

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0009

BETWEEN:

GREATER SAIL LIMITED
(A company incorporated in the British Virgin Islands)

Appellant

and

[1] NAM TAI PROPERTY INC
(A company incorporated in the British Virgin Islands)

[2] NAM TAI GROUP LTD
(A company incorporated in the Cayman Islands)

[3] NAM TAI INVESTMENT (SHENZHEN) CO LTD
(A company incorporated in the People's Republic of China)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Godfrey Smith

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

Appearances:

Mr. John Carrington, QC with him Mr. Andrew Emery for the Appellant
Mr. Edward Davies, QC with him Mr. Ben Griffiths and Mr. Nicholas Burkill for the Respondents

2022: May 11;
June 21.

Interlocutory appeal — Interim injunctions – Court's approach in respect of appeals from ex parte decisions – Abuse of process – Whether appeal an abuse of process – Whether it is appropriate for the Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders before the inter partes application has been heard – Academic appeal

In October 2021 this Court ordered that a special meeting of the shareholders of the first respondent, Nam Tai Property Inc (“Nam Tai”) should be convened on 30th November 2021. Following the court-ordered meeting, the new board attempted to take control of the assets and affairs of the Nam Tai group of companies including the third respondent, Nam Tai Investment (Shenzhen) Co. Ltd and other subsidiaries in the Peoples Republic of China. However, the appellant, Greater Sail Limited (“Greater Sail”) had in December 2021 sent letters to the Shenzhen Administration for Market Regulation (“The AMRs”) Bao’an and Guangming Branches, requesting them not to approve any changes regarding the management and legal representative of Nam Tai. The new officers and managers of Nam Tai were therefore unable to take control of the assets and affairs of much of its group of companies including office premises, bank accounts and corporate seals.

In January 2022, the respondents sought urgent interim orders that Greater Sail allow the new board to take control of the group and its assets. On 31st January 2022, the learned judge granted *inter alia* the *ex parte* interim mandatory and prohibitory injunctions sought against Greater Sail. Greater Sail belatedly complied with the *ex parte* order of the learned judge. However, dissatisfied with the learned judge’s order, Greater Sail has appealed contending that the learned judge was plainly wrong in exercising his discretion to grant the injunctive relief, erred by failing to afford procedural fairness to the appellant and failed to provide a reasoned judgment. The respondents counter that the appeal is an abuse of process as it is against an *ex parte* order in respect of which there has been no application to discharge and, in any event, the appeal has no merit.

This Court is of the view that the abuse of process point is dispositive of the appeal and as such the central issue to be determined is whether the appeal is an abuse of process.

Held: dismissing the appeal; and ordering costs to the respondents to be assessed by a High Court judge if not agreed within 21 days, that:

1. An appellant who seeks to challenge the grant of an *ex parte* interim injunction must first give the learned judge an opportunity to review it in the light of full evidence and full submissions and reach a decision at a scheduled *inter partes* hearing. To do otherwise could seriously undermine the structure for dealing with interim applications and open the floodgates for leapfrogging over *inter partes* hearings directly to the Court of Appeal. In this case, Greater Sail did not apply to the learned judge below to discharge the injunction. It instead asked this Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders before the *inter partes* application has been heard. It is therefore improper to permit Greater Sail to appeal to this Court against the *ex parte* order in these circumstances.

WEA Records Ltd. V Visions Channel 4 Ltd and Others [1983] 1 WLR 721 applied; **Hunter & Partners Limited v Wellings & Partners** [1987] FSR 83 applied; **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 distinguished.

2. Greater Sail's compliance with the mandatory and prohibitory orders renders the appeal academic, serving no practical purpose.

JUDGMENT

- [1] **SMITH JA [AG.]:** This is an interlocutory appeal against the decision of the learned judge in the proceedings below to grant *ex parte*, interim mandatory and prohibitory injunctions against the appellant. The appellant essentially contends that the learned judge was plainly wrong in exercising his discretion to grant the injunctive relief, erred by failing to afford procedural fairness to the appellant and failed to provide a reasoned judgment. The respondents essentially counter that the appeal is an abuse of process as it is against an *ex parte* order in respect of which there has been no application to discharge and, in any event, the appeal has no merit.

