ("the SO/SJ Application"), were listed for hearing by Wallbank J [Ag.] during a case management conference held before him in July 2022. In his case management order, Wallbank J [Ag.] ordered that the SFC Application be listed on the first available date after 12th September 2022, with a time estimate of 1 day, and the SO/SJ Application be listed on the first available date, not before Monday 17th October 2022, with a time estimate of 2 days. Subsequently, MBFX provided a drafting list request form in respect of the SFC Application. However, VDHI indicated there was no availability of counsel until 2023. As a result, MBFX requested a listing appointment before Wallbank J [Ag.].

The listing appointment took place on 21st September 2022 before Wallbank [Ag.], who declined to vacate the SO/SJ Application and made a listing order, which directed that the SFC Application be listed for hearing after the SO/SJ Application. MBFX applied for and was granted leave to appeal the listing order, and on 28th November 2022 the Court heard and granted an application made on 19th October 2022 for a stay of the SO/SJ Application. The Court ordered that the SO/SJ Application be stayed pending the handing down of the Reserved Judgments of the Court of Appeal ("the SO/SJ Stay Order"). MBFX appealed against the listing order and filed before this Court 8 grounds of appeal seeking that the listing order be set aside and that the hearing of the SFC Application be listed for the first available date, with a time estimate of 2 days.

The main issues which arise for the Court's determination are: (i) whether MBFX can rely on its fresh submissions filed on 19th May 2023; and (ii) whether the Court should overturn the trial judge's decision to list the SO/SJ Application before the SFC Application.

Held: dismissing the appeal and awarding costs on appeal to VDHI, to be assessed by the court below if not agreed within 21 days, that:

1. An appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court. While the court is not confined to the grounds set out in the notice of appeal, it may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest such ground. In this case, VDHI has had adequate time to respond to any additional arguments advanced by MBFX and have done so in their submissions. Thus, even if the Court was minded to disagree with the manner in which MBFX filed its submissions without the permission of the court, and which submissions are at some variance with the grounds identified in the notice of appeal, the Court can still rule on grounds advanced in the submissions which were not necessarily on all fours with the grounds contained in the notice of appeal. In the

circumstances, the Court will consider MBFX's fresh submissions filed on 19th May 2023.

Rules 62.4(8) and (9) of the **Civil Procedure Rules 2000** applied; **Leroy King v AG of Antigua et al** ANUHCVP2017/0011 (delivered 18th September 2018, unreported) applied.

2. Case management decisions are the province of the trial judge and should be accorded the highest respect by appellate courts. An appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. Accordingly, a litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court's interference with such a decision or order. The test for interfering with a judge's case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision; the Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Rules 1.1(1) and (2), 1.2 (a) and (b), 25 (f) and (j) and 26.1(2) of the **Civil Procedure Rules 2000**; **Dufour and Others v Helenair Corporation Limited and Others** (1996) 552 WIR 188 applied; **Employers International and Others v Boston Life and Annuity Company Ltd** Civil Appeal No. 55 of 2007 (delivered 4th July 2007, unreported) applied; **Sergey Taruta v JSC** BVIHCP2021/0002, BVIHCP2021/0008, BVIHCP2021/0012 (delivered 2nd June 2021, unreported) applied; **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited** Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) considered.

3. While in some cases justice and fairness would require a strict observance of the first in time principle, such that the application filed first at the court ought to be considered first, that principle does not, however, displace the power of the court to manage its own calendar. A judge must be given flexibility and the power to fix the court's calendar and the order in which applications are heard, particularly in matters of this complex and lengthy nature. In this case, the learned judge clearly considered the arguments on both sides and the implications of both applications and, in the exercise of the discretion accorded to him, he determined that the SO/SJ Application should be heard before the SFC Application, and he could not, in the circumstances, be said to have been plainly wrong in so doing so that his decision could be regarded as being outside of the generous ambit of the discretion entrusted to him. This Court has no basis, therefore, to upset his findings.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) considered.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the order of Wallbank J [Ag.] dated 21st September 2022, by which the learned judge directed that an application by Multibank FX International Corporation (“MBFX”) for security for costs filed on 24th June 2021 (“the SFC Application”) be listed for hearing after an application by Von Der Heydt Invest S.A. (“VDHI”) filed on 7th July 2022 to strike out parts of MBFX’s statements of case or alternatively for summary judgment in relation to those parts of the statements of case (“the SO/SJ Application”).
- [2] The appeal arises out of claims numbered BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073 in the Commercial Court of the Virgin Islands which involve lengthy and complex disputes between MBFX and VDHI. The relevant background to this appeal is set out briefly in paragraphs 3 to 15 below.

