IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/01333

BETWEEN

(1) WILTON LIVINGSTON SAUNDERS

(2) NIVRON LIMITED

Claimants

AND

(1) SUNSHINE FINANCE LIMITED

(2) SHARON WILSON & CO. (A FIRM)

Defendants

Before: The Honourable Madam Justice Simone I. Fitzcharles

Appearances: Mr. Alton McKenzie appearing for the First Claimant

No appearance for the Second Claimant

Mrs. Gail Lockhart-Charles with Mrs. Syann Thompson-Wells appearing for the Defendants

Hearing Date: 22 August 2024

RULING

FITZCHARLES, J.

Introduction

[1.] This is a ruling on an application for leave to appeal and a stay pending appeal emanating from an interlocutory decision delivered on 12 July 2024 wherein the Court dismissed three applications. The applications dismissed were a Summary Judgment Application, Strike Out Application, and Leave to Re-Amend Statement of Case Application brought by Wilton Livingston Saunders ("the First Claimant") and Nivron Limited ("the Second Claimant") (collectively, "the Claimants") in relation to a claim commenced by them against Sunshine Finance Limited ("the First Defendant") and Sharon Wilson & Co. ("the Second Defendant") (collectively, "the Defendants").

[2.] By way of a Notice of Application and an Amended Notice of Application filed on 31 July 2024 and 8 August 2024, respectively, the Claimants sought the following reliefs –

i. leave to appeal the ruling delivered by Hon. Justice Simone Fitzcharles on 12 July 2024;
ii. leave for an extension of time to appeal the learned judge's ruling and/or leave to file out of time; and
iii. an Order that the said Orders given on 12 July 2024 be stayed.

[3.] The grounds on which the Claimants sought the above-mentioned reliefs were extensively outlined in the Notice of Application and Amended Notice of Application, respectively. Although the grounds are too voluminous to replicate in this ruling, the Court has thoroughly considered them in conclusively determining the present application.

[4.] The Notice of Application and Amended Notice of Application were supported by the following evidence –

i. the Affidavit of Wilton Livingston Saunders filed on 31 July 2024.

[5.] The Court, through an oral ruling, dismissed the present application and denied the Claimants' leave to appeal and a stay pending appeal. The Court promised to provide its written reasons for the refusal at a later time. This ruling embodies the Court's written reasons.

Factual Background

[6.] The factual background and chronological history touching and concerning the claim and resulting in the Court's written interlocutory decision delivered on 12 July 2024, the subject of the present application, was adeptly summarized and outlined in the interlocutory decision and need not to be replicated in this ruling.

Issues

[7.] The issues that arise for the Court's determination pertaining to the present application are as follows –

i. Whether the Claimants ought to be granted leave to appeal the interlocutory decision delivered on 12 July 2024; and

ii. Whether the Claimants ought to be granted a stay of the Orders granted in the interlocutory decision delivered on 12 July 2024 pending appeal.

The Claimants' Case

[8.] The Claimants have proffered no skeleton arguments or authorities or draft Notice of Appeal to assist the Court in determining whether they have met, at minimum, the basic

threshold, to warrant an order of the Court granting them leave to appeal and staying the proceedings pending appeal of the interlocutory decision delivered on 12 July 2024.

[9.] Apart from the Claimants proffering no skeleton arguments and/or bundles of authorities, Counsel nor a representative for the Second Claimant appeared for the hearing of the present application and have not provided the Court with any advance notice of their non-appearance and/or the reasoning for their non-appearance. To date, Counsel nor a representative for the Second Claimant have offered any reasoning for their unexplained absence. However, the Court notes that Mr McKenzie, then Counsel for the First Claimant seemed to have filed the application for both Claimants.

The Defendants' Case

[10.] The Defendants, through the oral submissions of Mrs. Gail Lockhart Charles, KC, made several preliminary objections to the present application. Apart from contending that the present application was unmeritorious and bound to fail, Mrs. Lockhart Charles, KC, contended that the present application was not properly before the Court and is incurably defective. The present application outlined bare grounds of appeal and did not contain an attached draft Notice of Appeal to better assist the Court in determining whether the Claimants, at minimum, have met the basic threshold for the Court to grant them leave to appeal and a stay pending appeal emanating from the interlocutory decision delivered on 12 July 2024. Mrs Lockhart-Charles KC indicated that it is insufficient for a party to merely state that a judge has erred without providing reasons why the party thinks such actions are errors and ones which would justify a ruling being set aside. Thus, the present application ought to be dismissed.