Background

- [2] On 4th October 2021, this Court, in different but related proceedings, had ordered that a special meeting of the shareholders of the first respondent should be convened for 30th November 2021. That meeting was duly held and resolutions were passed removing four of the incumbent directors from office and appointing a slate of new directors.
- [3] Following that meeting, the new board attempted to take control of the assets and affairs of the first respondent's group of companies including the third respondent and other subsidiaries in the Peoples Republic of China. The respondents alleged that, since then, the appellant and persons associated with it have taken steps to stymie the transfer of control of the first respondent and its subsidiaries to the new board and management.
- [4] Immediately following the court-ordered meeting, the appellant on 1st December 2021 had sent letters to the Shenzhen Administration for Market Regulation ("The AMRs") Bao'an and Guangming Branches, requesting them not to approve any changes regarding the management and legal representative of the first respondent.

The new officers and managers of the first respondent were unable to take control of the assets and affairs of much of the first respondent's group of companies including office premises, bank accounts and corporate seals.

- [5] On 26th January 2022, the respondents (the claimants below) sought urgent interim orders that the appellant (the respondent below) allow the new board to take control of the group and its assets. The application was first scheduled for 27th January 2022, but the learned judge ordered that the appellant preserve relevant documents and directed that the application be adjourned to 31st January 2022.

Trial Judge's Orders

- [6] On 31st January 2022, the judge refused the appellant's application for a 28-day adjournment and, on the respondents' application, ordered that the appellant:
- a) Cease any act that might delay or otherwise hinder the new board of directors from taking control of the first respondent or any of its subsidiaries or their property.
 - b) Send a letter, in prescribed terms, by 4pm Beijing time on 8th February 2022, to the AMRs withdrawing objections it had previously made to the registration of changes to the personnel of the first respondent's other subsidiaries and provide a copy of those retraction letters to the respondents' attorneys.
 - c) Provide to the respondents, by 4pm BVI time on 15th February 2022, copies of all correspondences with the AMRs and an affidavit setting out the contents of all oral communications with the AMRs.
- [7] The appellant failed to send the retraction letters to either the Bao'an or the Guanming AMR on the stipulated date and time and also failed to provide copies and details of its communications with the AMRs by the stipulated date and time. In

response to this non-compliance, the respondents, on 22nd February 2022, applied to commit the appellant and its two statutory directors, Mr. Mai and Ms. Lee for contempt of court. The appellant then sought to purge its contempt by sending the retraction letters to the Bao'an Branch and Guangming Branch of the AMRs and providing copies and details of its communications with the AMRs. At the hearing of the contempt application the learned judge ruled that the appellant, Mr. Mai and Ms. Lee were in contempt of court for failing to send the retraction letters to the AMRs (by the required date and time?) but dismissed the other two allegations of contempt.

Application for Stay

- [8] Despite having belatedly complied with the learned judge's mandatory orders that the retraction letters be sent to the AMRs and that the respondents be provided with details of communications with the AMRs, the appellant, on 22nd February 2022, applied to this Court for a stay pending the determination of an appeal against the interim orders made by the learned judge on 31st January 2022.
- [9] On 15th March 2022, the stay application was heard by a single judge of this Court in chambers. That judge found that the legal requirements for a stay were not met, that the application sought to obviate compliance with the learned judge's mandatory and prohibitory injunction orders with which the appellant had belatedly complied and that it had provided no cogent evidence, in respect of the other orders of the judge, that their appeal would be rendered nugatory, and therefore the single judge refused the application.

