

THE EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS
VIDEOCONFERENCE

Monday, 28th November 2022

APPLICATION

Case Name:

Multibank FX International Corporation

v

Von der Heydt Invest SA

[BVIHCMAP2022/0032]

(Territory of the Virgin Islands)

Date:

Monday, 28th November 2022

Coram:

The Hon. Mr. Mario Michel, Justice of Appeal

The Hon. Mr. Paul Webster, Justice of Appeal [Ag.]

The Hon. Mr. Gerard St. C. Farara, Justice of Appeal [Ag.]

Appearances:

Applicant:

**Mr. Hodge Malek KC, with him Mr. Hefin Rees KC and
Mr. Oliver Clifton**

Respondent:

Mr. Alexander Cook with him Mr. Guy Oliff-Cooper

Issues:

Application for a stay of the strike out/summary judgment application filed by the respondent on 7th July 2022 pending the delivery of the reserved judgment of the Court of Appeal - Whether stay should be granted - Test for stay - Jurisdiction of Court of Appeal - Whether Court of Appeal can stay an application made in lower court - Whether it is necessary that the Court of Appeal's reserved judgment be delivered before the strike out/summary judgment application be heard in lower court

Type of Order:

Oral Decision

**Result /
Order:**

IT IS HEREBY ORDERED THAT:

1. Von der Heydt Invest SA's strike out/summary judgment application is stayed pending the handing down of the reserved judgments of this Court in the representation appeal and the discharge appeal.
2. Von der Heydt Invest SA shall pay the costs of the Multibank FX International Corporation's stay application to be assessed by a judge of the commercial court, if not agreed within 21 days.

Reason:

The Court considered both the oral submissions and written submissions of counsel for both parties. The Court further noted that the essence of Multibank FX International Corporation's ("MBFX") application for a stay of Von der Heydt Invest SA's ("VDHI") strike out/summary judgment application ("the SO/SJ Application") was that the decisions of the Court of Appeal in the Representation Appeal and the Discharge Appeal would be relevant to and could have a significant impact on any determination as to whether there are real issues to be tried on the merits in the proceedings before the commercial court and it would be inappropriate, unfair and a wasteful use of the Court's resources to proceed with the VDHI SO/SJ Application before this Court delivered its reserved judgments in the Representation Appeal and the Discharge Appeal.

Moreover, the judgment in the Representation Appeal would address the fundamental issue of whether VDHI is a proper representative party appointed by the court in these proceedings. If the Representation Appeal were to be successful and the Representation Order discharged by this Court, this would have a significant impact on the prosecution by VDHI of the VDHI SO/SJ Application on behalf of the Noteholders, and the appointment of a replacement representative on behalf of the Noteholders or the continuation of the proceedings by VDHI on behalf of the three funds (and not the Noteholders). The Court was therefore of the view that these matters should be resolved after the

delivery of the reserved judgment in the Representation Appeal. Further, the Discharge Judgment would deal with contentious issues such as VDHI's standing to bring the claim in the court below (BVIHC(COM)2021/0073). This issue would not be suitable for disposal in a summary procedure and should therefore be resolved before significant steps such as the VDHI SO/SJ Application are heard.

The Court also noted the objections made by counsel for VDHI against the grant of the stay, including (i) that the said application for a stay was made to the wrong court and ought properly to have been made in the court below; (ii) that the Court of Appeal did not have jurisdiction to grant a stay in the particular circumstances of this matter; (iii) that the stay application was an abuse of process as the commercial court had already ruled on the application to vacate the scheduled hearing; and (iv) that the stay application failed on the merits and there was no good reason why the VDHI SO/SJ Application should not be heard before judgment was delivered in the Reserved Judgments.

Having considered these objections, the Court was satisfied that it had the jurisdiction and power to hear and determine the stay application pending the delivery of the reserved judgments in the Representation Appeal and the Discharge Appeal for the following reasons:

1. Section 12 of the Windward and Leeward Islands (Courts) Order in Council, 1959 which was relied on by VDHI for establishing the jurisdiction of the Court of Appeal, provides that –

“...for all purposes of, and incidental to, the hearing and determination of an appeal within its jurisdiction, the Court of Appeal shall have all the powers and authority and jurisdiction vested in the court or authority from which the appeal is brought.”

The Court was satisfied that the issues raised by the stay application were incidental to the Representation Appeal and the Discharge Appeal.

2. The lower court has an inherent jurisdiction and wide powers to grant a stay of proceedings. The powers of the lower court to grant a stay are exercisable by the Court of Appeal by virtue of section 12 (above) and in accordance with Rule 62.20 of the Civil Procedures Rules 2000 which provides that:

“In relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26”.

The powers of the High Court in Part 26 include “the power to stay the whole or any part of any proceedings generally or until a specified date or event.”

3. In all the circumstances deferring the hearing of the VDHI SO/SJ Application until after the Reserved Judgments in the Representation Appeal and the Discharge Appeal are delivered will not cause substantial prejudice to VDHI and the risk of injustice favours the grant of a stay of the VDHI SO/SJ Application pending delivery of the judgments in these appeals.