Background

- [3] On 24th June 2021, MBFX filed the SFC Application on the basis that VDHI is based in Luxembourg and appears to have minimal assets to pay any costs order made against it in these proceedings. The SFC Application remains unheard.
- [4] In the week of 25th to 29th April 2022, the Court of Appeal held a special sitting in which a number of appeals brought on by MBFX were heard (“the Special Sitting Appeals”) including: (i) MBFX’s appeal against the dismissal by Jack J [Ag.] of MBFX’s application to set aside the Representative Party Order which was granted on 21st June 2021 and (ii) MBFX’s appeal against the order of Jack J [Ag.] dismissing its application to discharge the Worldwide Freezing Order which was obtained on 26th April 2021. At the end of the Special Sitting Appeals, the Court of Appeal ordered that Jack J [Ag.] be recused from hearing the case and vacated an expedited trial, whilst judgment was reserved on the remainder of the Special Sitting Appeals (“the Reserved Judgments”).

- [5] On 27th June 2022, MBFX applied for permission to make ancillary claims against VDHI and Mex Securities (“the Ancillary Claims Application”).
- [6] On 7th July 2022, VDHI filed its SO/SJ Application, in which it alleged that the Tomlin Order in the MCL Proceedings was procured by fraud.
- [7] On 12th to 13th July 2022, a case management conference (“CMC”) took place before Wallbank J [Ag.], who ordered that: (1) the SFC Application be listed on the first available date after 12th September 2022, with a time estimate of 1 day (agreed by the parties); (2) the SO/SJ Application be listed on ‘the first available date not before Monday, 17th October 2022’, with a time estimate of 2 days (plus half a day of judicial pre-reading); and (3) the Ancillary Claims Application be heard on paper, with VDHI given the opportunity to put in submissions (“the CMC Order”). Following VDHI’s submissions, which opposed the application notwithstanding that it is against Mex Securities and not against VDHI, it was ordered that the Ancillary Claims Application be listed for an oral hearing.
- [8] On 19th July 2022, MBFX provided a draft listing request form in respect of the SFC Application. VDHI indicated there was no availability of counsel until 2023. MBFX then requested a listing appointment before Wallbank J [Ag.].
- [9] At the listing appointment which took place on 21st September 2022, Wallbank J [Ag.] declined to vacate the SO/SJ Application and made the Listing Order, which directed that the SFC Application be listed for hearing after the SO/SJ Application.
- [10] MBFX applied for and was granted leave to appeal the order of Wallbank J [Ag.] made on 21st September 2022. On 28th November 2022, the Court heard and granted an application made on 19th October 2022 for a stay of the SO/SJ Application. The Court ordered that the SO/SJ Application be stayed pending the handing down of the Reserved Judgments of the Court of Appeal in the Representative Appeal and the Discharge Appeal (“the SO/SJ Stay Order”).

[11] By notice of appeal filed on 30th November 2022, MBFX appealed against the order of the learned judge made on 21st September 2022. Although 8 grounds of appeal are set out in the notice of appeal, the 2 main grounds are as follows:

- (i) The learned judge erred in the exercise of his discretion and was plainly wrong in directing that the SFC Application is to be heard after the SO/SJ Application, because he failed to consider the implications of the determination of the Representative Appeal on the SO/SJ Application.
- (ii) There is otherwise a compelling reason why the appeal should be heard to determine the issue of whether in the light of the stay of the hearing of the SO/SJ Application, the remaining provision of the CMC Order that the SFC Application should be heard only after the determination of the SO/SJ Application, falls away.

[12] In its notice of appeal, MBFX asked that the Court set aside Wallbank J's order of 21st September 2022, by which he ordered that the SFC Application be listed after the SO/SJ Application. MBFX also sought an order that the hearing of the SFC Application be listed for the first available date, with a time estimate of 2 days.