Law and Discussion

Issue One – Leave to Appeal

[11.] Any party aggrieved by an interlocutory decision rendered by a Judge of the Supreme Court and wishing to appeal the interlocutory decision to the Court of Appeal must first obtain leave from the Judge of the Supreme Court who rendered the interlocutory decision, if he or she is available, provided such interlocutory decision does not fall under one of the exceptions where leave is not required.

[12.] It is undisputed that the decision rendered by the Court on 12 July 2024 emanated from interlocutory applications and none of the leave exceptions apply. Therefore, the provisions of **section 11 of the Court of Appeal Act, Chapter 52** are instructive, which provide as follows –

> **"Restriction on civil appeals.**
>
> 11. **No appeal shall lie** –
>
> ...

(f) **without 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 except** –

(i) where the liberty of the subject or the custody of infants is in question;
(ii) where an injunction or the appointment of a receiver is granted or refused;
(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;
(iv) in the case of an order in a special case stated under the Ch. 181. Arbitration Act;
(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Ch. 308. Companies Act in respect of misfeasance or otherwise; or
(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decisions."

[Emphasis added]

[13.] **Rule 11(1) of the Court of Appeal Rules, Chapter 52** stipulates the timeframe within which the aggrieved party must lodge his or her appeal. It provides as follows –

"Time within which to appeal.

11. (1) **Every notice of appeal shall be filed and a copy thereof served by the appellant upon all parties to the proceedings in the court below who are directly affected by the appeal –**

(a) **in the case of an appeal from an interlocutory order, fourteen days**;
(b) in any other case, six weeks,

calculated from the date on which the judgment or order of the court below was pronounced or made."

[Emphasis added]

[14.] The Court is only armed with the jurisdiction to grant or refuse leave to appeal. The Court is not armed with the jurisdiction to extend the time to lodge an appeal. If the aggrieved party, by his or her own inaction, failed to lodge his or her appeal within the stipulated timeframe, he or she must seek leave from the Court of Appeal to extend the time and in the case where leave to appeal was refused by the Court, leave to appeal and extend the time.

[15.] The Judicial Committee of the Privy Council in **Junkanoo Estate Ltd and others (Appellants) v UBS Bahamas Ltd (In Voluntary Liquidation) (Respondent) (Bahamas) [2017] UKPC 8**, a decision involving the appeal of a summary judgment application refusal by Evans J (as he then was), clarified the leave to appeal mechanism and/or procedure in The Bahamas. The Board at paragraph 8 pronounced as follows –

> "8. If so, this was an error. The proper course would have been to apply first to Evans J, on notice to the plaintiff bank, for leave to appeal. If that application for leave had been made in the ordinary way by notice of motion, the registry would have been bound to receive it and list it for hearing before the judge. If leave had been given, the next step would have been to apply to the Court of Appeal for an extension of time for the appeal. If leave to appeal had been refused, application could then have been made to the Court of Appeal for leave to appeal and an extension of time. An application for a stay of execution could have been made at the same time as these applications."

[16.] The test that the aggrieved party must satisfy before the Court grants him or her leave to appeal is whether he or she possesses a realistic prospect of succeeding against the interlocutory decision on appeal. A fanciful prospect or unrealistic argument is not sufficient. The Court may also grant leave to appeal an interlocutory decision even if it is not satisfied that the aggrieved party possesses a realistic prospect of succeeding on appeal provided it is satisfied that the interlocutory decision seeking to be appealed raises an issue of public importance or involves an issue that requires clarification in the public interest. The leave test was applied by the Supreme Court of The Bahamas in **Bethell v Barnett and Others [2011] 1 BHS J No. 64**. In that decision, Isaacs Sr. J (as he then was) at paragraph 10, cited with approval, the dicta of Sir Thomas Bingham MR in **Index Trust Ltd. v Morgan Trust Co. and Others [1995] EWJ No. 4268** where that court stated –

> "The leave of leave is imposed as a filter to obviate the expenditure of money and time on appeals which have no hope of success. The decision whether or not to grant leave to appeal is usually made in the first instance by a single Lord Justice on paper. He will refuse leave if he is of the clear opinion that the proposed appeal is not arguable. He will however be anxious not to stifle appeals which might succeed even if he is skeptical about the appeal's chances of success. The Lord Justice will therefore, inevitably and properly, give the prospective appellant the benefit of the doubt. That is why the figures show that a large majority of appeals fail even where there is a requirement of leave."

