

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0047

BETWEEN:

AO ALFA-BANK

Appellant

and

KIPFORD VENTURES LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

Appearances:

Mr. Paul Lowenstein, QC, Mr. Tony Beswetherick and Ms. Tamara Cameron for the Appellant

Mr. Alain Choo-Choy, QC, Ms. Clair Goldstein and Ms. Sarah Thompson for the Respondent

2022: January 13;
January 14.

Interlocutory appeal – Application for stay of execution – Principles governing grant of stay pending appeal – Whether the Court ought to grant a stay of order discharging freezing injunction – Whether there is a real risk of dissipation of its assets by the respondent

ORAL DECISION

[1] **MICHEL JA:** By order dated 17th December 2020, a judge of the Commercial Court granted a freezing injunction (upon an *ex parte* application by the appellant) restraining the respondent from causing or permitting the removal from the Territory of the Virgin Islands (“the BVI”) of any of its assets which are up to the value of US\$48,340,991.54, or the disposal of, or dealing with, or diminution of the value of any of its assets (whether they are inside or outside the BVI) up to the same value.

The freezing injunction was subsequently varied by further orders on 12th January 2021, 15th February 2021, 25th February 2021 and 18th March 2021, but these variations are not material to the issues which are to be determined on the stay application.

- [2] By an application filed on 5th January 2021, the appellant applied to the High Court to continue the freezing injunction. By a cross application filed by the respondent on 8th January 2021, and amended on 23rd March 2021, the respondent applied to the court to discharge the freezing injunction.
- [3] By order dated 23rd November 2021, the learned judge dismissed the appellant's continuation application and granted the respondent's discharge application, discharging the freezing injunction forthwith. The judge, however, stayed his order until 4 pm on 17th December 2021 or such other date as the Court of Appeal may order in respect of any urgent application by the appellant to the Court of Appeal for a stay of the discharge order pending an intended appeal against the order. The learned judge also gave various directions and ordered the appellant to pay the respondent's costs of the continuation and discharge applications, with liberty to the respondent to apply for an interim payment on account of costs.
- [4] The appellant has in fact filed the intended appeal against the order of the learned judge dated 23rd November 2021 and has in fact made an urgent application to this Court for a stay of the discharge order pending the determination of the appeal; whilst the respondent has in fact applied for an interim payment on account of costs.
- [5] In its application, the appellant seeks the following orders:
 - (i) an order that the application be expedited and heard during the week of 10th January 2022;

- (ii) an order that the discharge of the freezing injunction be stayed pending determination of the appeal against the order of the learned judge dated 23rd November 2021;
- (iii) alternatively, an injunction in the same terms as the freezing order;
- (iv) an order staying the order for costs made against the appellant consequent upon the discharge of the injunction; and
- (v) such further or other relief as the Court may see fit.

[6] It is to be noted that on 14th December 2021, the respondent gave an undertaking to the High Court that, with effect from the discharge of the injunction on 17th December 2021, the respondent would effectively observe the terms of the freezing injunction. Once certain conditions are met by the appellant (which conditions have been met) the respondent's undertaking will endure until 4 pm today, 14th January 2022. The appellant accordingly sought a hearing of its stay application before 4 pm today, which was agreed to by the respondent, and which application has now been heard.

[7] The respondent (in its submissions in opposition to the appellant's application for a stay) seeks to frame the issue to be decided by the Court on the appellant's application as not whether the Court should grant a stay of the discharge of the freezing injunction, but whether the Court should grant a fresh freezing injunction pending the hearing of the appeal. The respondent bases this submission on the fact that the order of the learned judge discharging the freezing injunction was made on 23rd November 2021 and that the learned judge was only willing to extend the effect of the freezing injunction to 4 pm on 17th December 2021 to enable the appellant to apply urgently to this Court, and that even if the respondent gave an undertaking not to dispose of its assets pending the determination of this application, or until 4 pm on 14th January 2022, there is no extant injunction to stay the discharge of. In essence, what the respondent is saying is that the freezing injunction has already been discharged and so the order discharging it cannot be stayed. As a consequence, the respondent

contends that what this Court has to consider is whether it should grant a fresh injunction pending the hearing of the appeal. I do not agree.

[8] The learned judge made an order on 23rd November 2021 dismissing an application to continue a freezing injunction which he had previously granted, granting an application to discharge the freezing injunction, discharging the freezing injunction forthwith, and ordering the appellant to pay the respondent's costs on the continuation application and the discharge application. The appellant has appealed against the order and has applied for a stay of the discharge order pending determination of the appeal against the order of the learned judge dated 23rd November 2021, alternatively, a freezing injunction in the same terms as the injunction granted by the learned judge on 17th December 2020, and an order staying the order for costs consequent upon the discharge of the injunction.