[13] On 22nd December 2022, MBFX filed skeleton arguments in support of its appeal. They relied on the SO/SJ Stay Order which stayed the SO/SJ Application pending the determination of the Representative Appeal, but also submitted that, apart from the determination of the Court of Appeal in the SO/SJ Stay Order, it would be appropriate to reverse the judge's decision and order that the SFC Application be heard ahead of the SO/SJ Application.

[14] VDHI filed their submissions in response on 13th January 2023. They asserted that the order made on 21st September 2022 is a case management order and submitted that case management orders are the province of the first instance judge and should be accorded the highest respect by appellate courts, and that an

appellate court should not interfere with the case management decision of a trial judge, unless the decision was plainly wrong.

[15] On 21st February 2023, this Court handed down judgments, including in the Discharge Appeal, the Representative Appeal, and VDHI's appeal against the Fortification Order. By those judgments, the Court of Appeal dismissed MBFX's appeal in the Discharge Appeal and its appeal against the Representative Party Order. The Court of Appeal also allowed VDHI's appeal against the Fortification Order.

[16] Following the delivery of the Reserved Judgments, MBFX filed fresh submissions on 19th May 2023. Their arguments in these later submissions reflect much of their initial arguments. They also argued, however, that since the date of the first submissions, the circumstances of the case had changed and that they amended their arguments accordingly.

[17] Based on the grounds of appeal and the submissions by counsel for MBFX and VDHI, the major issue for this Court's determination is whether the Court should overturn the trial judge's decision to list the SO/SJ Application before the SFC Application. Two preliminary issues also arise for consideration, firstly, whether MBFX can rely on its fresh submissions filed on 19th May 2023 and, secondly, whether MBFX can rely on the SO/SJ Stay Order.

MBFX's Submissions

[18] In reliance on **Broughton v Kop Football (Cayman) Ltd**¹ and **W White & Sons v White**,² MBFX submits that the learned judge's decision was plainly wrong in that it would allow VDHI to pursue the SO/SJ Application without having to put up any security (or without MBFX having the opportunity to obtain security) in circumstances where: (1) the SO/SJ Application is a very heavy application and

¹ [2012] EWCA Civ 1743.

² 2021 WL 0116597818.

likely to incur significant costs, which VDHI is - by its own admission - unable to meet; (2) the SO/SJ Application will not be heard for some time (and VDHI appears to be taking no steps towards its listing); and (3) the SO/SJ Application is, in light of the judgment of the Court of Appeal in the Discharge Appeal, not viable.

[19] MBFX also submits that it is plainly wrong for the SO/SJ Application to be heard before the SFC Application for a number of reasons. Their first argument focuses on the logic and fairness of the listing order. MBFX submits that it is fair and logical that the SFC Application be heard prior to the SO/SJ Application, which is a substantial application whose costs will be substantial. MBFX argues that, as it stands, it has no protection whatsoever in the event that a costs order is made in its favour and VDHI cannot or will not pay it. One of the major issues on the SFC Application, that is, whether VDHI is financially secure, has largely been determined in a parallel application for fortification. MBFX submits that it has been forced to expend very substantial sums in costs in litigation against a company which it is now clear is impecunious and has no intention of paying costs orders made against it, without the protection of security for costs. They argue that the current sequence of hearings leaves MBFX exposed to an inordinate risk that it will not be able to recover any costs awarded in its favour.

[20] MBFX also lists various factors which it argues renders it plainly wrong that the SO/SJ Application will be heard before the SFC Application. Firstly, MBFX raises the fact that the SFC Application was filed before the SO/SJ Application and has been pending for almost 2 years. Secondly, that the SFC Application appears to have been intended by the CMC Order to be heard before the SO/SJ Application. And thirdly, that the CMC Order provided for a number of applications to be listed 'not before' certain dates and that the 'not before' dates reflected the order in which the applications ought to be heard.

[21] MBFX reminds the Court that the SFC Application has already been and continues to be delayed for a significant period of time, which was not the judge's intention.

MBFX argues that the learned judge's determination was largely borne out of pragmatism and preserving the status quo, in that to have acceded to MBFX's application to list the SFC Application before the SO/SJ Application would have required the learned judge to vacate the SO/SJ Application, which was listed for 6th and 7th December 2022, and allow the SFC Application to be heard in the vacated listing. There is an obvious implication from the transcript (which is apparent from the learned judge inquiring whether there was availability in the list to hear the SFC Application first) that had there been availability in the list to hear the SFC application, the learned judge would have listed it first, while maintaining the listing of the SO/SJ Application.