[17.] In **Sumner Point Properties Ltd. v David E. Cummings [2015] 3 BHS J No. 35**, Bain J identified the proper form in which an aggrieved party is to make an application for leave to appeal an interlocutory decision. This includes the aggrieved party attaching a Draft Notice to Appeal to his or her supporting affidavit which sets out the grounds of the prospective appeal. The Court at paragraph 23 pronounced as follows –

> "23. **The Court holds that the application for leave was not made in the proper form as the defendant failed to attach a Draft Notice of Appeal setting out the grounds of the Appeal as set out in Rule 10 of the Court of Appeal Rules**. Even though Counsel for the defendant submitted the grounds of appeal may have been contained in the Affidavit of Edward Patrick Toothe this was not sufficient. It is not the function of the Court to read through the Affidavit of Edward Patrick Toothe to discern what the grounds of appeal are. The Court, in an application for leave to appeal has to determine if the appellant has an arguable ground of appeal. The Court

is only able to make such a determination if the grounds of appeal are clearly set out."

[Emphasis added]

[18.] Further, this Court considers that the Court of Appeal, in **Jack Donovan Johnson v Sealand Investments Limited** SCCivApp No 161 of 2018 confirmed the following:

> **Grounds of Appeal must comply with Rule 10(2) of the Court of Appeal Rules and set out sufficient particulars to make it clear what is being challenged. General statements that the Judge erred in law and/or in fact in relying on evidence or facts not admitted into evidence, without stating the specific evidence or facts which is said to have been relied on by the Judge, are inadequate.**

[19.] In the present application, the Claimants have not exhibited to the Affidavit of Wilton Livingston Saunders a Draft Notice of Appeal. Instead, the Claimants have set out their proposed grounds of appeal in the Notice of Application and Amended Notice of Application filed herein, respectively. Therefore, the present application was not made in the proper form, which drew the criticism of the Defendants that the Claimants made only generic complaints and gave no proper notice of the grounds of appeal or reasons why the appeal ought to be allowed.

[20.] Furthermore, the Affidavit of Wilton Livingston Saunders contains offending material and is incapable of supporting the present application. The Affidavit is laden with legal submissions and authorities which were considered and rejected by the Court through the interlocutory decision delivered on 12 July 2024.

[21.] In any event, the Court, having considered the proposed grounds of appeal, is satisfied that they possess no realistic prospect of succeeding on appeal. The Court is further satisfied that the proposed grounds of appeal raise no issues of public importance or involve issues that require clarification in the public interest.

[22.] The present application, in the Court's view, is a hopeless last-ditch effort by the Claimants to further prolong the prosecution of their claim that was commenced some nine (9) years ago. The proposed grounds of appeal are incapable of surviving an appeal. The Court is mandated by **Rule 1.2 of the Supreme Court Civil Procedure Rules, 2022 (as amended) ("the CPR Rules")** to give effect to the overriding objective of the CPR Rules which is to enable the Court to deal with cases justly and at a proportionate cost. Parties are obligated by **Rule 1.3 of the CPR Rules** to help the Court in furthering the overriding objective. At this time, the Court wishes to reinforce its pronouncement at paragraph 92 of the interlocutory decision, which states as follows —

> **"92. … Litigation must have an end. Parties should not be dragged into fathomless litigation, being made to suffer the unduly onerous financial burden of defending themselves in such proceedings. In the present claim, some nine (9) years have lapsed. Enough of the Court's valuable judicial time and resources have been expended as a result of the mismanagement of this claim…"**

[Emphasis added]

