IN THE COURT OF APPEAL OF BELIZE AD 2022

CIVIL APPLICATION NO 5 OF 2021

FBS MARKETS INC. **Applicant**

v

DORIAN GRYFFYN **Respondent**

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Before:

The Hon Madam Justice Minnet Hafiz-Bertram	-	President (Ag.)
The Hon Madam Justice Marguerite Woodstock-Riley	-	Justice of Appeal
The Hon Mr Justice Peter Foster	-	Justice of Appeal

I Swift for the applicant.
A Arthurs Martin with E Quiros for the respondent.

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28 March 2022 and 20 May 2022

REASONS FOR DECISION

HAFIZ BERTRAM P (Ag)

[1] I have read in draft the reasons given for judgment, by my learned sister Woodstock-Riley JA, for refusing leave to appeal the decision of the trial judge. I agree with those reasons.

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HAFIZ BERTRAM P (Ag.)

WOODSTOCK-RILEY, JA

[2] FBS Markets Inc. ("the Applicant") by Notice of Motion dated 2 December 2021 applied for:

> *(1) An Order pursuant to* ***Section 16*** *of the* ***Court of Appeal Act*** *and* ***Order II Rule 2*** *of the Court of Appeal Rules and/or the inherent jurisdiction of this Honourable Court that the Applicant be granted leave to appeal the decision of Court in* ***Claim No. 42 of 2020 – Dorian Gryffyn v FBS Markets Inc****. made on 7 June 2021 and that proceedings be stayed pending the determination of the appeal; and*
>
> *(2) An Order that the costs of the application be costs in the cause; and*
>
> *(3) Such further or other relief that the court deems just.*

[3] The Grounds of the Application for leave were stated as:

> (1) On 7 June 2021, the Court dismissed FBS Markets Inc's (FBS) Application for Security for Costs.
>
> (2) On 11 November 2021, the learned trial Judge refused FBS' application for leave to appeal and stay of proceedings.
>
> (3) This Honourable Court is empowered pursuant to Section 16 of the Court of Appeal Act and Order II Rule 2 of the Court of Appeal Rules and/or the inherent jurisdiction to grant an order for leave to appeal and stay of proceedings.
>
> (4) There is a prima facie case that an error has been made in the judgment and therefore leave to appeal should be granted.
>
> (5) The learned Judge's decision was informed by a wrong principle.

(6) The learned Judge took into account irrelevant matters so that the ultimate decision is so aberrant that no reasonable judge could have reached it.

(7) Should leave be granted to appeal and these proceedings are not stayed, the appeal will be rendered nugatory.

[4] The Application was supported by an Affidavit of Marissa Jorgensen, Legal Assistant of the Applicant's attorneys, sworn on 2 December 2021 and which recited simply the Trial Judge's decision on dismissing the application for security as:

> "*Decision of this court is that I have conducted such a balancing exercise and that the Defendant's relevant factor as argued ably by Counsel does not outweigh the relevant factor which has been argued for the Claimant. I find that the Claimant would be stifled in his ability to put forward his claim and that that in these particular circumstances outweighs the other relevant factor and therefore that in these circumstances, it would not be just to order security for costs and I therefore decline to exercise the discretion in order to order security for costs*".

The Applicant's contention is that

> "*….the learned Judge erred in law in failing to properly balance the rights of the Claimant against the Defendant in light of the residence of the Claimant and his lack of assets and the learned Judge erred in law in failing to have due regard to the relevant considerations for determining an application for security for costs*".

Further, that without a stay the appeal will be rendered nugatory.

At the hearing of the Application before this Court on 28 March 2022, the Applicant indicated it would not be relying on grounds 5 and 6. The Court having heard the application denied leave to appeal the decision of the trial judge. There was no order as to costs. We promised written reasons and do so now.

Background

[5] By notice of Application dated 5 May 2020, FBS sought security for costs in Claim No, 42 of 2020 – Dorian Gryffyn v FBS Markets Inc. The Application for security for costs was heard on 7 June 2021 and the learned Trial Judge dismissed the application.

[6] By notice of Application dated 28 June 2021, FBS applied for leave to appeal and a stay of proceedings. The said application was refused by the learned Judge on 11 November 2021. FBS then sought from this Court an order for leave to appeal and a stay of proceedings.

[7] The Trial Judge noted both parties agreed on the applicable test for Security for Costs; and the point of departure is how that test is to be applied and in particular, how it is applied to this case in which the Applicant is asking for the Claimant/Respondent, an individual, to pay security for its costs in these courts prior to any further proceedings.

[8] There is also no dispute on the law relating to the grant of leave to appeal. Both counsel acknowledged several cases guided by the principles set out by the Belizean Court of Appeal in ***James Wang v. Atlantic Insurance Co Ltd*** (Action No. 114 of 1988) (Wang), and which the Trial Judge noted as "the Wang Test" (as it is sometimes referred to in Belize)" which sets out the circumstances in which a Court will grant leave to appeal to an Applicant,

(a) Where they see a prima facie case that an error has been made;

(b) Where the question is one of general principle, decided for the first time; and

(c) Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.

[9] The reliance on ***Wang*** was affirmed by the Court of Appeal in ***Belize Offshore Centre et al v Worldwide Property Management Limited et al*** (Civil Appeal No 28 of 2010), adopted in ***Worldwide Property Management Limited v Belize Offshore Centre Limited et al,*** Claim No. 354 of 2009. Considerations for leave to appeal were reviewed in ***Karina Enterprises Ltd. v China Tobacco Zhejiang Industrial Co Ltd*** including the importance of the appeal having a realistic prospect of success, and the principles from those decisions enunciated in ***Kevin Millien v BT Trading Ltd****,* Claim No. 325 of 2014.

[10] In particular, the additional considerations that arise in appeals from interlocutory orders were noted in ***Belize Telemedia Limited v The Attorney General et al*** (Civil Appeal No. 23 of 2008):

> "*(a) the point may not be of sufficient significance to justify the costs of an appeal;*
>
> *(b) the procedural consequences of an appeal (e.g. loss of trial date) may outweigh the significance of the interlocutory issue;*
>
> *(c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused*."

[11] The Applicant acknowledges that the Trial Judge's decision was an exercise of the Court's discretion. The Applicant therefore accepts the is onus on it to satisfy this Court that the learned Trial Judge erred in the exercise of her discretion and that circumstances exists that would persuade a Court of Appeal to overturn that exercise of discretion.

[12] There is extensive authority in this regard. The Applicant cited ***Dufour v Helenair Corporation Ltd***. where the court summarized the circumstances as follows:

> "*We are thus here concerned with an appeal against a judgement given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors or considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial Judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."*

[13] The Respondent submitted similarly, that in ***Enzo Addari v Edy Gay Addari*** (Civil Appeal No. 21 of 2005), Rawlins JA stated at para. 14 that:

> "*This court will only entertain an appeal from a matter, which is within the plentitude of the discretion of a Judge, in certain circumstances. The applicant must satisfy this court that in the exercise of the discretion, the Judge made a mistake of law, disregarded principle, misapprehended the facts, took into account irrelevant material, ignored relevant material or failed to exercise discretion. The applicant may also convince this court that the conclusion which the Judge reached, was "outside the generous ambit within which reasonable disagreement is possible" (See Quillen and Others v Harney, Westwood & Riegels (No.2) (1999) 58 WIR 147, at page 150j-151a.)*."

[14] The Trial Judge reviewed ***Fort Street Tourism Village v Suzanne Kilic****,* Civil Appeal No 26 of 2016 relied upon by the Applicant, a Belize Court of Appeal decision as authority on the test to be applied by the Belize courts when considering an application for security for costs. The trial Judge identified that it was a balancing exercise and she was aware of the factors to consider. The Trial Judge took note, that the Claimant is not ordinarily resident within the jurisdiction; that one of the circumstances is whether there is a real risk that the Defendant may not be able to enforce a costs order against the Claimant should they not succeed; that the Court is also to consider other relevant factors if they may be found; that the other relevant factor in this case is the poverty claimed by the Claimant and the effect that it would have on stifling his claim and denying the opportunity to pursue such a claim; the evidence of the Claimant of his impecuniosity filed with his affidavit supporting documents and giving evidence in that affidavit as to his assets, his liabilities and his condition; that there is no evidence to controvert that evidence as to the same.

[15] The trial Judge found that on conducting a balancing exercise the factor argued by the Defendant did not outweigh that argued for the Claimant. That it would not be just to order security for costs in these circumstances.

[16] The Applicant's indicated draft Grounds of Appeal are that:

a. The learned trial Judge erred in law and/or misdirected herself in finding that an order for security for costs would stifle the claim.

b. The learned trial Judge erred in law and/or misdirected herself in failing to consider whether the Claimant's claim was genuine or had any "*prospect of success*".

c. The learned Judge's decision was informed by a wrong principle in law.

d. The learned Judge erred in law and/or misdirected [herself] in failing to consider the cause of the Claimant's impecuniosity.

e. The learned Judge erred in failing to properly balance the rights of the Claimant against that of the Defendant in light of the residence of the Claimant and his lack of assets in Belize.

f. The learned Judge took into account irrelevant matters so that the ultimate decision is so aberrant that no reasonable judge could have reached it.

g. The decision is against the weight of the evidence.

[17] The ultimate argument of the Applicant was that there was no evidence before the court regarding whether the Claimant was unable to obtain the funds for security from third parties and as such there was insufficient evidence for the court to find that an order for security would stifle the claim. That the burden rested on the Claimant whether a company or individual to provide proof that his claim would be stifled if an order for security for costs is granted. That the Claimant while deposing to his own financial difficulties had an evidential burden to prove that he would also be unable to obtain the costs from Third Parties.

[18] The Applicant relied on ***Brimko Holdings Ltd v Eastman Kodak Company***, [2004] EWHC 1343 (Ch), ***Keary Developments Ltd v Tarmac Construction Ltd***, [1995] 3 All ER 534, ***Ackerman v Ackerman*** [2011] EWHC 2183 (Ch). ***Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd*** ANUHCVAP2016/0004 (Noting the trial Judge did not have the benefit of those authorities before her). Counsel cited from **Keary**,

> "*If the Claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of a corporate claimant, shareholder or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether security should*

be regarded as being available from third parties, the burden still rests on the claimant.''

[19] It is important to keep in focus the provisions for a security for costs application that are set out under Part 24 of the Civil Procedure Rules (CPR), Rule 24.3.

> "*The Court may make an order for security for costs under Rule 24.2 against a Claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order…".*

[20] As Counsel for the Claimant points out the cases cited by the Applicant that relate to security for costs from a Company and under Company legislation, in considering the company's financial means, the consideration can include whether it can raise the amount needed from its directors, shareholders or other backers as interested persons.

[21] The circumstances in which consideration would be given to availability of funds from Third Parties is not open ended or at large. As a review of the cases cited by the Applicant bear out, it is still a consideration within the discretion of the Judge "*whether it can reasonably be expected to provide it from third parties*". The issue still remains for the evaluation of the Judge in the overarching consideration of *'all the circumstances of the case'* and the determination of what is *'just'*.

[22] The trial Judge specifically alluded to the Respondent's evidence and supporting documents, and that there was no evidence to controvert them .There has been nothing presented from which this Court can conclude that the evidence she reviewed could not support her determination.

[23] There has been no prima facie error identified and other aspects raised in the draft grounds of Appeal have not been argued or prospects of success demonstrated. In fact the Applicant withdrew the grounds within its motion related to the assertion that the trial Judge was informed by a wrong principle and took into account irrelevant matters so that the ultimate decision is so aberrant that no reasonable judge could have reached it. Grounds which were also referred to in its draft grounds of appeal.

[24] While the addition to jurisprudence in the Caribbean is welcome, it is not agreed that there is a lack of authority on the issue of security for costs that would justify the need for further argument nor was that argued by the Applicant. Further the Applicant has conceded it has not argued that the appeal raises an issue to be determined for the first time.

[25] Ultimately the submissions of the Applicant do not establish a prima facie error by the Trial Judge and that she exercised her discretion in error. In the circumstances there was no basis to overturn the Trial Judge's exercise of discretion.

[26] It was for those reasons that the Court refused leave to appeal the decision of the trial judge. There was no order as to costs.

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WOODSTOCK-RILEY, JA

FOSTER, JA

[27] I likewise have had the opportunity to read the draft of my learned sister Justice of Appeal Woodstock-Riley and I concur with the reasons given there for refusing the Application for leave to appeal the decision of the trial judge and for also ordering that there be no order as to costs.

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FOSTER, JA