[22] In support of their appeal, MBFX took issue with the viability of the SO/SJ Application and submitted that it is a speculative application which suffers from fundamental flaws; a position which they say has been confirmed by this Court's judgment in the Discharge Appeal, which identifies a number of triable issues. They relied on paragraphs 48, 126 and 127 of that judgment in support of this submission. These paragraphs are replicated below:

"[48] The issue of VDHI's standing as a party representing Noteholders can be looked at in two ways. Firstly, VDHI manages three funds which in turn invested in the Notes. Mr. Priess' evidence at Stage 1 is that VDHI brought the claim as the management company of the three funds as it was entitled to do under the governing law of the Notes – Luxembourg. Whether this is correct as a matter of Luxembourg law is a matter for the trial on the basis of expert evidence."

...

"[126] On the issue of ownership and control, the evidence shows that Mex Securities was owned at all material times by a Dutch Stichting, which, as a matter of Dutch law, does not have shareholders or members. The directors of the company are three employees of TMF which, unsurprisingly, does not show who actually controls the company. VDHI is inviting the Court to infer that Mr. Taher, and/or the Multibank Group, is or was the real owner and controller of Mex Securities. This is disputed by Multibank, who say that the company is owned by the Stichting and is controlled by Mr. Gollits and VDH AG.

Analysis

[127] I will start my brief analysis with the second limb of the *Ladd v Marshall* test – that the new evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive. As indicated in the preceding paragraph, the real ownership and control of Mex Securities is unclear. This issue will, if necessary, be resolved at the trial following disclosure and cross examination. For now, while it is relevant to the continuation or discharge of the WFO, it is not a matter that this Court can resolve at this interlocutory stage. I am satisfied that the new evidence relating to ownership and control does not have an important influence on the result of the appeal. A fortiori, the new evidence that challenges Mr. Taher's credibility is quintessentially an issue to be resolved at the trial."

[23] MBFX submits that, in relation to the applicability of the SO/SJ Stay Order, to the extent that it is suggested that this is material (which was not before the court below), such that the *Ladd v Marshall*³ criteria must be satisfied, the *Ladd v Marshall* principles ought to receive a relaxed application, particularly on an interim application.

[24] MBFX asserts that VDHI relies heavily on certain findings and statements of Jack J [Ag.] in his judgment on 14th October 2021, which has now been superseded by this Court's judgment, which does not repeat the findings of Jack J [Ag.]. They argue further that the judgment goes no further than finding that some of VDHI's claims meet the relatively low standard of good arguable case for the grant of a freezing injunction (see paragraph 83 of the judgment). In contrast, the standard for summary judgment and strike out is that the claimant must have no real prospect of succeeding on the claim or issue, or the defendant must have no real prospect of successfully defending the claim or the issue.

[25] MBFX also takes issue with the main considerations which they say appear to have motivated the learned judge to retain the current listing for the SO/SJ Application; primarily that it had already been listed for 6th and 7th December 2022.

³ EWCA Civ 1.

They argue that inertia is not a reason to retain a listing and, in any event, that factor has now been erased by the SO/SJ Stay Order. Further, they cited the learned judge's finding that the proceedings would be 'shaped' by the SO/SJ Application, but submitted that it misses the point that on VDHI's own argument the SO/SJ Application will not 'shape' the proceedings, but largely determine them. It also does not deal with the risk of unpaid costs orders if, as is likely, the SO/SJ Application fails. They argue further that, although the costs of the SO/SJ Application will be less than the trial, they are still going to be very substantial.

