

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0024

BETWEEN:

**OSCAR TRUSTEE LIMITED
(as trustee of the Chloe Trust)**

Appellant/Respondent

and

MBS SOFTWARE SOLUTIONS LIMITED

Respondent/Applicant

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Trevor Ward

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Mungo Lowe for the Appellant/Respondent
Mr. Sharif Shivji KC with him, Mr. Guy Olliff- Cooper and Mr. Jonathan Addo
for the Respondent/Applicant

2023: February 8.

REASONS FOR DECISION

Motion for conditional leave to appeal to His Majesty in Council — Appellant's failure to comply with orders of court – Application for stay of motion for conditional leave to appeal to His Majesty in Council pending compliance with certain conditions – Court's residual inherent jurisdiction to protect its process from abuse – Whether the Virgin Islands (Appeals to the Privy Council) Order 1967 has displaced the Court's residual inherent jurisdiction to protect its process from abuse - Exercise of the Court's broad case management powers under Part 26 of the Civil Procedure Rules 2000 (CPR) – Whether the Court has jurisdiction to impose any conditions on a motion for conditional leave to appeal to the Privy Council other than those set out in the Appeals to the Privy Council Order — Security for costs –

- [1] **PEREIRA CJ:** This case highlights the consequences which may flow where a party has signally failed to comply with orders of the court and the court is called upon to protect its process from abuse. On 8th February 2023, on the application of the respondent, MBS Software Solutions Limited (“MBS”), the Court stayed a motion for conditional leave to appeal to His Majesty in Council issued by the appellant, Oscar Trustee Limited (as trustee of the Chloe Trust) (“Oscar Trustee”) upon the condition that Oscar Trustee complies with certain orders made against it in the court below and provides security for MBS’ costs on the motion in the event of the motion coming on for hearing. We further ordered that, unless Oscar Trustee complies with an order for interim payment of costs made by the court below, it shall be debarred from being heard, making representations in, or otherwise participating in the proceedings before this Court and any other proceedings arising out of the costs assessment proceedings in the court below. At the conclusion of the hearing, we indicated that we would give written reasons for our decision at a later date. We now do so.

Background

- [2] The underlying proceedings were a claim by Oscar Trustee for the return on an investment made under a Hong Kong law agreement in relation to a mining project in Turkey (“the agreement”). That mining project was pursued by MBS, a company incorporated in the Territory of the Virgin Islands and headquartered in Hong Kong. The background to this matter in so far as is relevant to the application before this Court is as follows.
- [3] In 2012, MBS’ sole director, Mr. Simon Butler, his friend, Mr. Matthew Paget, and Mr. Reid Zulpo invested US\$1 million into the mining project via an Australian company, Oscar Corporation Pty Limited (“Oscar Corp”) in the hope that the project would be lucrative and result in significant returns. At the time of the investment

and until December 2016, Oscar Corp was the trustee of the Chloe Trust, a discretionary family trust of which Mr. Paget is a beneficiary.

- [4] It transpired that the project never came to fruition. While MBS claims that Oscar Corp was repaid its US\$1 million investment into the project, Oscar Trustee disputes that it was repaid in full. Further, the difficulties with the project and its failure to realise the profits anticipated resulted in a breakdown in relations between Mr. Butler on the one hand and Mr. Zulpo and Mr. Paget on the other.
- [5] In October 2020, after the agreement, Oscar Trustee, an entity incorporated in New Zealand claiming to be an assignee of Oscar Corp's chose in action against MBS and the current trustee of the Chloe Trust, purported to terminate the agreement. Mr. Paget is the sole director and shareholder of Oscar Trustee. Subsequently, in February 2021, Oscar Trustee commenced proceedings against MBS in the court below seeking a return of US\$5,887,874.00 on the US\$1 million investment by Oscar Corp.
- [6] Shortly thereafter, on 8th March 2021, MBS issued an application to stay proceedings in favour of the courts of Hong Kong on grounds of *forum non conveniens* ("the forum challenge application"). On 1st April 2021, Oscar Trustee then issued an application for summary judgment. Upon considering the submissions advanced on behalf of the parties, Jack J dismissed the summary judgment application, granted the forum challenge application, and awarded MBS its costs on both applications.
- [7] MBS later sought to recover the costs awarded on the forum challenge and summary judgment applications. On 12th October 2021, MBS served a schedule of costs on the legal practitioners for Oscar Trustee. Oscar Trustee failed to respond. MBS then issued an application for detailed assessment of its costs and for an interim payment on account of its costs ("the first assessment application"). Oscar Trustee, however, failed to meaningfully engage with the assessment application until it filed skeleton arguments shortly before the hearing.