[9] In determining whether to grant a stay of the order, the Court must necessarily consider what the order is that the appellant is seeking to stay, which in this case is an order discharging a freezing injunction and a consequential cost order. If the Court grants the stay, it will mean that the discharge of the freezing injunction is effectively suspended until the appeal against its discharge is determined. The fact that there is a lacuna between the making of the discharge order and the making of a stay order (if this Court so decides), is inconsequential. Indeed, the grant of a stay, particularly by the Court of Appeal, will more often than not be sometime after the order being stayed is made and comes into effect. It makes no difference that the order sought to be stayed is an order discharging an injunction. What I will therefore be determining on the application before me is whether to grant a stay of the order made by the learned judge on 23rd November 2021 discharging the freezing injunction previously granted by him on 17th December 2020, until the hearing and determination of the appeal against the discharge order. If the discharge order is stayed, so too will be the consequential cost order.

[10] This Court has consistently applied a set of principles in determining whether to grant a stay of proceedings, a stay of execution, or a stay of the order of a lower court. These principles were stated by Blenman JA in the case of **C-Mobile Services Limited v Huawei Technologies Co. Limited**¹ to be the 5 principles identified in the English case of **NB v London Borough of Haringey**² as relevant to applications for stays pending appeal. These are: (1) the Court must take into account all the circumstances of the case; (2) a stay is the exception rather than the general rule; (3) a party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; (4) in exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and (5) the court should take into account the prospects of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[11] I will take a brief look at each of the 5 principles, in terms of their application to this case.

[12] In terms of the first of the 5 principles, I take the view that when one looks at all of the circumstances of this case, including the nature of the allegations made by the appellant against the respondent, the sums of money involved in the claim, the nature of the operations of the respondent, in terms of its dealings in several capacities through several different persons and entities and the apparent ease with which it might be able to move money through persons, companies and countries and render itself judgment proof, if not restrained; including too the fact that the learned judge made determinations about the merits of the appellant's case by delving into detailed legal and factual analyses about what is or is not a representation or misrepresentation, for instance, by making legal and factual distinctions between giving opinions and making representations, making assessments as to quality of coal

¹ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

² [2011] EWHC 3544 (Fam).

and other endeavours that I feel ill-equipped to undertake; it is clear to me that there are issues which might give rise to an arguable appeal.

- [13] The application of the second of the 5 principles does not require much discussion. Suffice it to say that, based on some of my comments and observations above and below, I am satisfied that this application for a stay is one which justifies a departure from the general rule.
- [14] In terms of the third principle, the appellant filed an affidavit sworn to by Ms. Tamara T. Cameron, a Senior Associate in the law firm representing the appellant, which affidavit contains the appellant's evidence in support of its application for a stay of the order of the learned judge. In paragraph 38 of the affidavit, Ms. Cameron alleges that there is a real risk that if the stay is not continued until after final resolution of the appeal, the monies and any assets being held by the respondent will be dissipated by those controlling it. She then lists various factors which she alleges evidence that risk. She then swears at paragraph 39 that: '[b]ased on the evidence, there are cogent reasons to believe that if the stay is not granted, those who control Kipford will take immediate steps to move Kipford's assets beyond the reach of the Court in this jurisdiction.'
- [15] It is to be noted that, although liberty was given to the respondent to file an affidavit in response to the appellant's application and supporting affidavit, no evidence was filed by the respondent, leaving the evidence of the appellant's witness uncontroverted by any other evidence. Learned Queen's Counsel appearing for the respondent, Mr. Choo-Choy, QC, did however posit that the purported evidence of Ms. Cameron was no more than the disputed assertions which the learned judge had found to be without merit and so need not be specifically controverted by affidavit evidence, because it did not amount to solid evidence of a real risk of dissipation.
- [16] In its written submissions, in support of its application for a stay of the discharge order, the appellant submits that the essential point is that a refusal of the stay of the

discharge order is highly likely to render the appeal nugatory, particularly in circumstances where the learned judge himself found that there was a real risk of dissipation of assets by the respondent. The appellant submits that if the respondent is left free to deal with its assets pending the determination of the appeal and is paid any costs at this stage by the appellant, there is a clear risk of irredeemable prejudice to the appellant in the event that it succeeds on its appeal, because it may be unable to recover the monies due to it or the costs paid by it.

[17] What the learned judge said on the risk of the respondent dissipating its assets can be pieced together from paragraphs 6, 45, 51 and 54 of his written judgment. At paragraph 6, the learned judge stated that the test of what constituted a good arguable case was decided in the well-known case, referred to as the **Niedersachsen**³ case, where it was held that: “a good arguable case was one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success.” Then in paragraph 45, after discussing various aspects of the pleadings and/or evidence, he makes findings that the appellant does not meet the **Niedersachsen** hurdle in relation to a particular allegation. Then in paragraph 51, after discussing certain aspects of the pleadings and/or evidence, he makes a finding that one of the appellant’s allegations does not reach the **Niedersachsen** hurdle. Then in paragraph 54, the learned judge states: “If the claimant did meet the **Niedersachsen** test, then I would find there was a real risk of dissipation. The way monies have been moved shows a real risk that assets will continue to be moved so as to render execution difficult or impossible. But in the event, these points do not save the freezing order.”

