

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

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2020/0015

BETWEEN:

**[1] AMERICA 2030 CAPITAL LIMITED
[2] MARK SIMON BENTLEY (aka VAL SKLAROV)**

Applicants

and

**[1] SUNPOWER BUSINESS GROUP PTE LTD
[2] TOURNAN TRADING PTE LTD**

Respondents

SKBHCVAP2020/0016

BETWEEN:

AMERICA 2030 CAPITAL LIMITED

Applicant

and

**[1] SUNPOWER BUSINESS GROUP PTE LTD
[2] TOURNAN TRADING PTE LTD
[3] GUO HONG XIN
[4] MA MING**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Ms. M. Angela Cozier for the Applicants
Mr. Nicholas Peacock, QC, with him, Ms. Elizabeth Harper and Ms. Michelle Slack
instructed by Ms. Martha Ramthahal for the Respondents

2020: October 26, 30.

Application to discharge order of single judge of Court of Appeal — Order of single judge dismissing applications for leave to appeal having been filed out of time — Applications for extension of time — Principles guiding grant of extension of time — Approach of appellate court to exercise of case management discretion of lower court judge

ORAL JUDGMENT

[1] **PEREIRA CJ:** There are in essence three applications before the Court for determination, arising out of the two matters intitled as appeals numbered SKBHCVAP2020/0015 and SKBHCVAP2020/0016. The applications raise similar issues arising out of similar applications made in the claims below. The claims in the court below are claims numbered NEVHCVAP2019/023 and NEVHCVAP2019/0141. Claim NEVHCVAP2019/023 has been commonly referred to as the 'Fixed Date claim' (FDC) and was the claim filed first in time. Claim NEVHCVAP2019/0141 commonly called 'the Fraud Claim' was filed later. For convenience only, they will be referred to as the Fixed Date Claim (FDC) and the Fraud Claim. Central to the FDC and the Fraud Claim which involve similar or related parties, are stock loan agreements and amendments thereto in respect of the arbitration agreement contained therein. The applications before this Court are for:

- (a) the discharge of the orders of a single judge of this Court dismissing applications for leave to appeal;
- (b) extensions of time to seek leave to appeal; and
- (c) in respect of the Fraud Claim only, an interim stay of the proceedings below pending the determination of the proposed appeal.

[2] By way of background summary, for placing the matters in context, in February 2019, the respondents in appeal SKBHCVAP2020/0016 namely, Sunpower Business Group PTE Limited ("Sunpower"), Tournan Trading PTE Limited ("Tournan"), Guo Hong Xin and Ma Ming filed the FDC in the Nevis High Court against America 2030 Capital Limited ("America 2030"), and Ms. Karen Hill Hector, the arbitrator purportedly appointed under the arbitration agreement in the stock loan

agreement as amended. An interim injunction was also sought restraining the commencement of arbitration on the basis that arbitration had not been validly commenced, as well as for the removal of Ms. Karen Hill Hector as arbitrator on the basis of apparent bias. This application was supported by the affidavit evidence of Guo Hong Xin, director and beneficial owner of Sunpower, which was said to be also in support of the FDC. It was accepted that, under the stock loan agreement as amended, the Nevis High Court is the supervisory court for the purposes of the arbitration clause as amended. The injunction was granted and remains in place.

- [3] Case management hearings were undertaken and some 6 issues were eventually identified for determination at trial of the FDC, which was listed to take place around 17th December 2019.
- [4] On 5th December 2019, the respondents in appeal SKBHCVAP2020/0015 namely, Sunpower and Tournan, commenced the Fraud Claim against America 2030, Mr. Mark Simon Bentley ("Mr. Sklarov") and the stockholder/broker, Weiser Global Capital Markets Ltd. (formerly known as Weiser Asset Management Ltd.) ("Weiser") seeking, among other relief, rescission of the stock loan agreement, including the arbitration agreement as well as for tracing orders to discover the whereabouts of the Sunpower shares or stock which had been pledged as security under the stock loan agreement, in circumstances where they assert no loans had in fact been provided to the respondents despite the deposit of their stocks. They also sought damages. The respondents considered that they were the victims of a stock loan fraud scheme by America 2030 and its guiding mind, Mr. Sklarov, assisted by Weiser, through the use of a web of various corporate entities. They alleged that, by December 2019, they had uncovered evidence which they believed showed that they had been the victims of a fraud.
- [5] On 6th December 2019, a worldwide freezing order was granted against America 2030 and Mr. Sklarov and a preservation order was granted against Weiser, prohibiting it from disposing of or diminishing the value of the Sunpower shares held

by it or any proceeds of sale thereof. Underpinning the freezing order, were orders for disclosure of assets and for information relative to the stock. There has been no compliance with these orders to date and these appear to have been simply ignored. The respondents have not brought proceedings for contempt as they consider doing so would be pointless as no assets of the applicants appear to be situate in the State of Saint Kitts and Nevis.

[6] The applicants failed to file any defences to the Fraud Claim within the time limited and default judgment was eventually entered against them.

[7] On 3rd February 2020, America 2030 issued an application to strike out the FDC alleging in general an abuse of process. Its challenge may be condensed as follows:

- (a) various breaches of the **Civil Procedure Rules 2000** (CPR), in particular, CPR 8.1 (as to form) and CPR 30 as to portions being scandalous and irrelevant;
- (b) that the FDC was barred by res judicata or issue or party estoppel on the basis that the Singapore High Court had determined the issue of arbitration in Nevis as between the same parties; and
- (c) that the FDC failed to disclose any reasonable ground for bringing the claim.

[8] In respect of the Fraud Claim, America 2030, Mr. Sklarov and Weiser asserted in the main that:

- (a) the claim was in breach of the CPR as it sought to re-litigate an issue namely, jurisdiction to determine the issue of breach of contract and the issue of arbitration such claim having been stayed by the Singapore High Court (the res judicata/issue estoppel point); and

(b) the statement of claim was prolix, scandalous and portions thereof irrelevant.

- [9] The learned judge refused the strike out applications. In his written reasons, he referred to the parties in the Singapore proceedings and stated at paragraph 10 that neither Mr. Sklarov or Weiser were parties to the Singapore proceedings. They are however parties to the Fraud Claim. The trial judge accepted that the Singapore court was made aware of the Nevis High Court proceedings by way of the FDC by America 2030. He also accepted that Mr. Sklarov's evidence before the Singapore court pointed out that no relief was being sought there rendering the stock loan agreement null and void. The learned judge further opined that the issues raised in the FDC "especially as it relates to the impartiality of the arbitrator and the process in general, were not before the court in Singapore". The Singapore court granted a stay of Sunpower's claim pursuant to section 6 of the International Arbitration Act of Singapore. No stay was granted in respect of the claims brought by Ma Ming and Mr. Guo Hong Xin as they were not parties to the stock loan agreement.
- [10] The learned judge dealt with the attacks made on the claims under the two broad heads of res judicata/issue estoppel, and whether the claims are an abuse of process having regard to the stay granted in respect of Sunpower's claim in Singapore and finally the procedural defects in the claims so as to determine whether the nuclear option of striking out the claims were warranted.
- [11] In relation to the issue estoppel point, the learned judge concluded that no issue estoppel arose in that the stay order did not seek to trouble the process in Nevis, the Singapore court being fully aware of the proceedings which had been commenced in Nevis. As the learned judge puts it at paragraph 38 of his reasons, "[a]ll that was done was to stay the Singapore proceedings pending the outcome of the arbitration in Nevis". He further opined that the Singapore court would have been aware of the Nevis court's supervisory jurisdiction over the arbitration and that "the court's desire to honour arbitration agreements are not designed to oust [the court's] jurisdiction over disputes, but rather...to honour contractual arrangements entered into freely by

parties”. He further found that the stay granted in Singapore was in no way intended to take away the jurisdiction of the Nevis court, being the supervisory court, to consider the claims made in the FDC to ensure the integrity of the arbitral process. He also referred to the fact that the respondents sought removal of the arbitrator on the basis of bias and that the Nevis court was seized with the power to do so and that the stay of the Singapore proceedings did not take away the right to seek that specific relief. He concluded that no issue estoppel could arise in such circumstances.

[12] As it relates to the Fraud Claim, the learned judge concluded that although the claim does repeat in some respects the issues of breach of contract, they are to a great extent predicated on different issues. In essence, that the case was one alleging fraud. He found at paragraph 45 of his reasons that “the Fraud case unlike the case in Singapore seeks to rescind the agreement altogether rather than enforce it” on the basis of fraud and that the respondents were relying on the court’s power contained in sections 24(2) and (3) of the 1950 Arbitration Act of the UK which is in force in Saint Kitts and Nevis. He concluded at paragraph 53 of his reasons that the issues raised in the Fraud Claim were not similar to the issues in the Singapore claim, save for the issues relating to breach of contract. Even so, he concluded that those issues “had not been fully litigated given the fact that the proceedings...[had been] stayed”; the parties were not the same; and the issues had not been finally determined in Singapore. Accordingly, he found that there was no issue estoppel or res judicata barring the Nevis Fraud Claim. The learned judge also found for the same reasons that there was no abuse of the court’s process in any way, as asserted by the applicants.

[13] On the procedural issues, the learned judge made plain that form would not be permitted to override substance. He found that the allegation that the FDC was not supported by affidavit was factually incorrect and recounted the steps of the FDC through the case management processes with the applicants filing affidavit evidence in response. He was satisfied that the applicants were well aware of the case they

were called upon to meet. As it relates to the Fraud Claim, he found that the assertion that the claim was unsubstantiated was without merit, having considered that it was unnecessary to duplicate documents earlier exhibited to the affidavit filed in the claim in support of the freezing order. He further opined that a complaint of lack of information could be remedied by a request for information. He accordingly concluded that none of the procedural issues raised warranted striking out the claims.

[14] Finally, on the complaint that no reasonable basis had been shown for bringing the claims, the learned judge concluded that the issues identified for trial by the case management judge were substantive issues relating to the validity of the commencement of the arbitration proceedings; the impartiality of the arbitrator and her removal in the FDC; and substantive allegations of fraud, and misrepresentation in respect of the Fraud Claim. He found the statement of claim to be detailed rather than prolix given the peculiar circumstances of the case. Accordingly, the learned judge held that the test relating to strike out applications had not been met and refused the strike out applications.

[15] The applicants sought to appeal the dismissal of their strike out applications. The leave applications were filed a day out time, on 2nd July 2020. The applicants must be taken to have been aware of this given their explanation of electrical and associated internet problems experienced by them when they sought to file on the last day limited for making the application under the CPR. No applications to extend time were made. A single judge of this Court, on noting that the leave applications were filed out of time dismissed the applications for that reason on 28th July 2020.

[16] The applicants then made the present rolled up applications seeking: to discharge the order of the single judge primarily on the basis that she had wrongly exercised her discretion in dismissing the leave applications; an extension of time to make the leave applications and for leave; and for a stay of proceedings in the Fraud Claim. They contend that the delay in making the applications was not inordinate; that they

had provided a good explanation for the delay and importantly that their appeals had realistic prospects of success.

- [17] It is worth stating that the applications to discharge the single judge's order has itself been made out of time with no extension of time being sought. That said, we are of the view that in any event, there is no basis for discharging the single judge's order. As the leave applications were filed out of time and there being no applications to extend time, the learned judge quite rightly dismissed the applications as being not properly before the Court. This did not engage the exercise of a discretion. Rather, it was simply a recognition that there was no leave application properly before the Court.

The Application to Extend Time to Seek Leave to Appeal

- [18] This brings us to a consideration of the application for extension of time. Notwithstanding the sheer volume and multiplicity of documents this matter has unnecessarily generated, the principles guiding the exercise of the discretion are well settled. The Court will have regard to all the circumstances of the case including the length of the delay; whether there is a good explanation for it; the prejudice and whether the proposed appeal has realistic prospects of success. It is the grant of an indulgence to a party who is in default.¹

Length of Delay

- [19] While the delay in making their application may not be said to be inordinate, the applicants were seemingly aware that they were out of time from the very day of filing their leave applications. That period is sufficiently explained by the electrical and internet difficulties experienced by the applicants at that time. What has not been sufficiently explained is why the applicants failed to issue extension applications then and there but rather waited until the leave applications were dismissed for precisely the fact of being untimely, followed by a further period after

¹ See Lindsay F.P. Grant and Anor v Tanzania Tobin Tanzil SKBHCVAP2020/0004 (delivered 6th July 2020, unreported).

what must have been appreciated would have been the consequence of untimeliness in respect of their leave applications. Rather, the applicants seemed content to challenge their dismissal by asserting that the single judge was in error for dismissing them even in the face of never seeking to place material before the single judge on which she could have exercised her discretion in putting matters right by extending time. The fact that the Court has a power to put matters right does not equate to the Court exercising that power in a vacuum.

Prejudice

- [20] It cannot be gainsaid that the respondents now have a judgment in their favour in respect of the Fraud Claim. Furthermore, the Court has been told without demur that the applicants have failed to engage this claim on the merits in the court below. It does not appear that the applicants have taken any steps to set aside the default judgment, a step which would require them to put forward defences to the claim on the merits even while they seek from this Court a stay of the very proceedings in the court below which could only be taken to be asking, in effect, for a stay of execution of the judgment which has already been entered. They have flouted the disclosure and asset tracing orders of the court. In such circumstances, it cannot be said that the respondents will suffer no prejudice.

Prospects of Success

- [21] It is this factor on which detailed arguments on both sides were focused. It is useful to remind ourselves that what was before the learned judge were applications to strike out the claims. He was very much alive to the fact that the power to strike is one of the most powerful weapons in the court's arsenal in managing and dealing with a case justly in the exercise of the overriding objective. The power has been described by the Privy Council in **Real Time Systems Limited v Renraw Investments Limited et al**² as one of the court's nuclear options and thus one to be exercised sparingly and normally as a measure of last resort. The learned judge, from his reasoning, was also alive to the fact that in dealing with an application to

² (2014) 84 WIR 439.

strike out a case, he also had open to him the whole plenitude of case management powers on which to draw rather than acceding to this nuclear option. As the trial judge, he would have been managing the cases and is best placed to assess the general feel of them.

[22] A party who seeks to overturn the exercise of a judge's discretion in such circumstances has a heavy burden to discharge in showing how the exercise of his discretion refusing to strike out falls outside the generous ambit of the discretion reposed in him.³ For the purposes of this exercise, the applicants must show that their proposed appeals have realistic prospects of overturning the discretion exercised by him, and that this Court should in the exercise of its discretion extend time for the purpose of seeking leave.

[23] The grant of leave itself requires that the proposed appeals meet the threshold of showing realistic prospects of success warranting the Court's permission to appeal. The proposed appeals herein do not lie as of right and for good reason. They are from interlocutory decisions made by the court below in ongoing proceedings. Such appeals always have an impact on the flow and progress of the underlying proceedings with the potential for them to become protracted and delayed. The requirement for leave to appeal most interlocutory decisions provides a filter for safeguarding the Court's process and resources by enabling the Court to weed out would-be unmeritorious appeals.

[24] We now turn to the applicants' arguments bearing in mind those observations. The applicants have placed heavy reliance on the 1981 decision of the UK House of Lords (now the UK Supreme Court) of **Bremer Vulkan v South India Shipping Corporation Ltd.**⁴ Counsel for the applicants contend that this case stands for the proposition that the court has no jurisdiction to restrain arbitration proceedings and,

³ See *Nilon Limited and another v Royal Westminster Investments S.A. and others* [2015] 3 All ER 372; *Marinor Enterprises Limited and Anor v First Caribbean International Bank (Barbados) Ltd.* DOMHCVAP2013/0003 (delivered 4th April 2016, unreported).

⁴ [1981] AC 909.

in essence, that the court having done so was in error thus giving rise to a realistic prospect of success on appeal. Counsel also repeated many of the arguments made before the trial judge as to the stay granted in the Singapore proceedings which she says requires the application of the principles of res judicata or issue estoppel barring the claims. She asserts that the FDC could not seek to stay the arbitration proceedings given the arbitration agreement and insists, in effect, that the intent of the stay granted by the Singapore court was for the purpose of the arbitration proceedings being carried out in Nevis with no recourse to the High Court being possible at this stage.

[25] Having reviewed the **Bremer Vulkan** decision, we do not agree that it stands for that broad proposition as advanced by counsel. To the contrary, the court recognised the power to grant injunctions restraining an arbitration while making clear that such a power is to be exercised only in appropriate cases. This case is also of no assistance to the applicants because they are not seeking to appeal against the grant of the injunction. Rather, they seek to rely on it as a basis for striking out the claims altogether as an abuse of process in favour of the arbitration proceedings, notwithstanding that the respondents' main thrust in the proceedings is to impeach the arbitration agreements as well as the arbitral process in respect of its commencement and the impartiality of the arbitrator. We are satisfied that the learned judge was alive to this distinction, and the nature of the proceedings before him based on his careful reasoning.

[26] Having reviewed the reasoning of the learned judge, we have not discerned any basis tending to show that he may have committed some error in principle in his assessment of the evidence and the pleaded cases before him, or that he failed to take into account relevant matters or took into account irrelevant matters or that there is a real prospect that his decision may be plainly wrong in relation to those aspects or his treatment of the procedural issues. We are accordingly not of the view that the proposed appeals from the exercise of his discretion have any realistic prospect of success. It would be pointless to grant an extension of time to allow

appeals with little or no hope of success to be launched in the circumstances. Such a course would not be in keeping with furthering the overriding objective of dealing with cases justly. The extensions of time are accordingly refused. It follows that the applications for leave to appeal fall away and that the application for a stay of proceedings or stay of execution in the Fraud Claim must be dismissed.

Conclusion

- [27] For the reasons given, the applications to discharge the orders of the single judge are dismissed; the applications to extend time for seeking leave to appeal are refused. Accordingly, the applications for leave to appeal fall away and the application for a stay in the Fraud Claim is dismissed.

Costs

- [28] The applicants shall bear the costs of the applications to be assessed by the court below, unless agreed by the parties in 30 days, such costs to be no more than two-thirds of the assessed costs in the court below.

I concur.
Gertel Thom
Justice of Appeal

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

By the Court

Chief Registrar