VDHI's Submissions

- [26] VDHI submits that the court below, being aware of both applications, and at MBFX's request and on the basis of MBFX's own submissions, postponed all further case management of the proceedings until after the SO/SJ Application has been determined.
- [27] VDHI submits that the correct order of the applications is that the SO/SJ Application should be determined first, because until that application is determined, the Court will not be in a position to decide whether security for costs should be ordered in MBFX's favour at all, and, if yes, to assess what part of the costs should be ordered. If the claim is determined in VDHI's favour, then it will not have to provide security at all.
- [28] VDHI also submits that MBFX has not sought to progress its own SFC Application with any due expedition. At no stage has MBFX indicated that any other step in the proceedings could not take place before the SFC Application was determined. VDHI argues that, based on MBFX's conduct, it is clear that MBFX has been willing to engage with longer and far more substantial applications and appeals involving substantial costs, without putting the SFC Application first and without seeking in any way to delay those other applications to await the outcome of the SFC Application. The scope of the SO/SJ Application is in fact very limited and purely consequent upon the failure of MBFX to provide any answer (in pleadings or

submissions) to the basis upon which VDHI and/or the Noteholders seek to set aside the MCL Claim and consent order.

[29] VDHI reminded the Court of the principles applicable to its review of case management orders. They submitted, in reliance on **Taruta v JSC VTB Bank**⁴, that case management orders are the province of the first instance judge and should be accorded the highest respect by appellate courts. An appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. Further, VDHI submitted that case management should not be interrupted by interim appeals, because it leads to satellite litigation and delays in the litigation process.⁵

[30] VDHI pointed to what they assert are the judge's reasons for the order, which include: (1) the SO/SJ Application had, by that stage, already been listed; (2) the SO/SJ Application 'will show the shape of the matter going forward'; (3) the costs of the SO/SJ Application would be a small proportion of the overall costs of the proceedings; (4) 'some more impulsion could have been shown by [MBFX] for security for costs here to insist upon its application being brought on first'.

[31] VDHI submits that the learned judge was correct to reach the decision that he did. They assert that MBFX agreed to the listing of the SO/SJ Application on 6th and 7th December 2022, despite the SFC Application not having been listed first, and that MBFX failed to cooperate to ensure the listing of the SFC Application on the likely first available dates for it to be heard. VDHI also submits that the learned judge was right that MBFX had shown no impulsion to get the SFC Application listed, and that it still had not been heard more than a year after it was filed. MBFX had also not insisted upon it being listed first in agreeing to the listing of the SO/SJ Application.

⁴ BVIHCMAP2021/0002 (delivered 2nd June 2021, unreported).

⁵ Aquaduct Limited & Anr. v Faelesseje SVGHC VAP 2014/0017 (delivered 18th April 2016, unreported).

- [32] It is VDHI's submission that if the Court is minded to grant MBFX security, then one of the tasks of the Court will be to estimate MBFX's likely future costs in respect of VDHI's claim. MBFX's likely future costs will depend on the outcome of the SO/SJ Application. In particular, if the SO/SJ Application is successful, then MBFX's future costs in respect of VDHI's claim are likely to be minimal. Accordingly, the court cannot perform the task that it will need to perform on the SFC Application unless and until the SO/SJ Application has already been determined.
- [33] VDHI submits that the judge was right to conclude that the costs of the SO/SJ Application will be a small proportion of the overall costs of the proceedings. It therefore makes good case management sense for the SO/SJ Application to be determined before the SFC Application. The judge's decision cannot therefore be described as plainly wrong or outside the generous ambit where reasonable decision makers may disagree.
- [34] VDHI also argues that, in accordance with rule 62.4(8) of the **Civil Procedure Rules 2000** ("CPR"), MBFX may not rely on any ground not mentioned in the notice of appeal but raised for the first time in the skeleton arguments filed on 19th May 2023 without the permission of the court, and that MBFX has not obtained such permission. They submit that the only ground of appeal is (and is conceded to be) one which has been overtaken by the outcome of the Representative Appeal and is hopeless in light of that outcome.
- [35] VDHI submits that, in the event that the court allows MBFX to advance their new arguments, VDHI challenges MBFX's argument that it should not be obliged to incur the costs of the SO/SJ Application without the benefit of security in circumstances where VDHI will not be able to pay the costs of the Application if it loses. They submit that MBFX has deliberately chosen to incur costs on other applications without the protection of security, demonstrating that it suffers from no restraint or difficulty in bombarding the court below and this Court with a flood

of applications and appeals. VDHI also submits that MBFX has already incurred substantial costs in responding to the SO/SJ Application and argue that it is the reality that MBFX has no qualms about incurring apparently vast amounts of costs without any security at all (despite that being stated to be the reason for it seeking security). Almost all of those costs (claimed by MBFX to be in the millions) have been incurred during a time when MBFX failed to progress its SFC Application.