Issues

- [10] The appellant enumerated a plethora of grounds in its notice of appeal to this Court. These included that the learned judge had erred in law by failing to give adequate reasons, was blatantly wrong in the exercise of his discretion (in support of which eight errors of law were alleged), erred in law in treating the matters as urgent, in granting mandatory and prohibitory injunctions that were too wide in scope and in

failing to consider whether the BVI was the proper forum. The respondents joined issue with the appellant on all its grounds and contended that the appeal was an abuse of process. This Court is unanimously of the view that the abuse of process point is dispositive of the appeal. For this reason, and because the *inter partes* hearing of the application is listed to be heard in the court below, the less said about the other issues argued before this Court the better.

Abuse of Process

[11] Central to the resolution of this issue is the fact that the appellant never applied to the learned judge below to discharge the injunctions. Indeed, the *inter partes* hearing of the application is listed for 20th September 2022. The appellant is therefore asking this Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders even before the *inter partes* application has been heard.

[12] Mr. Davies QC for the respondent, helpfully referred this Court to the English cases of **WEA Records Ltd. v Visions Channel 4 Ltd and Others**¹ and **Hunter & Partners Limited v Wellings & Partners**,² which set out with clarity the English approach in respect of appeals from *ex parte* decisions. Sir John Donaldson MR in **WEA Records Ltd.** stated at page 727 :

“In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court upon an *ex parte* application. This jurisdiction is conferred by section 16 (1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order, which has been made *ex parte*. This jurisdiction is inherent in the provisional nature of any order made *ex parte* and is reflected in R.S.C., Ord. 32, r. 6.

As I have said, *ex parte* orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an

¹ [1983] 1 WLR 721.

² [1987] FSR 83.

opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an *ex parte* order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see R.S.C., Ord. 35, r. 2 (1), and *Vint v. Hudspith* (1885) 29 Ch.D. 322 to which Mr. Tager very helpfully referred us this morning.”

- [13] In **Hunter & Partners Limited**, the plaintiffs had filed a notice of motion for interlocutory relief. After the judge in that case had given directions for the filing of the defendants’ evidence and ordered the motion to be heard not before 10 days’ time, the plaintiffs moved *ex parte* on their evidence alone for interim injunctions. The defendants, being present by counsel, resisted the application. The judge granted the injunctions.
- [14] On appeal, the Court of Appeal held that there had been procedural confusion at the opposed *ex parte* application. The motion for interim interlocutory injunctions had been made *ex parte*. The judge having indicated directly or indirectly that he was minded to grant such injunctions, the defendants as a matter of procedure had to be taken to have moved *inter partes* for the discharge of those injunctions. The proper procedure was for the defendants to challenge the judge’s decision by way of an appeal against the judge’s dismissal of that *inter partes* motion. This was what the court had in fact heard on the appeal.
- [15] May LJ, in **Hunter & Partners Limited**, after quoting Donaldson MR’s statement in **WEA Records Ltd.** with approval, stated:
- “In that case, where the facts were very different from those in the instant case, this court dismissed the appeal on the basis that it was wholly inappropriate to entertain an appeal from the *ex parte* order. In the instant case the plaintiffs did not contend that the appeal was either inappropriate

or incompetent, but argued it on its merits. Further, in his judgment below, the learned judge said; “I am entitled to hear as *inter partes* the present motion – it has been an *ex parte* opposed motion”. We think with respect that in this the learned judge was not wholly accurate.

We have consulted those who are more familiar with the niceties of Chancery practice than we are and on a strict analysis we think that what took place before the learned judge below in this case was, first, an *ex parte* motion by counsel for the plaintiffs for interim interlocutory injunctions. The judge having indicated directly or indirectly that he was minded to grant such injunctions, counsel for the defendants must be taken then to have moved *inter partes* to have those injunctions discharged. In this he failed. Accordingly, if he were to seek to challenge the learned judge’s decision in this court, the proper procedure was by way of an appeal against the judge’s dismissal of his *inter partes* motion to set aside the interim interlocutory injunctions. This in the end is what we heard. However, that we did so should not be relied on as any precedent that on another similar occasion this court will be prepared to hear such an appeal on its merits as we did. Having made what we think is the correct procedural analysis of what occurred at first instance, we wish to make it clear that we deprecate appeals to this court at this stage in matters of this nature. It is in general most unsatisfactory for this court to be asked to adjudicate upon such appeals when only one side’s evidence has been filed. The usual procedure in future should be to let the plaintiffs’ original motion stand over to the subsequent *inter partes* hearing when the evidence on both sides will be before the court of first instance. After that court has reached its decision on that evidence, then the party aggrieved, by either the grant or refusal of an injunction, may appeal without leave to the Court of Appeal – see section 18(1)(h) of the Supreme Court Act 1981. Even so, it should be kept well in mind that the decision of the judge at the first instance will have been one which was made by him in the exercise of his judicial discretion. As is well known an appeal against such an exercise of discretion can only succeed in limited circumstances.” (Underlining added)