- [8] The assessment application came on for hearing before Jack J on 25th January 2022. The judge adjourned the hearing of the application to allow Oscar Trustee time to file points of dispute and ordered Oscar Trustee to pay MBS' costs thrown away as a result of the adjournment. Critically, the judge further ordered Oscar Trustee to make an interim payment on account of MBS' costs of the summary judgment and forum challenge applications in the sum of US\$600,000 by a certain date ("the Interim Payment Order"). Oscar Trustee failed to comply with the order for interim payment.

The Appeal

- [9] On 3rd February 2022, Oscar Trustee appealed against the decision of Jack J staying proceedings in the court below on *forum* grounds and awarding MBS costs. It also applied for a stay of the Interim Payment Order and of the hearing of the assessment application before Jack J pending the determination of the appeal. This application was later dismissed by a single judge of this Court as it failed to demonstrate a risk of the appeal being stifled or rendered nugatory if a stay were not granted. Oscar Trustee's appeal against the decision of Jack J subsequently came on for hearing and on 17th August 2022, the Court of Appeal dismissed the appeal and awarded MBS its costs on the appeal at two-thirds of the costs awarded in the court below. Despite MBS' requests and communications between the parties for payment of the costs, no payments whatsoever or promises to do so were forthcoming from Oscar Trustee.
- [10] Oscar Trustee later brought a motion on 6th September 2022 seeking conditional leave to appeal to His Majesty in Council against the decision of the Court dismissing its appeal in respect of the forum challenge. It is noted that this would not be an appeal as of right under section 3(1)(a) of **The Virgin Islands (Appeals to the Privy Council) Order 1967**¹ (the "**Privy Council Order**") but rather one which would invoke the Court's discretion as to whether and on what basis leave should be granted.

¹ 1967 No.234.

[11] Oscar Trustee, having failed to comply with any of the costs orders made in the proceedings or the Interim Payment Order, MBS filed the instant application on 24th November 2022 seeking a stay of the motion for conditional leave until:

- (a) Oscar Trustee complies with the Interim Payment Order or that such sums be paid into court.
- (b) Oscar Trustee complies with any other order for costs which are assessed prior to the hearing of the motion for conditional leave, or that such sums be paid into court.
- (c) Oscar Trustee provides security for MBS's costs in respect of the motion for conditional leave in the sum of US\$100,000, or such other amount as this Court thinks fit.

[12] By the same application, MBS also sought an order that, unless it fully complies with the Interim Payment Order within 14 days, Oscar Trustee be debarred from being heard, making representations in, or otherwise participating in the proceedings before this Court ("the debarring application"). The application may properly be termed as an "Unless Orders" application with the sanctions for failure to comply being, a stay of the motion and/or debarment from being heard and ultimately, the dismissal of the motion.

[13] On 23rd December 2022, MBS filed a further application to adjourn the motion for conditional leave until the May 2023 sitting of the Court of Appeal for the Territory of the Virgin Islands for the purpose of enabling the Unless Orders application to be determined in the February 2023 sitting of the Court of Appeal for the Territory of the Virgin Islands – in essence in advance of the motion for leave (the "Adjournment Application"). This application was successful, and the motion was adjourned over to the later sitting of the Court in May 2023.

[14] By the date of the hearing of the Unless Orders application in February before this Court, MBS had obtained some 7 costs orders against Oscar Trustee as well as

an order in the court below debarring Oscar Trustee from making further representations in the proceedings in the court below. The costs orders include: (i) the 26th January 2023 costs awarded to MBS on the summary judgment and forum challenge applications; (ii) the 25th January 2022 costs thrown away on the hearing of the assessment application; (iii) the 26th January 2023 costs awarded to MBS on the dismissal of Oscar Trustee's application for a stay of the Interim Payment Order pending appeal; (iv) the 26th January 2023 costs awarded to MBS in the court below on the granting of the debarring order against Oscar Trustee; (v) the 17th August 2022 costs awarded to MBS on the dismissal of its appeal against the decision of Jack J; (vi) the 26th January 2023 costs of the first assessment application and (vii) the costs of a second assessment application filed by MBS on 14th November 2022 in relation to the costs orders referred to in (iii), (iv) and (v). These costs orders as well as the Interim Payment Order remained wholly unsatisfied by Oscar Trustee at the time of the hearing before us.