[36] Contrary to MBFX's suggestions in its submissions, VDHI has not admitted that it will be unable to pay MBFX's costs, and especially not the costs of the SO/SJ Application (if it were to be unsuccessful). VDHI has paid every cost order that has been made against it to date and will continue to do so if and when ordered to. As a result of MBFX's arguments at the CMC, all future steps in the litigation appear to have been put on hold pending determination of the SO/SJ Application, so MBFX is not at risk of incurring the costs associated more generally in the litigation in the meantime.

[37] VDHI challenges MBFX's arguments in relation to the timing of the applications and submits that the mere fact that an application is issued first in time does not mean that it must be heard first in time; it depends on the application in question. They contend that MBFX's submission that it was the learned judge's intention that the SFC Application be heard first is incorrect, and they submit that if this was the learned judge's intention, he would have made a direction to that effect at the CMC.

[38] In response to MBFX's assertion that the SFC Application has already been significantly delayed, VDHI avers that the same is true in respect of the SO/SJ Application, which has been outstanding since July 2022. VDHI argues that the delay in the hearing of the SFC Application is due to MBFX's own actions and inaction, in particular: (i) its failure to prosecute its application for months after it was issued; (ii) its failure to cooperate in the listing of the SFC Application; (iii) its application to stay the SO/SJ Application pending the outcome of the

Representative and Discharge Appeals; and (iv) its application to stay those appeals pending the outcome of the Fortification Appeal. VDHI argues that this Court is limited to reviewing the trial judge's decision and whether he was right to make the order that he did based on the material available to him at the time. The fact that the SFC Application has since been further delayed was not a fact available to the judge at the time. Although MBFX attempts to use **Ladd v Marshall** to assist in addressing this fact, no **Ladd v Marshall** application has been made and MBFX has not made any attempt to explain how it would meet the **Ladd v Marshall** test.

- [39] VDHI submits that the learned judge asked about availability of dates to hear the SFC Application in the period before the SO/SJ listing as a matter of practicality in order to ascertain whether MBFX's argument had any hope of achieving anything in practice by obtaining an earlier listing, not because he considered that it was necessarily correct that the SFC Application should be heard first. VDHI submits that none of the matters that this Court said in the Discharge Appeal was an issue for trial arise on the SO/SJ Application, which is based on the simple fact that the MCL Claim was based on loans, which MBFX itself no longer alleges existed. Even if the issues identified did arise on the SO/SJ Application, were based on the material available to them on the Discharge Appeal, and were concerned with whether MBFX had established that VDHI had no good arguable case, and even if the Court of Appeal felt able to conclude now that SO/SJ Application was unlikely to succeed (which it cannot and should not), it does not follow that the SFC Application should be heard before the SO/SJ Application. The issues are logically distinct.

Whether MBFX can rely on its fresh submissions filed on 19th May 2023.

- [40] In light of the fact that VDHI has challenged the skeleton arguments filed on 19th May 2023 on the basis that they are at variance with the grounds of appeal proffered by MBFX, this preliminary issue should be addressed first.

- [41] The relevant CPR rule is 62.4(8), which provides that: ‘The appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court’.
- [42] Rule 62.4(9) states that: ‘The court is not confined to the grounds set out in the notice of appeal, but may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest such ground’.
- [43] A good illustration of the Court’s treatment of rule 62.4(8) is in the case of **Leroy King v AG of Antigua et al.**⁶ The appellant in that case raised arguments on the alleged breach of his constitutional rights in circumstances where his notice of appeal did not contain any challenge to the learned judge’s findings on the alleged breach of his constitutional rights, nor any grounds in support of the same. In giving judgment in the Court of Appeal, Chief Justice Pereira stated:
- “In his notice of appeal, Mr. King’s focus in respect of this ground was the judge’s error in refusing to grant leave on the basis of arguability. He did not challenge the specific findings of the learned judge in relation to alleged constitutional rights breaches nor did he provide any grounds in support of the challenge. He cannot now in his submissions seek to raise constitutional issues that were not set out in his notice of appeal. CPR 64.4(8) states that the “appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court”. No application has been made before this Court on behalf of Mr. King seeking permission to raise this additional ground of appeal and I would therefore not entertain it.”
- [44] The grounds contained in MBFX’s notice of appeal all challenge the learned judge’s decision to fix a date for the SO/SJ Application prior to the SFC Application. Although two of the grounds appear to relate to the impact of the Representative Appeal, it is evident on the reading of the grounds contained in the notice of appeal that MBFX ultimately challenges the discretion of the learned judge to list the SO/SJ Application before the SFC Application. That is the main issue.