- [16] I consider the approach taken in these cases to be salutary and commendable and I respectfully adopt it. There is no reason why this Court should adopt a different approach. To do otherwise could seriously undermine the structure for dealing with interim applications and open the floodgates for leapfrogging over *inter partes* hearings directly to the Court of Appeal. It appears to me to be unsatisfactory and improper to permit the appellant to appeal to this Court against an *ex parte* order without first giving the learned judge an opportunity of reviewing it in the light of full

evidence and full submissions and reaching a decision at scheduled *inter partes* hearing.

[17] Mr. Carrington QC for the appellant contended that the facts in **WEA Records Ltd.** were “radically different” from the case of bar. Different though the facts may be, Donaldson MR’s statement of principle at paragraph 12 above is one of general application to appeals to the Court of Appeal from *ex parte* decisions of High Court judges. It helpfully explains the approach that should generally be taken in such situations and why.

[18] Mr. Carrington QC further contended that **WEA Records Ltd.** represented an outmoded ‘dogmatic approach’ to abuse of process that had been overtaken by **Johnson v Gore Wood & Co (a firm)**.³ He relied on the following extract from that case (at page 31) as authority for the correct approach that should be followed in determining whether the appeal is an abuse of process:

“That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it is necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.”

[19] Reliance on **Johnson v Gore Wood & Co (a firm)** is clearly misplaced. Firstly, Lord Bingham’s statement was in the context of a discussion on the doctrine of estoppel.

³ [2002] 2 AC 1.

The issue was whether the bringing of a claim in later proceedings amounted to an abuse of process if the court is satisfied that the claim should have been raised in the earlier proceedings, if it was to be raised at all. What Lord Bingham was referring to as “too dogmatic an approach” was holding that, because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. He then went on to make the statement relied upon by Mr. Carrington QC in the entirely different legal context of estoppel.

- [20] Plainly, the circumstances of this case give rise to a different form of abuse of process wholly unrelated to estoppel and the principles espoused by Lord Bingham on estoppel *qua* abuse of process has no application to the case at bar.
- [21] Furthermore, it bears repeating that the appellant has already complied with the mandatory orders it now seeks to appeal, rendering the appeal academic. In answer to this Court’s question as to whether the appeal was academic, Mr. Carrington QC responded that it was not. He contended that if the decision is wrong it should be set aside and if it is set aside, the appellant may be able to use that in “some way” in China. He did not offer any specifics. Because the appellant has complied with the mandatory aspects of the learned judge’s orders by sending the retraction letters and providing copies and details of communications with the AMRs, I am of the view that this appeal is academic and would serve no practical purpose.
- [22] The issue of whether the injunction prohibiting the appellant from delaying or otherwise hindering the new board of directors from taking control of the first respondent or its subsidiaries should be continued, will be determined on the basis of full evidence and submissions at the *inter partes* hearing in September before the learned judge. If the court below refuses to discharge or vary that injunction, the appellant may then appeal to this Court from such decision.

Conclusion

[23] For the reasons stated above, I would therefore dismiss the appeal with costs to the respondents to be assessed by a High Court judge if not agreed within 21 days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gerard Farara
Justice of Appeal [Ag]

By the Court

Chief Registrar