The Application for Determination Submissions

- [15] On behalf of MBS learned King's Counsel, Mr. Sharif Shivji, contended that based on Oscar Trustee's conduct in these proceedings to date, it is unlikely that it will pay any of the costs orders which have been made to date, or any costs order which may be awarded in MBS' favour on the motion for conditional leave, without the imposition of a stay of the motion upon the conditions outlined in paragraph [11] as well as an order debarring Oscar Trustee from participating further in the proceedings.
- [16] On MBS' stay application, Mr. Shivji submitted that Oscar Trustee has consistently flouted certain orders made by the Commercial Court in these proceedings and has failed to provide any compelling explanation for its failure to comply with these orders. He contended that, in circumstances of continued non-compliance by Oscar Trustee with the court's orders, the court has power to protect its processes from being abused by staying its proceedings until Oscar Trustee complies with the outstanding orders. Mr. Shivji referred the Court to the decisions of **Chester**

John v Colonial Life Insurance Company (Trinidad) Ltd et al² and Shlaimoun v Mining Technologies International Inc.³ in support of his submissions.

[17] Mr. Shivji also invited the Court to order that Oscar Trustee provide security for MBS' costs on the motion for conditional leave as a further condition of the stay. In short, Mr. Shivji submitted that Oscar Trustee is a non-resident entity with no assets in the jurisdiction. He reiterated that, on Oscar Trustee's own case, it has no realisable assets whatsoever apart from its chose in action against MBS. He argued therefore that the risk of MBS not being able to enforce any costs order in its favour is extremely high. He further indicated that MBS had applied for a non-party costs order against Mr. Paget and Mr. Zulpo. However, that application is yet to be determined and is being vigorously contested and until any order is made, there is no person or entity aside from Oscar Trustee against whom MBS can recover its costs. Mr. Shivji accordingly invited the Court to order that Oscar Trustee provide security for MBS' costs on the motion in the amount of US\$100,000.00, which he contended is a reasonable sum that is likely to be awarded to MBS if it succeeds on its opposition to the motion.

[18] Mr. Shivji also argued that the circumstances of this case necessitated the grant of a further order debarring Oscar Trustee from participating in the proceedings before this Court unless it complies with the Interim Payment Order. Referring to the principles governing debarring orders summarised in **Michael Wilson & Partners Ltd. v Sinclair et al**,⁴ he contended that Oscar Trustee has been in contumelious breach of the Interim Payment Order, which became payable a year ago, despite having been refused a stay of the Interim Payment Order pending appeal and having been debarred from participating in the proceedings in the court below. Mr. Shivji stated that Oscar Trustee has proffered no valid excuse for its non-compliance, it is having adduced no real evidence that it is unable to obtain funds to meet the Interim Payment Order from the principals of Oscar Trustee, Mr.

² GDAHCV 2011/0017 (delivered 16th January 2013, unreported).

³ [2012] EWCA Civ 772.

⁴ [2017] 5 Costs LR 877 at para. 29.

Paget and Mr. Zulpo, the individuals who would receive the financial benefits if its claim in the court below ultimately succeeds.

[19] Mr. Shivji also argued that there would be no proper basis for contending that the debarring order would stifle Oscar Trustee's proposed appeal to the Privy Council. He stated that, if Oscar Trustee wishes to contend that there is a risk of its proposed appeal being stifled, it was required to provide clear and unequivocal evidence of both its own assets and the assets of any person who could reasonably be expected to put up any security. Oscar Trustee, he stated, has not provided any such documentary evidence. Mr. Shivji also posited that, while Mr. Paget and Mr. Zulpo too claim impecuniosity, like Oscar Trustee, they have provided no documentary evidence to support these claims. He further contended that their claims of impecuniosity are in any event contradicted by their ability to fund Oscar Trustee's legal practitioners as well as by evidence obtained by MBS which suggests that Mr. Paget and Mr. Zulpo have amassed considerable financial resources albeit outside of the jurisdiction.

[20] Mr. Shivji further pointed out that, assuming Oscar Trustee's contention that its only asset is its chose in action against MBS to be accurate, there is no way of enforcing the Interim Payment Order by means of execution in New Zealand or winding-up petition. He stated that the only other means of enforcing the Interim Payment Order therefore, is through other sanctions such as a stay of the motion for conditional leave. When pressed by the Court, Mr. Shivji maintained that merely staying the motion for conditional leave would not prevent Oscar Trustee from issuing other applications before this Court which would require MBS to incur further costs in responding. To this end, he argued that a debarring order would serve as an appropriate sanction for Oscar Trustee's non-compliance with the court's orders. He therefore urged the Court, as appropriate measures for preventing abuse of its process, to grant a stay of the motion for conditional leave upon the conditions prayed and make a debarring order against Oscar Trustee if it continues to breach the Interim Payment Order.