⁶ ANUHCVP2017/0011 (delivered 18th September 2018, unreported).

[45] The initial submissions and the fresh submissions are similar in nature in this case and address similar points. In any event, VDHI has had adequate time to respond to any additional arguments advanced by MBFX and have indeed done so in their submissions. Thus, even if the Court was minded to disagree with the manner in which MBFX filed its submissions without the permission of the court, and which submissions are at some variance with the grounds identified in the notice of appeal, the Court can still rule on grounds advanced in the submissions which were not necessarily on all fours with the grounds contained in the notice of appeal.

[46] In the circumstances, the Court will consider the fresh submissions.

Applicability of the SO/SJ Stay Order

[47] A further preliminary point which should be addressed is the applicability of the SO/SJ Stay Order, which was not before the learned judge at the time of the making of his order on 21st September 2022.

[48] Although MBFX has raised **Ladd v Marshall**⁷ to address this point, it has failed to apply the principles of **Ladd v Marshall** in their submissions beyond their restatement of them and their reference to some dicta of this Court; they also failed to file the relevant application for the admission of fresh evidence.

Whether the Court should overturn the trial judge's decision to list the SO/SJ Application before the SFC Application.

[49] The relevant rules of the CPR in determining this issue are as follows:

“Rule 1.1 (1) provides that the overriding objective of the Rules is to enable the court to deal with cases justly.

Rule 1.1 (2) provides that dealing justly with the case includes:

⁷ [1954] 1 W.L.R. 1489.

d) ensuring that it is dealt with expeditiously.

Rule 1.2 states that the court must seek to give effect to the overriding objective when it –

- (a) exercises any discretion given to it by the Rules; or
- (b) interprets any rule.

According to Rule 1.3, it is the duty of the parties to help the court to further the overriding objective.

Rule 25 entrusts the court with the duty to actively manage cases. Rule 25.1 provides that the court must further the overriding objective by actively managing cases. This may include –

- (f) deciding the order in which issues are to be resolved;
- (j) fixing timetables or otherwise controlling the progress of the case.

Rule 26.1, which deals with the court's case management powers, provides at subrule (2) that, except where these rules provide otherwise, the court may-

- (d) decide the order in which issues are to be tried".

[50] **Dufour and Others v Helenair Corporation Limited and Others**⁸ is often cited in relation to challenges to the exercise of discretion by a judge, including in the exercise of his case management powers. In this seminal case, Floissac CJ said:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

⁸ (1996) 552 WIR 188.

[51] More specifically, in terms of appeals against case management decisions of a lower court, Rawlins CJ, in giving judgment in this Court in the case of **Employers International and Others v Boston Life and Annuity Company Ltd**,⁹ stated that:

“It is settled principle that an appellate court would not easily interfere with a case management decision of a judge or master. The following statement from *Royal & Sun Alliance v T & N Limited*[6] elucidates this principle:“....[the] Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

[52] In **Sergey Taruta v JSC**¹⁰, Webster JA [Ag.] confirmed the established principles guiding an appellate court when deciding challenges to case management decisions of a trial judge. His Lordship stated:

“This Court has repeatedly said that case management decisions are the province of the trial judge and should be accorded the highest respect by appellate courts. The basic principles have been set out and repeated in many decisions of this Court and for convenience we will repeat what was said in *Shallan Overseas Limited v Primefuels Investments Limited and others* –

“It is now settled law that an appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. This Court acknowledged this principle in *Aquaduct Limited and another v Faelesseje and another* where Baptiste JA noted at paragraph 21–

“In ordering as she did, the learned judge was in essence making a case management decision. A case management decision is peculiarly that of the first instance judge. As Lady Justice King stated in *Re U (children)*

‘It has always been the case that a case management decision is peculiarly that of the first instance judge and the Court of Appeal will be slow to interfere with such a determination.’