[23.] The Claimants' grievance relative to the Court's decision on the Summary Judgment Application is meritless. The Claimants seek to invite the Court to make findings of fact and law in the claim based on documents attached to the two witness statements filed by the Defendants. It must be noted that the witness statements and/or documents attached thereto are not yet evidence in the claim for the Court's consideration. It is only when these witness statements are tendered and entered into evidence at trial and the witnesses' testimonies are tested through the process of cross-examination that the Court can consider the witness statements and the documents attached thereto. The Court has already pronounced that the allegations put forth by the Claimants against the Defendants must be tested through the trial process. It is only through the benefit of the refining fire of the trial process that the claim can be genuinely disposed of. Even the authorities relied on by the Claimants in the Summary Judgment Application revealed such a conclusion. It was only through the trial process that the decisions emanating from those authorities were determined. The defence filed by the Defendants presents more than an arguable or fanciful defence. The Court has already determined that the defence is sufficiently vigorous to withstand a summary judgment application. The law on summary judgment is well-established and has been well-traversed by the Courts in The Bahamas.

[24.] The Claimants' grievance relative to the Court's decision on the Strike Out Application is likewise meritless. There again, the Claimants seek to invite the Court to make findings of fact and law in the claim based on documents attached to the two witness statements filed by the Defendants. Apart from the witness statements not yet being evidence in the claim, the documents requested by the Claimants and purportedly undisclosed by the Defendants are specific. The Case Management Order made on 21 February 202, which includes an order for disclosure, resembles that of an order for standard disclosure and not specific disclosure. There has been no order for specific disclosure rendered in the present claim nor has there been application for specific disclosure made. The Court found that there was no basis to make an order for specific disclosure on its own motion. The requested documents were speculative and the exercise may be perceived as the Claimants' fishing expedition. Moreover, the requested documents, if they do exist, purport to be needed to support the Claimants' case as outlined in their Application for leave to Re-amend their Statement of Case, which was rejected by the Court in the interlocutory decision. The Court's decision on the Application for leave to Re-amend the Claimants' Statement of Case, quite correctly, is not the subject of the present application.

[25.] The disclosure put forth by the Defendants thus far is adequate for the Claimants to prosecute their claim. In any event, strike out was not the appropriate remedy for a purported failure to comply with an order for standard disclosure. Moreover, the Court is still empowered to prevent any party to the claim, whether it be the Claimants and/or Defendants, from relying on any document not previously disclosed. The witness statements and/or the documents attached thereto, if they are in the Claimants' favour as purported, will undoubtedly be available for the Court's consideration if and/or when they are tendered and admitted into evidence at trial.

[26.] The Court, having regard to the foregoing reasons and relevant law, is satisfied that the Claimants ought not to be granted leave to appeal the interlocutory decision delivered on 12 July 2024. The present application having been made outside of the fourteen-day appeal window, the Court is further satisfied that it is not empowered with the jurisdiction to grant the Claimants an extension of time to appeal the interlocutory decision delivered on 12 July 2024.

Issue Two – Stay Pending Appeal

[27.] Having not granted the Claimants leave to appeal the interlocutory decision delivered on 12 July 2024, the Court is satisfied that the issue of whether the Claimants ought to be granted a stay of the Orders granted in the interlocutory decision delivered on 12 July 2024 pending appeal falls away. In particular, the Claimants have not attempted in argument to persuade the Court that their appeal will be rendered nugatory or that there is a risk of injustice to them if a stay is not granted. Further, the Court considers that the Claimants are not entitled to an appeal as of right and have not shown an arguable appeal. (Well-known principles governing the grant of a stay of proceedings pending appeal are set out in paragraph 14 of **Bahamas Real Estate Association v George Smith** SCCivApp No. 109 of 2015). The application for a stay is therefore refused.

Conclusion

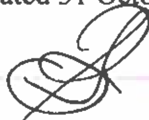
[28.] The Court, having regard to its Ruling and the reasons set out above, makes the following Orders –

i. this application is dismissed with costs of and occasioned by the application awarded to the Defendants to be assessed if not agreed sooner by the parties;

ii. if the costs are not agreed upon by the parties, Counsel for each side shall proffer written submissions on costs within thirty (30) days from the date of this Ruling for the Court's determination; and

iii. the trial of this claim and/or any issue relative thereto is to proceed forthwith in accordance with directions given at the pre-trial review hearing held on 19 September 2024.

Dated 31 October 2024



Simone I. Fitzcharles
Justice