[21] Curiously, no written submissions were filed on behalf of Oscar Trustee. Learned counsel for Oscar Trustee, Mr. Mungo Lowe, instead sought to rely on arguments set out in the second affidavit of Christopher Bromilow filed on 13th January 2023 on behalf of Oscar Trustee. The peculiarity of this approach notwithstanding, the nub of Mr. Lowe's submission was that the Court of Appeal had no jurisdiction to impose any conditions on a motion for conditional leave to appeal apart from those conditions set out in section 5 of the **Privy Council Order**. He stated that the conditions and the amount of security which MBS seeks that the Court impose go beyond those which the Court has jurisdiction to grant. Accordingly, he urged the Court to dismiss MBS' application.

[22] In reply, Mr. Shivji contended that Oscar Trustee has misconstrued section 5 of the **Privy Council Order**. He first stated that MBS, was not inviting the Court to impose conditions following the grant of leave. Rather, it was asking the Court to stay the motion itself pending compliance with certain conditions. Mr. Shivji, therefore submitted that section 5 has no application to this case. He then contended that, assuming section 5 was applicable to this case, the section only addresses the conditions which the Court must impose on the grant of leave to appeal to His Majesty in Council. It does not somehow, he argued, restrict the powers of the Court only to those conditions. Mr. Shivji further pointed out that there is no logical reason for the Court of Appeal's jurisdiction to be constrained, in the manner that Oscar Trustee suggests, in relation to a motion for conditional leave to appeal to the Privy Council when it is not so constrained on any other application before it. Learned King's Counsel accordingly invited the Court to grant a stay of the motion for conditional leave and the debarring order as prayed.

Discussion

[23] It is well-settled that the court has and always retains a residual inherent jurisdiction which enables it to make orders aimed at protecting its process from abuse. In **Danone Asia Pte Limited et al v Golden Dynasty Enterprise Limited et al**,⁵ the

⁵ Territory of the Virgin Islands HCVAP2009/002 (delivered 28th September 2009, unreported).

Court in recognising its inherent jurisdiction recited a passage from **Halsbury's Laws of England** to the effect that the Court's inherent jurisdiction is:

"a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just and equitable to do so in particular to ensure observance of due process of law."⁶

It is also well-settled that the notion of abuse of process cannot be restricted to 'defined and closed categories'⁷ as 'notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values as well as take account of the circumstances of the case'.⁸

[24] It is also recognised that the powers of the Court to prevent an abuse of process includes a power to stay proceedings that may be considered frivolous vexatious, or oppressive. In fulfilling this objective, we can see no reason why the Court may not draw on its broad case management powers for this purpose. In relation to an application for permission to bring an appeal before it, there is no doubt that the Court is empowered to stay an application for leave to appeal upon the condition that the proposed appellant complies with any outstanding orders and/or provides security for the respondent's costs of the application. This principle has been given judicial recognition by the High Court in **John v Colonial Life Insurance Company** and by the English Court of Appeal in the **Shlaimoun** case.

[25] The provisions of Part 26 of the **Civil Procedure Rules 2000** ("CPR") also make this plain. CPR 26.1(2)(q) empowers the court to 'grant a stay of the whole or part of any proceedings generally or until a **'specified date or event'** (emphasis added). CPR 26.1(3) provides that when the court makes an order or gives a direction, it may make the order or direction subject to conditions. CPR 26.1(4) then provides a non-exhaustive list of conditions which the court may impose

⁶ See: Halsbury's Laws of England (4th Edn., Vol. 37 at para.14).

⁷ See: *Hamilton v Oades* (1989) 166 CLR 486 at 502 citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 and *Tringali v Stewardson Stubbs & Collett Ltd.* (1966) 66 SR (NSW) 335 at 340.

⁸ See: *Ridgeway v R* [1995] 3 LRC 273.

including a condition ‘...(b) requiring a party to give security; (c) requiring a party to pay all or part of the costs of the proceedings; (d) requiring the payment of money into court or as the court may direct’. Moreover, CPR 26.1(2)(w) gives the court broad and overarching powers to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective. In our considered view these rules, when read together, make plain that the court is empowered to take any step to manage a case in any manner which accords with the overriding objective. This broad power must, of necessity, include the power of the court to take steps to prevent a party from abusing its own processes by, for example, staying its proceedings upon the condition that a party complies with a previous order of the court.