Baptiste JA also relied on the Supreme Court decision of **HRH Prince Abdulaziz v Apex Global Management Ltd and another** where Lord

⁹ Civil Appeal No. 55 of 2007 (delivered 4th July 2007, unreported).

¹⁰ BVIHMAP 2021/0002, BVIHMAP 2021/0008, BVIHMAP 2021/0012 (delivered 2nd June 2021, unreported).

Neuberger made a similar pronouncement, emphasising that it is inappropriate for an appellate court to interfere with a case management decision unless it was “plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree.”

[53] Useful guidance can also be provided by the case of **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**.¹¹ In that case, Caribbean 6/49 Limited instituted proceedings by writ of summons against the St. Kitts-Nevis-Anguilla National Bank Limited for a sum due and owing. A central issue for the court was whether the mere fact of filing an application to strike out stopped time from running in relation to the period within which a defence should have been filed. In relation to this failure to file a defence, an application for default judgment was sought and obtained. An application to set aside the default judgment was made on the ground that the judgment in default had been entered before the time limited for entering a defence had expired. In a written judgment, the learned trial judge took the view that the bank’s application to strike out did not operate as a stay of the requirement to file a defence; that the time limited for filing a defence had expired; that the judgment obtained by the bank was a regular judgment and that it ought not to be set aside.

[54] The Court provided useful dicta in relation the case management powers of the court and noted that:

“... it is important to re-emphasise an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court. Here we had a situation where an application was filed and was awaiting the fixing of a hearing so that a Judge in Chambers could decide whether or not the statement of claim should be struck out as being an abuse of the court’s process. This application was followed by a later application or request to the Registrar to enter a judgment in default of Defence. If the earlier application to strike out the Claim had been heard first and decided in the bank’s favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively

¹¹ Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim.

[18] The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in a denial of justice to the bank." (emphasis mine)

[55] As the CPR expressly entrusts the High Court with the power and responsibility to actively manage its cases, great deference is paid to a judge's exercise of discretion in case management decisions. Accordingly, a litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court's interference with such a decision or order. The test for interfering with a judge's case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision; the Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[56] It is necessary to examine the learned judge's reasoning, which begins at page 20 of the transcript of proceedings. It is evident that he considered both sides of the coin in coming to his decision -

(a) The learned judge considered that the summary judgment would dictate the shape of the proceedings moving forward. He noted that if the summary judgment application succeeds, the proceedings or a significant part thereof will be over.

(b) The learned judge then considered that there is merit in having the SFC Application heard before the summary judgment application.

He considered that the order for security for costs would also have a large effect on the shape of the proceedings.

- (c) The learned judge noted that it is the responsibility of an applicant to make sure that his application gets brought on in due time. He noted that there was a dispute as to the length of time that's going to be needed for the SFC Application.
- (d) The learned judge acknowledged the difficulty in balancing all the factors in the court's discretion under the case management discretion which the court has.
- (e) The learned judge then considered that the SO/SJ Application would shape the matter going forward and that the costs of the application, although substantial, would be a small portion of the overall costs.
- (f) The learned judge then noted that there could have been more impulsion shown by MBFX for the SFC Application to insist that the application be brought on first.

[57] In some cases, such as **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**, justice and fairness would require a strict observance of the first in time principle, such that the application filed first at the court ought to be considered first. That principle does not, however, displace the power of the court to manage its own calendar. The learned judge must be given flexibility and the power to fix the court's calendar and the order in which applications are heard, particularly in matters of this complex and lengthy nature. As the learned judge observed in this case, both applications, no matter which one is heard first, would indeed have an impact on the shape of the proceedings.

[58] The learned judge clearly considered the arguments on both sides and the implications of both applications and, in the exercise of the discretion accorded to

him, he determined that the SO/SJ Application should be heard before the SFC Application, and he could not, in the circumstances, be said to have been plainly wrong in so doing, so that his decision could be regarded as being outside of the generous ambit of the discretion entrusted to him. This Court has no basis, therefore, to upset his findings. I will accordingly dismiss the appeal against his order and order that the appellant, MBFX, pays the costs of the respondent, VDHI.

[59] My order therefore is as follows:

- (i) The appeal is dismissed.
- (ii) The appellant shall pay the respondent's costs on the appeal, to be assessed by the court below if not agreed within 21 days.

I concur.
Trevor Ward
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar