

In the Commonwealth Of The Bahamas

In The Supreme Court

Commercial Division

Claim No. 2020/COM/adm/00016

B E T W E E N

MS AMLIN CORPORATE MEMBER LIMITED

(suing on behalf of itself and all other underwriters subscribing to policy of insurance No.B0621MMILYFY16CVA, including underwriters at Lloyds of London)

Claimant

AND

BUCKEYE BAHAMAS HUB LIMITED

Defendant

**RULING RE: CLAIMANT'S APPLICATION FOR
LEAVE TO APPEAL
RULING OF 04 DECEMBER
2023**

Before: Her Ladyship The Honourable Madam Senior Justice Deborah Fraser

Appearances: Mr. Terry North, Mr. Richard Horton and Mr. Darzhon Rolle for the Claimants
Mr. Keith Major Jr. and Ms. Denise Newton for the Defendant

Date: 05 April 2024

Leave to Appeal – Ruling on Amendment of Pleadings - Realistic Prospect of Success of Appeal – Clarification of Law – Public Interest – Supreme Court Civil Procedure Rules, 2022

Introduction

1. This application for Leave to Appeal arises from a ruling of this Court made on 04 December 2023 granting the Claimant leave to amend its Statement of Case ("**Ruling**").
2. The Court granted, in part, the relief sought by the Claimant in its application for leave to amend its Statement of Case. Paragraph 79 of the Ruling reads as follows:

"79. My Order shall read as follows:

(a) The Claimant is granted leave to amend its Statement of Case as outlined in its draft Statement of Case attached to the Notice of Application filed 17 July 2023 – save and except, any amendments relating to the design, construction and/or operation of the oil tankers – such amendments are disallowed. The Claimant shall file and serve its amended Statement of Case within twenty-one (21) days from the date of this judgment.

(b)The Defendant is granted leave to file and serve any amended Defence within twenty-eight (28) days from the full 21 days from the date of this judgment.

(c)The Claimant is granted leave to file and serve a Reply to the amended Defence within fourteen (14) days from the date of service of the Defendant's amended Defence.

(d)The Claimant shall pay the Defendant's costs for any amendments to its Defence, to be assessed by the Registrar if not agreed.

(e)The Claimant shall pay the Defendant's costs for this application, to be assessed by the Registrar if not agreed."

3. Subsequently, the Claimant filed an application on 14 December 2023, requesting leave to appeal the Ruling on the basis that, *inter alia*, the Court: (i) misdirected itself by not appreciating that adding the words

“design and/or construct” would merely be adding particulars of the same existing claims; (ii) misdirected itself by not appreciating the words *“design and/or construct”* arose from the same or substantially the same facts as had already been pleaded; (iii) misdirected itself by not finding that *“operation”* is a facet of “maintenance” and that both words are merely particulars of the same existing claim; (iv) the word *“operate”*, even if a new claim, arose from the same facts or substantially the same facts as initially pleaded; (v) did not attach sufficient weight to its finding at page 62 of the Ruling where the Court states: “may not have come to the knowledge of the Claimant’s experts until further discovery occurred...”; (vi) attached too much weight to the Defendant’s assertion that it would be prejudiced if the amendments were allowed, with no evidence to prove any prejudice; (vii) did not attach sufficient weight to her statement at paragraph 69 of the Ruling which provides: *“it is unclear why the Defendant could not foresee an amendment application forthcoming once further discovery - especially because this matter is highly technical and will require expert testimony to address the issues,”*; (viii) misdirected itself in failing to find the existence of special circumstances when deciding who was to pay the costs of the application following the Court’s comments at paragraph 69 of the Ruling.

Issue

4. The Court will have to determine whether or not leave to appeal ought to be granted in the instant case.

Relevant Law

5. The parties agree with the relevant law, which may be summarized as follows:

Leave to Appeal

6. Section 11(f)(ii) of the Court of Appeal Act, 1965 [CH.52] (“CAA”) (**See at Tab 1**) provides as follows:

" 11. No appeal shall lie —

....

(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court ...

7. In **Lucayan Towers South Condominium Association v H. Godfrey Waugh and another; Lucayan Towers South Condominium Association v Gregg Waugh and another; Lucayan Towers South Condominium Association v Julie Glover and another [2022] 1 BHS J. No. 128_(See at Tab 2)**, Klein, J provides the following discourse on the subject:

“Jurisdiction and Principles

4 Appeals to the Court of Appeal from interlocutory rulings or orders can only be done with the leave of the Supreme Court or, failing that, the leave of the Court of Appeal (s. 11(f) of the Court of Appeal Act). In this regard, Rule 27(5) of the Court of Appeal Rules provides that:

“Wherever under the provisions of this Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below.”

5 There is no dispute that a summary judgment ruling is an interlocutory order. As the Privy Council had occasion to observe in Junkanoo Estates Ltd. v. UBS Bahamas (In Voluntary Liquidation) [2017] UKPC 8 [at para. 5]:

“It is common ground that for this purpose [leave to appeal] an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in White v Brunton [1984] QB 570 and has been applied for many years in the Bahamas.”

Principles

6 The general approach of the court to the exercise of its power to grant leave to appeal are well known. Broadly stated, leave to appeal will only be given where: (i) the grounds have a real prospect of success, or (ii) there is a compelling reason that an issue raised should be examined in the public interest.

7 Many expositions of the principles start with the guidance given by Lord Woolf MR in Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840, where he stated:

(1) “The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. This test is not meant to be very different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word “realistic” makes it clear that a fanciful or an unrealistic argument is not sufficient.

(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying (emphasis added)”...

8. The test for leave to appeal was essentially adopted from **Practice Note (Court of Appeal: Procedure) [1991] 1 All ER 186, Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840** and succinctly formulated in the Court of Appeal decision of **Keod Smith v Coalition to Protect Clifton Bay SCCivApp. No. 20 of 2017** at paragraph [23] as being *“whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying”*.

Analysis and Discussion

9. The Third Affidavit of Shenique Hanna merely provides the draft Notice of Appeal which the Claimant would like to file (and summarized above at paragraph 3 of this Ruling).
10. In an application for leave to appeal, it is the Court’s role to determine whether the appeal is hopeless or not. Based on the material contained in the draft Notice of Appeal and the technicality of this case, the appeal ought to be allowed to permit the appellate Court to further clarify the position. I acknowledge that the introduction of the Supreme Court Civil Procedure Rules, 2022 (“CPR”) has ushered in a new era, which should be fully ventilated and considered to determine a firm position the Court should take when dealing with such applications under the CPR.
11. The application of the relevant principles on leave to amend ought to be examined by the appellate Court to clarify the position in law under the CPR.

Conclusion

12. Based on the law and the present circumstances, I grant the leave to appeal.

13. There is discussion on stay of execution by the Defendant. This is a matter that the Claimant ought to have addressed in its submissions. In any event, the Court can, of its own motion, stay the execution of its Ruling by virtue of Rule 26.1(2)(q) of the CPR. It is only corollary to do so, given the fact that I granted leave to appeal. In the premises, I stay the execution of my Ruling pending the outcome of the appeal.
14. Costs shall be in the cause.

Senior Justice Deborah Fraser

Dated this 05 day of April 2024