The Jurisdiction Point

[26] Notwithstanding the provisions under Part 26 of the CPR, Mr. Lowe, on behalf of Oscar Trustee, sought to persuade us that the Court had no jurisdiction to impose any conditions on a motion for conditional leave to appeal to the Privy Council, apart from those conditions set out in section 5 of the **Privy Council Order**. We considered this point frontally as it engaged the very jurisdiction of the Court to determine MBS’ application. Having considered the arguments advanced on behalf of both parties, we agreed with Mr. Shivji that section 5 was not applicable in the case at bar. In full, section 5 of the **Privy Council Order** provides as follows:

“Conditional leave to appeal

5. Leave to appeal to [His Majesty] in Council in pursuance of the provisions of this Order shall, in the first instance, be granted by the Court only —

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for

the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.”

[27] In our considered view, the **Privy Council Order** does no more than outline the conditions which the Court of Appeal must impose upon granting conditional leave to appeal to His Majesty in Council. There is no dispute that the matter which was before the Court for determination was an application to stay the motion for conditional leave pending compliance with certain conditions. The Court was not being invited on this occasion to consider the merits of the motion itself and grant leave upon the conditions set out in section 5. We were therefore satisfied that the provisions of section 5 were not engaged.

[28] The Court views the Unless Orders application itself as being an unusual one in uncharacteristic circumstances. It is rare in the sense that it has been made not where a party is seeking permission to appeal to this Court but rather to the Privy Council where such applications are governed, not by the **Civil Procedure Rules**, but by the **Privy Council Order**. This then begs the question whether the Privy Council Order has displaced the court’s residual inherent jurisdiction to protect its process from abuse if so found. Put another way, is this Court impotent to prevent an abuse of process where it involves a motion for permission to appeal to a higher court, namely the Privy Council? We are satisfied that the **Privy Council Order** does not take away this residual power⁹ to ensure that a party’s invocation of a step, though open to it in law, does not work manifest injustice or unfairness to a party in the proceedings before it.

[29] We are however, unable to agree with Mr. Shivji’s second basis to the effect that section 5 does not suggest that these conditions are the only conditions available for the Court of Appeal to impose, nor does the section somehow restrict the Court’s exercise of its broad case management powers under Part 26 of the CPR.

⁹ See: *A v R (Guernsey)* [2018] UKPC 4.

The **Privy Council Order** operates in our view as a complete code once leave to appeal is granted and does not contemplate giving to this Court some broader power outside or beyond those therein contained. This is well-settled in a number of authorities such as **Donovan Crawford and Others v Financial Institutions Services Limited**¹⁰ and **Electrotec Services Ltd. v Issa Nicholas (Grenada) Ltd.**¹¹ emanating from the Privy Council. This Court has opined to the same effect in **Khouly Construction & Engineering Ltd. v Edmund Mansoor**¹² following **Crawford**. This brings us to the consideration of the Unless Orders application on the merits.

The Unless Orders Application

[30] The question of whether to impose conditions on an appeal proceeding, albeit in the context of an appeal to the Court of Appeal, was considered by the English Court of Appeal in the oft-cited decision of **Hammond Suddards Solicitors v Agrichem International Holdings Ltd.**¹³ In that case, the appellant had sought a stay of a judgment debt and costs order pending appeal. The respondent not only sought to oppose the appellant's application for a stay, but also issued an application for an order that the appeal be struck out unless, by a specified date, the appellant pays or secures the full amount of both the judgment debt and the specific orders for costs made by the judge, as well as providing security for costs in whatever sum the court determines. The court considered the broad issue of whether it was permissible for the court to impose conditions on the prosecution of an appeal. In its judgment, the court concluded that in exercise of its broad discretion the court could impose conditions on an appeal proceeding. Lord Justice Clarke, who delivered the judgment on behalf of the court, observed critically that there was nothing unjust or inconsistent with the overriding objective in requiring a party who has been ordered to pay costs to obey the court's orders as a condition of being permitted to continue to prosecute its appeal. Clarke LJ further highlighted that the

¹⁰ [2003] UKPC 49.

¹¹ [1998] 1 W.L.R. 202.

¹² ANUHCVP2020/0023 (delivered 20th October 2021, unreported).

¹³ [2001] EWCA Civ 2065 at [41].

following factors militate in favour of exercising the discretion to impose a condition on the appeal proceeding:

- (a) where the appellant is an entity against whom it will be difficult to exercise the normal mechanisms of enforcement (e.g. if the appellant is registered abroad and has no assets within the jurisdiction);
- (b) where the appellant plainly either has the resources or has access to resources which enable it both to instruct solicitors and leading and junior counsel to prosecute its appeal;
- (c) where there is no convincing evidence that the appellant does not either have the resources or have access to resources which would enable it to pay the costs ordered;
- (d) where the discovery which the appellant has provided of its financial affairs is inadequate; and
- (e) where the appellant is intending to prosecute the appeal whilst at the same time continuing to disobey the orders of the court as well as seeking to persuade the court that it cannot do so.