[18] The learned judge, in my view, clearly came to the conclusion that the way monies have been moved around by the respondent and the other persons and entities associated with it, shows a real risk of dissipation of assets by the respondent. This finding by the judge, which has been differently construed but not challenged by the

³ *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft MbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412.

respondent, in my view, removes from the equation the question of whether there is a real risk of dissipation of its assets by the respondent if the order discharging the freezing injunction is not stayed. The fact that the judge went on to say that: “But in the event, these points do not save the freezing order” does not take away from his finding that there is a real risk of dissipation.

[19] I am not persuaded by the arguments advanced by learned Queen’s Counsel, Mr. Choo-Choy, contained in paragraphs 3.2, 3.3, 25 and 26 of the respondent’s skeleton argument, or their elaboration in his oral argument that, in the absence of a good arguable case of fraud, the learned judge did not find that there was a real risk of dissipation of assets by the respondent. The learned judge made the definitive, material, unchallenged finding that: “[t]he way monies have been moved shows a real risk that assets will continue to be moved so as to render execution difficult or impossible.” That is a real risk of dissipation. The conditionality with which the judge surrounds his finding is relevant to his refusal to continue the freezing injunction notwithstanding his finding of a risk of dissipation, because he also finds that the appellant has not met the **Niedersachsen** test of having a good arguable case.

[20] The fourth principle is somewhat entwined with the third principle in that a real risk of dissipation of its assets by the respondent clearly tilts the balance of harm in favour of the appellant and can in fact have the effect of rendering the appeal nugatory. Conversely, there does not appear to be any real risk of harm to the respondent if a stay is granted, particularly where, as in this case, the respondent has the protection of the appellant’s proffered cross-undertaking as to damages, and the appellant is, according to the learned judge, “the biggest privately owned bank in Russia”; although the appellant is more modest in its description of itself as “a major private commercial bank in Russia”.

[21] Counsel for the appellant did not seek to engage the fifth principle on the granting of a stay where the Court takes into account the prospects of the appeal succeeding where strong grounds of appeal or a strong likelihood that the appeal will succeed

are shown. Mr. Paul Lowenstein, QC did, however, point out that counsel for the respondent was attempting to argue the flip side of that principle that where there is a weak prospect of success of the appeal, a stay will not be granted. Mr. Lowenstein, QC submitted that the principle is not applicable on its flip side.

[22] Mr. Choo-Choy, QC relied substantially on this flip side, arguing that logic would dictate that if a strong likelihood of success on an appeal will usually enable you to get a stay, then a weak prospect of success should usually disable you from getting a stay. One would have to concede that the logic of this argument seems irresistible. Learned Queen's Counsel, Mr. Choo-Choy spent considerable time advancing the argument that the appellant had virtually no prospect of success on the appeal because it did not have a good arguable case in the court below and the judge was correct in dismissing the application to continue the freezing injunction and granting the application to discharge the injunction.

[23] But not only did Mr. Choo-Choy, QC rely on the absence of a good arguable case to advance the case of the respondent on the application of the fifth principle, he relied on it as well to advance the case of the respondent that there was no real risk of dissipation of assets by the respondent absent fraud, which is what the appellant's claim is based on. Learned Queen's Counsel, Mr. Choo-Choy argued too that the balance of harm could not favour the appellant because it had no good cause of action.

[24] By the end of his extensive oral submission, following on from his comprehensive written submissions, Mr. Choo-Choy had effectively responded to the appeal against the 23rd November 2021 order of the learned judge, because if this Court accepts that the appellant had no arguable case as ruled by the judge, then the appeal (not yet heard) must be dismissed.

[25] My task here though is not to hear the appeal, far less determine it, but only to determine whether to stay the discharge order and cost order made by the learned judge on 23rd November 2021.

[26] Applying the principles set out in the **C-Mobile** case; in particular, looking at all of the circumstances of the case, the balance of harm and the risk of dissipation, with the likelihood that dissipation of the respondent's assets can render the appeal nugatory, and declining to determine the issues for determination by the Full Court on the hearing of the appeal, I can and need only say that I have perused the judgment of the learned judge and the notice of appeal, and that I have not discerned the futility of the appeal and the inevitability of its failure as canvassed by the respondent; I consider that, as I said earlier, there are issues in the judgment of the learned judge which give rise to an arguable appeal against his order discharging the freezing injunction, and I cannot say that the prospects of success of the appeal are so weak as to justify without more, the refusal of the grant of a stay. I will accordingly grant the stay of the order, dated 23rd November 2021, discharging the freezing injunction and ordering the appellant to pay the respondent's costs of the rival applications to continue and to discharge the freezing injunction.

[27] I find it unnecessary to deal with the appellant's alternative application for the granting of a fresh freezing injunction and I decline to do so.

[28] My order is as follows:

- (i) The order made by the learned judge on 23rd November 2021 discharging the freezing injunction, granted by him on 17th December 2020, is hereby stayed pending the hearing and determination of the appeal against his order.

- (ii) The costs order made by the learned judge that the appellant is to pay the respondent's costs on the continuation and discharge applications is also stayed pending the hearing and determination of the appeal.
- (iii) Costs on the stay application is reserved.

By the Court

Chief Registrar