[31] The issue of imposing conditions on an appeal proceeding was also considered quite recently by this Court in its decision in **Lunan Pharmaceutical Group Corporation v Zhao Long et al.**¹⁴ In **Lunan**, Ward JA, in a well-reasoned judgment, observed that, on a proper construction of the rules of court, the Court of Appeal has the power and discretion to impose conditions for the prosecution of an appeal before it, in the face of an ongoing and willful failure by an appellant to comply with consequential orders made in the court below, whether or not there has been a formal finding of contempt by the court below. In delivering the judgment of the Court, Ward JA approved the approach of the English Court of Appeal in **Arab**

¹⁴ BVIHCVAP2021/0007 heard together with BVIHCMAP2022/0029 (delivered 27th April 2023, unreported).

Monetary Fund v Hashim and others; Arab Monetary Fund v Bahiraluloom and Others.¹⁵ In **Arab Monetary Fund**, Lord Bingham observed as follows:

“From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.”

[32] It is evident from the principles outlined in **Hammond Suddards** and **Lunan** that the Court is required to undertake an evaluation of the particular factual circumstances of the case in determining whether to decline to further hear a party who has contemptuously flouted orders of the court. The authorities make pellucid that it is not sufficient for the court to refuse to hear the party in default merely because that party has not complied with orders of the court. While it is important for the court to ensure prompt observance of its orders and otherwise protect its processes from abuse, the critical consideration is whether the interests of justice are served by the court staying its proceedings until the defaulting party complies with the orders of the court. In like fashion, in considering abuse of process, the court is called upon to evaluate whether in all the circumstances a party's conduct is an abuse.

[33] In light of the factual circumstances of this case, we were satisfied that it was in the interests of justice to stay the motion for conditional leave issued by Oscar Trustee pending satisfaction by it of the outstanding costs orders and the Interim Payment Order made by the court below. To do otherwise would have been to shut one's eye or maintain a sterile approach to Oscar Trustee's conduct in all the circumstances which in our view amounted to an abuse. The circumstances surrounding Oscar Trustee's non-compliance with the costs orders of the court below and the Interim Payment Order were in our view egregious and contumacious. Oscar Trustee had

¹⁵ [1997] EWCA Civ 1298.

been in breach of the Interim Payment Order since 8th February 2022. It has also failed to comply with some 7 costs orders made in favour of MBS by the court below in the same proceedings. It has not proffered one cent. Oscar Trustee has provided no reason for its failure to comply with these orders apart from its allegation of impecuniosity, which has been previously rejected by this Court and the court below. Notwithstanding this, Mr. Lowe, on behalf of Oscar Trustee, was unable to draw the Court's attention to any documentary evidence demonstrating the company's impecuniosity, nor did he proffer any explanation as to why such documentary evidence is unavailable and has not been provided.

[34] In addition, while Oscar Trustee's principals, Mr. Paget and Mr. Zulpo, also claim impecuniosity, there is similarly no documentary evidence in support of their allegation. Oscar Trustee has also declined to address MBS' evidence in relation to Mr. Paget's considerable financial resources, or even explain how Mr. Paget and Mr. Zulpo are able to continue to fund Oscar Trustee's legal representation in this litigation and to instruct legal practitioners in their personal capacity to resist MBS' pending application for a non-party costs order.

[35] Furthermore, nowhere in the second affidavit of Christopher Bromilow, sworn on behalf of Oscar Trustee, is it contended that the motion for conditional leave would be stifled if the conditions sought by MBS are imposed. Unsurprisingly too, at no point during his submissions before this Court did Mr. Lowe so argue as there is no evidence before the Court on which such a finding could be premised. Moreover, assuming Oscar Trustee's contention that its only asset is its chose in action against MBS to be true, it would be difficult for MBS to enforce the Interim Payment Order and the outstanding costs orders through any other means apart from sanctions such as a stay of the motion. Any question of prejudice would therefore weigh heavily in favour of MBS, which has to date been unable to recover any of the costs awarded to it in the litigation.

[36] In view of the totality of the circumstances, we were satisfied that Oscar Trustee had no intention of complying with the outstanding costs orders. It appeared to us that

Oscar Trustee seemed quite content to simply make bald assertions that it cannot meet these costs payments without attempting to substantiate their claims by placing fulsome disclosure before the Court from which the Court could assess its true financial position. Oscar Trustee also seemed content to continue to litigate, as an option open to them, seemingly secure in the knowledge of the real unlikely possibility that MBS would ever be able to recover its costs in the litigation brought against it by Oscar Trustee, while apparently funding, along with those behind it, its lawyers but with MBS being made to incur more costs in defending the further litigation. This course of conduct in our view amounted to a manifest unfairness to MBS. We accordingly found that there was a real risk of Oscar Trustee failing to comply with any future costs order which could be made against it if it is unsuccessful on the motion for conditional leave. For these reasons, we were of the unanimous view that the motion for conditional leave ought to be stayed until Oscar Trustee complies with the outstanding orders of the court below.

[37] We then considered whether the circumstances warranted the imposition of a further condition requiring Oscar Trustee to provide security for MBS' costs on the motion for conditional leave. The aim of an order requiring the payment of security for costs is to guard against the risk that the respondent will be unable to recover his costs from the appellant if an appeal is unsuccessful. CPR 62.17 makes plain that in deciding whether to order a party to give security for the costs of an appeal, the court must consider two factors. First, the likely ability of the appellant to pay the costs of the appeal if ordered to do so; and second, whether in all the circumstances it is just to make the order.

[38] The key principles governing the grant of security for costs were elucidated by Webster JA [Ag.] in **Didier et al v Royal Caribbean Cruises Ltd.**¹⁶ Critically, in relation to the likely ability of the appellant to pay costs if ordered to do so, Webster JA [Ag.] opined at paragraph 11 that:

“A typical example of when the court will order [an appellant] who is ordinarily resident outside the jurisdiction to put up security, is when he does

¹⁶ SLUHCVP2017/0051 (delivered 18th September 2018, unreported).

not have assets in the jurisdiction. The combination of residence abroad and no assets within the jurisdiction increases the risk that a costs order may be difficult to enforce, or be unenforceable, and the court will be more inclined to make an order in these circumstances.”

[39] In relation to the second factor, that is, whether in all the circumstances it is ‘just’ to make the order, the court in **Pan Am World Airways Dominicana SA v Carlos Benitez and Another**¹⁷ recognised the following broad factors to be taken into account:

- (a) the risk of not being able to enforce a costs order and the difficulty or expense of enforcing a costs order, if the party is awarded costs;
- (b) the merits of the case;
- (c) whether the party seeking security may be able to recover costs from someone other than the appellant;
- (d) the impact on the appellant having to give security (for example, stifling the appeal); and
- (e) the delay in making the application.

[40] In applying the relevant principles to the circumstances of this case, it is undisputed that Oscar Trustee, having been incorporated in New Zealand, is not only a non-resident company, but one which has no assets in the Territory of the Virgin Islands. Indeed, on its own case, it appears to have no assets anywhere in the world apart from its chose in action being pursued against MBS. It follows therefore that the risk of MBS not being able to enforce any costs order made in its favour is extremely high. Accordingly, we were satisfied that the first factor under CPR 62.17 had been met in all the circumstances.

[41] In relation to whether it was just in all the circumstances to order security, we considered that the factors to be taken into account generally weighed in favour of

¹⁷ ANUHCv2016/0131 (delivered 30th September 2016, unreported).

granting security. Firstly, for the reasons explained earlier, it is clear that there is a risk of MBS not being able to enforce a costs order made against Oscar Trustee. Secondly, as mentioned earlier, Oscar Trustee has applied for a non-party costs order against Mr. Paget and Mr. Zulpo. However, until any order is made on that application, and unless successful, there is, at present, no other person against whom MBS can recover its costs. Thirdly, in relation to the impact on Oscar Trustee having to provide security, there was no evidence before us from which it could have been properly concluded, coupled with our assessment of the circumstances referred to above that the grant of security would stifle the hearing of the motion. As this Court explained in **Ultramarine (Antigua) Ltd. v Sunsail (Antigua) Ltd.**,¹⁸ it is not sufficient for an appellant to show that it does not itself have sufficient assets to provide security, an appellant must also show that there are no third parties who could reasonably be expected to put up the security for the respondent's costs. The opposite appears to be the case here. Oscar Trustee has totally failed to demonstrate how the granting of security would stifle its motion. We were therefore satisfied that it was just in all the circumstances to make an order requiring Oscar Trustee to provide security for MBS' costs on the motion.

- [42] It is noteworthy that the amount of security requested by MBS of \$100,000.00 was not challenged by Oscar Trustee either by Mr. Lowe during his oral submissions or in the second affidavit of Christopher Bromilow. We therefore accepted Mr. Shivji's submission that the amount requested was a reasonable sum which may be awarded to MBS if successful in opposing the motion for conditional leave, and accordingly awarded security in that sum.

The Application for a Debarring Order

- [43] We then considered MBS' application for an order debarring Oscar Trustee from making representations or otherwise participating in the proceedings, pending compliance with the Interim Payment Order. This is a short point. The rationale behind debarring orders is to ensure that costs orders are promptly obeyed. In this

¹⁸ ANUCVAP2016/0004 (unreported).

regard, we considered the following observations of Justice Chadwick in **Crystal Decisions (UK) Ltd v Vedatech Corp**¹⁹ to be apt:

“If the court is not in a position to enforce immediate interlocutory orders for the payment of costs which it was thought right to make, then the force of that sanction is seriously undermined. It is important that, in cases where the court thinks it right to make an order for immediate payment on an interlocutory application, that it does have the power - and can exercise the power - to ensure that order is met. For the reasons which Patten J explained, the only effective sanction in a case of this nature is to require payment of interlocutory costs as the price of being allowed to continue to contest the proceedings. Unless the party against whom an order for costs is made is prepared to, or can be compelled to, comply with, that order, the order might just as well not be made.”

[44] The principles governing the making of debarring orders have been helpfully summarised by the English court in **Michael Wilson** where, Sir Richard Field elucidated the relevant principles in the following terms:

“(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.

(2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.

(3) Consideration must be given to all the relevant circumstances including: ... (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.

(4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice...should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.

¹⁹ [2008] EWCA Civ 848 at para. 17.

(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

(6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.”

[45] In the premises, we considered that it was just and appropriate in all the circumstances to make a debarring order against Oscar Trustee for the following reasons. Firstly, Oscar Trustee has been in breach of the Interim Payment Order since February 2022 and has proffered no reason for their non-compliance, having put forward no documentary evidence that it is unable to obtain funds to satisfy the Interim Payment Order from its principals, Mr. Paget and Mr. Zulpo.

[46] Secondly, Oscar Trustee has also failed to provide detailed, cogent and proper evidence which gives full and frank disclosure of its financial position including its prospects of raising the necessary funds where its cash resources are insufficient to meet the liability. It therefore cannot be said that debarring Oscar Trustee would amount to a denial of justice. Oscar Trustee had similarly failed to provide any material to support such a conclusion.

[47] Thirdly, assuming Oscar Trustee’s only asset is its chose in action against MBS itself, there is no way of enforcing the Interim Payment Order by means of execution in New Zealand or winding-up petition. The only other means available to MBS to enforce the Interim Payment Order, therefore, is through other judicial sanctions such as a stay. We however agreed with Mr. Shivji that a stay of the motion for conditional leave, would not without more prevent Oscar Trustee from issuing other applications, causing MBS to incur further costs in these proceedings in responding to them. The debarring order would therefore serve a more useful purpose as opposed to merely staying the motion.

[48] Furthermore, there is no evidence that Oscar Trustee during the assessment proceedings had submitted to the court below that it was inappropriate for the costs orders to be made payable before the conclusion of its appeal. Indeed, there is nothing to suggest that Oscar Trustee had either requested that the judge postpone the due date of certain costs orders or otherwise reserve the issue of costs until a future date.

[49] It should also be reiterated that Oscar Trustee has already been debarred from participating in the proceedings in the court below. Oscar Trustee has not sought to appeal the debarring order of the court below. It therefore seemed logical to us that Oscar Trustee should similarly be debarred from participating in the proceedings before this Court, it having already been debarred in the court below for its non-compliance with the same Interim Payment Order at the heart of the instant application. Nonetheless, having discerned no strong reasons for making an immediate debarring order, we proceeded to make a debarring order against Oscar Trustee in the form of an unless order.

Conclusion

[50] For the reasons given above, we made the following orders:

- (1) The application filed by MBS on 24th November 2022 is granted.
- (2) The motion for conditional leave to appeal to the Privy Council filed on 6th September 2022 shall stand stayed until:
 - (a) Oscar Trustee has paid all outstanding costs due to MBS as have been ordered and assessed by the Court, which are outlined in paragraph 11.
 - (b) Oscar Trustee provides security for the MBS' costs of the motion for conditional leave in the sum of \$100,000.00 when Oscar Trustee seeks to lift the stay.
- (3) Unless Oscar Trustee fully complies with paragraph 2(a) of this order within 21 days of the date of the order, Oscar Trustee shall be debarred from being

heard, making representations in, or otherwise participating in these proceedings in the Court of Appeal and any other proceedings arising out of the costs assessment proceedings in the court below.

- (4) Oscar Trustee shall pay MBS' costs of the application, such costs to be assessed unless agreed within 21 days of the date of this order.

I concur.
Margaret Price- Findlay
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar