COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Consolidated Proceedings 2020/APP/STS/00013, 2020/APP/STS/00018
IN THE MATTER OF THE WINTER TRUST, THE SUMMER TRUST AND THE SPRING TRUST
AND
IN THE MATTER OF AN ARBITRATION
AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 90 AND 91 OF THE ARBITRATION ACT 2009
BETWEEN
DELANSON SERVICES LIMITED

Applicant/Appellant

—and—

(1) MATTEO VOLPI
(2) GABRIELE VOLPI
(3) SIMONE VOLPI

Respondents

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	John Martin KC, John Wilson KC, Michelle Deveaux for Matteo Volpi Elspeth Talbot Rice KC, Wynsome Carey, Richard Horton for Gabrielle Volpi Brian Simms KC, Marco Turnquest, Wilfred Ferguson for Delanson Services Limited. Lisa Bostwick-Dean for Simone Volpi
Hearing Dates:	16, 17 July 2024

KLEIN J.

Civil Appeal—Application for leave to Appeal—Costs Orders—Allegations of maintenance and champerty surfacing following Court's ruling awarding costs—Grounds for appeal—New evidence of maintenance and champerty constituting sole grounds for appeal—Extension of time in which to appeal—Supreme Court's jurisdiction to extend time—Rule 11 of Court of Appeal Rules—Permission to rely on further evidence—Ladd v Marshall principles—Stay of Execution

INTRODUCTION

1. This is my judgment following a hearing of applications made in materially similar terms by Gabriele Volpi and Delanson Services Limited ("applicants") seeking in the main leave to appeal this Court's ruling on costs consequential to the dismissal of their failed applications for leave to appeal two arbitration awards relating to a trust dispute.

2. These applications are the latest skirmishes in a lengthy legal saga arising out of those arbitration awards, which has played out in multiple applications before this Court and the Court of Appeal. This is the Court's fourth judgment arising from these proceedings.

3. The applicants, by Notices of Motion filed respectively on 6 June 2024 by Gabriele and on 12 June 2024 by Delanson, seek the following reliefs:

(i) leave to appeal the orders of this Court awarding the costs of the consolidated arbitration appeals to Matteo Volpi, as well as to order an interim payment on account of Matteo's costs of $800,000 ("the costs orders");
(ii) an extension of time in which to seek leave to appeal, or alternatively to seek leave from the Court of Appeal;
(iii) permission to rely on further evidence on appeal pursuant to the principle in **Ladd v Marshall** [1954] 1 WLR 1489; and
(iv) an order staying the costs orders until the determination of this application and, in the event leave is granted, until the determination of the appeal.

4. It should be pointed out at the outset that the applications do not attack any of the substantive findings in the consequential judgment, pronounced on 6 February 2024 and for which written reasons were provided on 22 May 2024.

5. Rather, the entire basis for the application for leave to appeal is that it surfaced in an article published in an Italian newspaper after the delivery of the Court's ruling that the first respondent (Matteo Volpi) was being funded by a commercial funder, which the applicants allege amounts to maintenance and champerty. Thus, they seek to have the costs orders made by this Court arrested and set aside on the basis that to give effect to them would involve the Court giving recognition and support to an illegal agreement, as maintenance and champerty are still unlawful at common law in this jurisdiction.

6. It appears, from Matteo's written submissions, that Gabriele's attorneys raised similar issues before the Court of Appeal during hearings on 3 and 4 July 2024 in their applications for leave to appeal to the Privy Council the Court of Appeal's decision dismissing the appeal from my decision refusing the applications for leave to appeal the arbitration awards, for Matteo's costs of that decision, and in partial justification of the request for a stay of the arbitration pending appeal to the Privy Council. In the alternative, the applicants sought before the Court of Appeal an adjournment of Matteo's application for the costs of his appeal pending this Court's determination of the present applications (which they foreshadowed would be made). I have been told that the Court of Appeal has reserved judgment on the applications.

7. Broadly stated, the two main intended grounds of appeal are:

(i) that the costs orders were wrongly made in circumstances (although unbeknownst to the Court or the applicants at the time) where the receiving party had entered into a commercial funding arrangement savouring of champerty and/or constituting maintenance, so as to be unlawful and contrary to public policy, and hence ought not to be enforced by the Court; and

(ii) that the arrangement is in breach of the indemnity principle, as no legal fees have been paid over by Matteo (as opposed to the commercial funder) in respect of which he is entitled to be indemnified.

8. Delanson's Ground 1 succinctly captures the gravamen of the appeal, and I set it out below:

> "The Learned Judge erred in law and/or erred in principle and/or erred in the exercise of his discretion in making the Costs Orders as the First Respondent's [Matteo's] costs were funded pursuant to an arrangement which is champertous, further or alternatively constitutes maintenance, further or alternatively savours of champerty and/or maintenance. The effect of the Cost Orders is to recognize, permit, support, aid, further, and/or condone the execution, use and operation of an arrangement which is unlawful and/or contrary to the public policy of the Bahamas and/or contrary to the public interest of the Bahamas. Had the Learned Judge known of the arrangement prior to making the Costs Orders, he would not have made them, alternatively he would have erred in law and/or erred in principle and/or erred in the exercise of his discretion had he made them nonetheless."

Background facts

9. I next set out a few salient background facts to provide some context to the issues before the Court.

10. On 28 December 2023, I handed down my reserved judgment on the applicants' appeal of two arbitration awards dated 13 June 2020 and 26 August 2020 (the "Consolidated Action"), which I dismissed in their entirety. By Order dated 6 February 2024 (orally pronounced and later sealed), I dismissed the applicants' applications for leave to appeal the judgment and for a stay of the arbitration. I also ordered that the applicants pay Matteo's costs of the Consolidated Action and related applications and that they make an interim payment on account to Matteo. This was assessed at $800,000 in the written ruling, and I further ordered that the $400,000 previously ordered to be paid into court by way of security for costs by Gabriele and Delanson be released to Matteo.

11. On 26 May 2024, the Italian newspaper *La Repubblica* published an article in which it was reported that:

> "[t]he eldest son [i.e. Matteo] alone, who after cutting ties with his father and after working for 27 years in the family business, now lives in London and works as a consultant in digital logistics and insurance, is said to have spent a dozen million,

> largely financed by a Dutch fund specializing in litigations and which expects to be reimbursed 3.5 times the advance in the event of Matteo Volpi's victory".

12. Gabriele and Delanson assert that the existence of this funding arrangement was "*unbeknownst*" to them (and the Court) until publication of the article. The degree to which the applicants knew of the funding arrangement is highly contentious between the parties, and more will be said on this in discussing the **Ladd v Marshall** criteria. But the applicants insist that they did not know of the funding arrangements before 26 May 2024. Consequently, they contend that it was not possible to raise these issues before the costs orders were made, nor to ask the court to review and/or vary its oral pronouncement (i.e., under the *re Barrell* jurisdiction), as the orders had already been sealed. Hence the application, *inter alia*, for leave to appeal.

Leave to appeal

13. Any appeal from my oral decision of 6 February 2024 and the written reasons of 22 May 2024 requires leave or permission to appeal. Section 11 of the Court of Appeal Act provides in relevant part that no appeal lies without the leave of the Supreme Court or of the court [the Appeal Court] "*…from an order…as to costs only where such costs are by law left to the discretion of the Supreme Court*" (11(e)); and "*…from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court*" (11 (f)).

14. There is no dispute as to the principles governing the grant of leave to appeal. The Court may not grant permission for leave to appeal unless there is either a "*real prospect*" of success on any of the proposed grounds of appeal or there is some other public policy reason why the appeal should be considered. As has been stated in numerous authorities, the phrase 'real prospect' does not suggest a test requiring any mathematical probability, but merely translates to a prospect of success that is not unreal or fanciful: **Tanfern v Cameron-MacDonald** [2001] 1311, applied in numerous local authorities (see also, this Court's ruling of 22 May 2024).

15. Gabriele and Delanson submit that they have a real prospect of succeeding on the proposed grounds of appeal. As to the first ground of appeal, they argue that the funding arrangement is clearly an example of maintenance and champerty and is therefore contrary to public policy. In this regard, reference is made to Lord Denning MR's oft-quoted speech in **In Re Trepca Mines Ltd.** (No. 2) [1963] 1 Ch. 199 at 219:

> "But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and this is champerty. Champerty is derived from *campi partition* (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by Scrutton L.J. in *Haseldine v Hosken*. The reason why the common law condemns champerty is because of the abuses to which it may give rise."

16. That the common law still pertains in The Bahamas is clear from the Privy Council's decision in **Massai Aviation Services v Attorney General of The Bahamas** [2007] UKPC, where the Board summarized the legal position as follows, and which I set out in some detail [12-14]]:

> "12. At common law, maintenance and champerty are both crimes and torts. In England and Wales both the crime and the tort have been abolished by ss 13(10 and 1491) of the Criminal Law Act 1967. This was as a result of a recommendation of the Law Commission (see Law Com No &, Proposals for Reform of the Law Relating to Maintenance and Champerty, 1966). The Law Commission defined maintenance as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by the law as justifying his interference" (para 3) and champerty as "a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds" (para. 4). A contract involving maintenance of champerty is (and this remains the law in England and Wales) unenforceable and void."
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> 13. The original object of the law was to protect vulnerable defendants, who might be unable to resist unmeritorious claims which were being pursued against them with the help of the rich and powerful: see *Giles v Thompson* [1994] 1 AC 142, per Lord Mustill at 153. A later objective was to protect vulnerable plaintiffs, who might be induced to part with some of the proceeds of their action in return for assistance in pursuing it: hence both contingency and conditional fee arrangements with legal advisers were prohibited. However, just as the need to protect vulnerable defendants has receded, so too have we come to appreciate that "treating such arrangements as criminal was also, before the introduction of the legal aid, an effective way of preventing poor people from obtaining legal redress": see *Norglen Ltd. v Reeds Rains Prudential Ltd.* [1999] 2 AC 1, per Lord Hoffman at 11.
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> 14. The crimes had fallen into disuse long before they were abolished in England and Wales. In relation to the torts, the Law Commission observed that "the trend of judicial decisions has been to increase the number of interests which the courts are prepared to prove that any loss had been suffered as a result of maintenance (para. 11). In policy terms, now that a great volume of litigation was supported by trades unions, insurance companies or legal aid, the Commission commented (para 15):
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> > 'The truth is that today the bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome but who are regarded by society as being fully justified in maintaining it…' "

17. In **Massai,** the issue for the Board's consideration was whether an assignment of a cause of action was void as constituting maintenance. The Board held that it was not, as the assignor (second plaintiff) had a "*genuine commercial interest*" in the litigation, and therefore could not be

regarded in the same light as funders who "*traffic in litigation*". The applicants assert that, contrary to those circumstances where the law recognizes a proper interest in a funder, the Dutch commercial funder has no interest or connection with Matteo's proceedings. Therefore, it is contended that the agreement not only falls into the category of maintenance (wanton and officious intermeddling or trafficking in litigation) but is also champertous, as the funder is seeking 3.5 times its investment from the litigation.

18. Counsel for Matteo did not address any arguments directly to the prospects of the appeal, but instead concentrated on the application to admit fresh evidence. In this regard, it was contended (quite properly) that the application for leave to appeal and for an extension of time depended wholly on whether leave to admit new evidence would be granted—a hurdle it was submitted could not be met.

Application for permission to rely on further evidence: Ladd v Marshall

19. Before turning to the substantive issues, there is a preliminary issue that I raised with counsel for the applicants relating to the application for permission to rely on further evidence. This was that the Court did not consider that it had any jurisdiction to grant leave to adduce new evidence for the purposes of an appeal, even if it granted leave to appeal. I had reason to indicate to lead counsel for Gabriele, Ms. Talbot-Rice, in particular, during the course of legal argumentation that there were no corresponding civil practice rules in this jurisdiction generally governing appeals as pertained under part 52 of the UK Civil Procedure Rules, which apply to appeals in the county courts, the High Court and Civil Division of the Court of Appeal. Instead, the principles relating to appeals were to be found mainly in the Court of Appeal Act and accompanying Rules.

20. Rule 24 (2) of the Court of Appeal Rules provides, in relation to appeals, as follows:

> "(2) The court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:
>
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds."

21. It may be noted that the proviso to Rule 24 mirrors Ord. 59. r.10 (2) of the English R.S.C. ("*the White Book*"), which was never received as part of the Rules of the Supreme Court (R.S.C.) 1978. The position under Rule 24 was stated in **Hertfordshire Investments Ltd. v Bubb and Another** [2000] 1 WLR 2318 as follows:

> "Where the ground [of appeal] alleged is fresh evidence, the matter was governed by R.S.C., Ord. 59., r.10(2), the relevant part of which provides: 'no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing)

> shall be admitted except on special grounds.' Special grounds, as we all know, meant that the fresh evidence satisfied the principles in *Ladd v Marshall* [1954] 1 WLR 1489; that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence or the result of the case; and it is apparently credible although not incontrovertible;…"

22. By contrast, the UK position governing applications to adduce fresh evidence is now governed by Rule 52.11(2) of the English CPR, which provides in material part that the appeal court will not receive evidence that was not before the lower court "*unless it orders otherwise*". It is no longer necessary under the English position to show "special grounds", although this does not do away with the **Ladd v Marshall** principles, which are now considered in the discretion of the court and in accordance with the overriding objective of doing justice: **Banks v Cox** (unreported), 17 July 2000, Court of Appeal (Civil Division) Transcript No. 1476 of 2000, per Morritt J. The test has not, however, been changed in this jurisdiction.

23. Rule 24 and the case law which has developed around it make it relatively clear that it is within the discretion of the Court of Appeal to decide whether to receive evidence that was not before the lower court for the purposes of an appeal. I therefore conclude that I have no jurisdiction on an application for leave to appeal to grant leave to adduce new evidence for the purposes of a proposed appeal before the Court of Appeal.

24. My finding in this regard disposes of the application for leave to rely on further evidence for the proposed appeal. But it does not dispose of the application for leave to appeal. In such a case as this, where the further evidence comprises the sole factual basis on which the applications for leave to appeal are brought, I apprehend that the correct approach to be followed (and the parties were agreed on this point) is whether this Court is satisfied that there is a real prospect of the application for permission to adduce new evidence succeeding before the Court of Appeal. It is to this question that I must therefore turn.

25. In **Ladd v Marshall** [1954] 1 WLR 1489, 1491, Denning LJ summarized the relevant principles for the reception of fresh evidence as follows:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must apparently be credible, though it need not be incontrovertible."

26. There is no dispute that *Ladd v Marshall* represents the legal principles to be adopted on such applications in this jurisdiction: see **Hall v Maritek Bahamas Ltd**. [2015] UKPC 23, **In the Matter of Leadenhall Bank Trust Limited** (2011) BHS J. No. 47. But as may be expected, the parties differ as to whether these criteria have been fulfilled.

27. Naturally, the applicants contend that the criteria have been satisfied. They submit that:

(a) the evidence could not with reasonable diligence have been obtained for use at the hearing;
(b) the champertous nature of the funding arrangement has an important bearing on the issue of whether the costs Orders should properly have been made; and
(c) the evidence of the champertous arrangement is credible (e.g., the *La Repubblica* article, and Simone's affidavit evidence).

28. They submit further that they had no knowledge of the existence of the third-party funder prior to 26 May 2024, and therefore were not in a position to deploy that evidence at the hearing at which the costs orders were made. Moreover, it is submitted that the evidence could not with reasonable diligence have been obtained for use at the hearing, as Gabriele had in fact sought disclosure of Matteo's funding arrangements on several occasions, all of which it is said Matteo steadfastly resisted.

29. Gabriele chronicles the various attempts by the applicants to obtain disclosure from Matteo as to his funding arrangements. For example, at the request of Gabriele, by Procedural Order No. 7 dated 29 May 2019, the arbitral tribunal ordered Matteo to produce documents relating to the identity of any person(s) providing funding for him in respect of the arbitral proceedings and the terms of any funding agreement. It is submitted that Matteo produced nothing in response to this Order, although the riposte of Matteo's counsel is that there was no funding agreement in existence that could be disclosed at the time (a submission also made in the hearings before the Court of Appeal).

30. Further, Gabriele made an application for leave to serve interrogatories against Matteo on 25 November 2020, requesting information on the source of Matteo's funding for this litigation, following averments by Matteo in his affidavit filed in support of the application for a stay of the arbitration as to his "*difficult liquidity*" position and the statement that "*I …have to seek additional funding to continue with the litigation*."

31. The interrogatories sought to be administered were set out in the Schedule to the summons as follows:

"1. Who is/are the persons providing you with additional funding?
2. What are the terms on which such additional funding is being provided?"

32. In the judgment on the application for the stay and related reliefs ("1st Ruling"), I refused Gabriele's application for interrogatories. I concluded that the application was not necessary at that point for the fair disposal of the matters or for saving costs, and I characterized it as an "*overreach (if not something of a fishing expedition*)".

33. Gabriele also points to an email dated 6 June 2024, in which lawyers for Gabriele referred to the *La Repubblica* article and asked Matteo's lawyers to disclose a copy of the funding agreement, and which (it is said) implied that Matteo's lawyers were a party to the agreement. In his written submissions, Gabriele contends that the inference that the lawyers were parties to the agreement was "*confirmed by Matteo's leading counsel at the Court of Appeal hearing on 9 July 2024*". In oral submissions, Mr. Martin vociferously resisted the suggestion that anything was said before the Court of Appeal to suggest that Matteo's lawyers were participants in the agreement. However, I am not required to resolve that dispute for the purposes of the applications before this Court, and in any event the Court was not aided by a transcript of those proceedings.

34. Counsel for Matteo submits that, taken at its highest, the *La Repubblica* article simply discloses that Matteo is in receipt of third-party funding. Therefore, to that limited extent only, it might be said that the third criterion in *Ladd v Marshall* is satisfied. However, it is contended that the evidence said to be relied on is deficient, as the newspaper article does not contain any evidence in respect of the terms of the funding arrangement on which Gabriele's and Delanson's allegations of maintenance and champerty are made. Matteo disputes, however, that the first and second criteria are satisfied.

35. Firstly, it is contended that the 'evidence' could have been obtained with reasonable diligence for use before the Court. In fact, Matteo relies on the applications for disclosure and representations made by counsel for Gabriele and Delanson in court as evidence that the applicants were aware of the arrangements and could have obtained the evidence. In this regard, Matteo contends that the precise terms of the interrogatories clearly show that the applicants knew and understood that Matteo was receiving additional funding from a third-party source, which included some form of financial conditions.

36. Although the refusal of the interrogatories meant that neither Gabriele nor Delanson knew the precise terms of the funding arrangements, Matteo submitted that they knew of its likely existence and the potential relevance to the outcome of the costs applications. This is said to be borne out from the following oral submissions made by Mr. Simms for Delanson and Mr. Black for Gabriele on the first day of hearing in the application for leave to appeal the dismissal of their challenges to the arbitration awards.

37. This is what Mr. Simms said on the point:

> "As you are aware, Matteo had applied for firstly, for an order of his costs to be paid. Well, I don't disagree that such an order should be made at this stage, his costs for the event. There is a difficulty which I will flag, and I would make more of it in my submissions. But it is a concern to me in terms of the evidence that had arisen is that Matteo's action in these proceedings, and in fact probably in the arbitration, appears to be funded by a third party. And while the practice in the UK this may be acceptable, we still have champerty. So I have –and there are laws against champerty, which funding by a third party is, and it's against public policy. The few cases I have known involving champerty the courts have moved to actually strike those actions out. So in terms of the order being made, I think it's

> fine that the order be made. However, I'm putting down the marker and the caveat that we're going to take a look at this and we may have to seek discovery, further discovery, in relation to the taxation to get this information. There was some interrogatories which were applied for by Gabriele early on in these proceedings to get to the bottom of this, and unfortunately my Lord didn't allow those interrogatories to be answered. So we are stuck with the position of what does he mean by "I have obtained funding"? Is it a loan? Is it an agreement of someone to pay his costs, which is champerty? So the issue is still alive, and that is why there was some hesitation in terms of my agreeing this order, my Lord, and that hesitation remains, but I think that now is not the proper time to deal with it. It will either be dealt with on taxation or separate proceedings to get to the bottom of the issue."

38. Mr. Black, having accepted that costs should follow the event, said the following in opposition to Gabriele's application for a stay of the arbitration:

> "Phase 2 of the arbitration will, as the court has already found, involve massive expense. To embark upon that exercise before the conclusion of the appeal process in relation to stage-1 risks incurring very substantial wasted costs and the evidence is that Matteo has consistently pleaded poverty. Now, whether that's true or not one can only take it at face value, but he claims he has burned through the $20 million given to him by his mother and he claims he can't even pay his living expenses or care for his own children such that his father Gabriele has to care for his grandchildren, if that is true, it is hard to see how he could have even paid his own legal fees without that assistance of litigation funding – I leave that to Mr. Simms to ex postulate upon – but without more information, we say that if he does have a funder, we don't know whether that funder could be made liable to repay any fees to us, whether they're – in other jurisdictions there are – there have been authorities where third party funding is not part of the – not part – of the geography of The Bahamas, we suspect that that's – that is not the case here."

39. As further evidence of knowledge of the funding arrangement, Matteo refer to the Second Affidavit of Simone Volpi, filed in support of these applications, in which he (Simone) deposes as follows:

> "3 I have been in direct communication with Matteo regarding the ongoing legal proceedings in the Arbitration and the instant Appeals.
>
> 4. On multiple occasions during our discussions, Matteo has explicitly stated and confirmed to me that he has engaged a litigation funder to finance his legal costs and expenses associated with the Consolidated Appeals. Matteo told me that the litigation funder will share Matteo's profits from this litigation in exchange for funding Matteo's legal costs and expenses. Matteo did not reveal to me that name of his litigation funder."

40. Matteo submits that, given Simone's position in these proceedings and the underlying arbitration, which has been to support Gabriele (and Delanson) in all respects, it is inconceivable that Gabriele would not have inquired and have been made aware of this once the issue of funding was raised in the interrogatories (in late 2020). Thus, this knowledge must be imputed to Gabriele.

41. In response to this contention, Simone lodged a Third Affidavit (sworn on the 15 July 2024, one day before the hearing), under cover of the Second Affidavit of Rhchetta Godet (also filed 15 July 2024) in which he refuted the suggestion that he had imparted any information to Gabriele about the funding arrangement:

> "3. I understand that Matteo is saying that it is inconceivable that I did not tell our father what Matteo told me about his funding arrangements, but nothing could be further from the truth. I have never told my father anything about what Matteo has told me about his funding arrangements."

42. Consequently, Matteo submitted that any arguments concerning third-party funding and champerty could and ought to have been raised when issues of costs relating to Gabriele's and Delanson's failed challenge to the award were argued in February 2024, if the point had the importance for which the applicants now contend. In fact, Matteo submits that the excerpts from the transcript of 24 January 2024 (reproduced above) demonstrate that Delanson took a deliberate decision not to further pursue the issue of the funding arrangements, and to defer it until taxation or separate proceedings brought for that purpose, a position which it is said also appears to have been adopted by Gabriele.

43. Turning to the second *Ladd v Marshall* criterion, it is submitted that the evidence of third-party funding would not in any event have had any important influence on the cost orders. There are two strands to this argument:

(i) first, it is contended that the evidence does not necessarily demonstrate that the third-party arrangement is "*champertous and/or constitutes maintenance and/or savours of champerty or maintenance and is therefore unlawful and contrary to the public policy of The Bahamas*"; and

(ii) second, it is contended that that evidence demonstrates that Matteo's costs have been paid by a third party and therefore, pursuant to the indemnity principle, Matteo cannot recover any costs.

Evidence does not demonstrate that third party funding is champertous and/or constitutes maintenance

44. As to the first strand, Matteo contends that the modern approach to allegations of champerty involves a detailed consideration of the control or influence said to be exercised by the third-party funder. As there is no evidence before the Court of the terms of the funding arrangement or otherwise, there is no proper basis on which the Court could conduct this assessment or conclude that the funding arrangement is champertous.

45. In support of this proposition, reference is made to **Davey v Money** [2019] EWHC 997, where Snowden J. summarized the position as follows:

> "The modern approach to the doctrine of champerty appears to be concerned with asking whether an agreement with a non-party as regards the conduct of litigation would tend to undermine or corrupt the process of justice; and in that context, the crucial issue appears to be whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement."

46. Closer to home, in a jurisdiction where (like The Bahamas) champerty remains a crime and a tort, Kawaley CJ in the Supreme Court of Bermuda upheld the validity of a funding agreement that required the plaintiffs to pay over approximately 40% of damages recovered in return for litigation funding and which was alleged to be contrary to public policy and void. He reasoned as follows:

> "Mr. Woloniecki accepted that the strength of the traditional prohibitions on champertous arrangements had been diluted almost to a vanishing point in much of the common law world but invited this Court to adopt a traditional approach. No cogent reasons for swimming against the modern tide were advanced…. The Harbour Funding Agreement is governed by English law and is clearly valid under its governing law. The constitutionally protected right of access to the Court which is implicit in the fair trial rights guaranteed by section 6(8) of the Bermuda Constitution as read with European Convention on Human Rights jurisprudence on article 6 of that Convention suggests that such funding arrangements should be encouraged rather than condemned. I see no reason why Bermuda's common law should adopt the antiquarian approach contended for by the Trustee."

47. Matteo further submitted that even pre-1967, when maintenance was still both tortious and criminal in England, the fact that an action was being illegally maintained was neither a defence to an action nor a proper ground for a stay of the proceedings: see **Abraham v Thompson** [1997] 4 All ER 362, per Millet LJ (at 377G-378A). In other words, a finding of maintenance and/or champerty would provide no defence to Gabriele's and Delanson's joint and several liability under the costs orders, although quantum would still be in issue, and that can still be dealt with at taxation. Thus, as explained by Morritt LJ in **Stockznia Gdanska v Latreefers** (No. 2) [2001] 2 BLCL 116, a finding of champerty only has consequences for the parties to the funding agreement and no effect on the merits of the litigation or on the costs of the parties to that litigation:

> "A person who has funded an action champertously may fail to enforce recovery of the agreed proportions of the spoils. A person who has secured a champertous agreement to fund his litigation may be unable to enforce payment of the agreed funds. But the fact that a funding agreement may be against public policy and therefore unenforceable as between the parties to it is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse."

48. As to the alleged breach of the indemnity principle, Matteo argues that Gabriele and Delanson's claims on this point are mistaken. This is because the proper test is not whether the receiving party has actually paid the costs, but whether or not the receiving party is under a liability to pay the costs: **Adams v London Improved Motor Coach Builders** [1921] 1 KB 495, per Bankes LJ at 501; **Davies v Taylor** (No. 2) [1974] AC 225, per Viscount Dilhorne at 230.

49. Matteo contends further that there is no evidence before the court that he was/is not liable to pay the costs claimed. It is said that the *La Repubblica* article is entirely silent on this point, save for the ambiguous reference to the "advance" provided by the funder, and therefore it is submitted that this is entirely insufficient to draw the inference for which the applicants contend.

50. The applicants go further, however, in advancing the argument of breach of the indemnity principle. In this regard, they placed great reliance (before this Court and it appears in submissions before the Court of Appeal) on the passage in **Re Trepca Mines** (No. 2) (*supra*), to the effect that if the lawyers whose fees are sought to be recovered themselves actively participated in procuring the champertous agreement they would be disentitled to their fees. The point was expressed by Lord Denning as follows [at 221]:

> "When a solicitor is retained to conduct litigation on the ordinary and accustomed terms, he is not debarred from acting in that litigation simply because he knows, or gets to know, that his client has made a champertous agreement to share the proceeds with another. He is entitled to conduct the litigation to the end, and to recover his proper costs for so doing, unless he himself in some way or other participated in the champertous agreement. Pennycuick J. held that knowledge by itself was enough to debar him from recovering: but I think this is erroneous. There must be active participation by the solicitor in the illegal transaction before he is disentitled to his costs. If he is himself a party to the champertous agreement by stipulating for a percentage for himself, the answer is clear. He cannot recover anything: see *Wild v Simpson*. But even though he is not himself a party, nevertheless, if he is an active participator in this sense, that he voluntarily does a positive act to assist to implement the unlawful agreement, then he cannot recover; for, by rendering positive assistance, he becomes guilty of aiding and abetting the offence and is himself guilty of it. If a solicitor, therefore, does not keep himself to his ordinary work, but goes further and helps his client to draw up the champertous agreement and to secure that the proceeds of the litigation are shared out in accordance with it, then he too has been guilty of an act which is unlawful and he can recover nothing."

51. In this regard, both Gabriele and Delanson invited the Court to infer that Matteo's lawyers were involved in the alleged champertous arrangements. Gabriele asserts in his written submissions that "*it appears that Matteo's English solicitors are parties to the agreement*" and that "*it can also be inferred that Matteo's lawyers both assisted him with securing the funding arrangements in the first place and are now paid by the Dutch litigation funder*". Delanson's states the following in its written submissions:

> "The terms of Matteo's champertous arrangement, and the involvement or otherwise of his lawyers, are not clear since he has remained steadfastly tight-

> lipped about it. However, it is difficult to envisage a circumstance where Matteo's lawyers did not have some knowledge of, and involvement in, the arrangement. There is therefore a prima facie and arguable case that the above principles [i.e., the principles in *Re Trepca Mines*] are engaged."

52. By way of answer, Matteo submits that the Court would "*be in the realm of pure speculation in seeking to determine that certain lawyers (and if so, which) actively participated in putting in place Matteo's funding arrangement so as to disentitle them to (the entirety) of their fees which are now sought*." It is also submitted that, to the extent that the contention is that Matteo's English lawyers fell foul of the **Trepca Mines** decision, their costs were in any event excluded from the estimate of costs on which the Court acted in making the interim payment order.

Additional arguments

Proper forum for raising issues is during taxation of Costs orders

53. Matteo contends that the "out-of-time" applications should be dismissed and the appeal of the costs orders should not be allowed on the alleged grounds of maintenance and champerty. But in any event, it is contended that to the extent that the applicants wish to rely on these grounds, they are not precluded from doing so even if this Court were to dismiss the applications. This is because the issue of the recoverability of certain categories of costs and whether or how Matteo's funding arrangement might affect recoverability of certain costs can (and should) be ventilated and determined during taxation.

54. In fact, during oral submissions, Mr. Martin developed the point that it would be an abuse of process for Delanson (and Gabriele, who supported Delanson's position) to now raise the champerty point, having already indicated before the Court their intention to pursue these issues during the taxation, which was identified as the "right forum". In response, Gabriele and Delanson submitted that any indication to the court of an intention to raise these issues during taxation does not and cannot create anything in the nature of an estoppel against them raising the point on an application for leave to appeal.

General public importance

55. The applicants also argue that the appeals raise issues of public importance that need to be determined either by the Supreme Court or the Court of Appeal, and which cannot be appropriately addressed on a taxation hearing before a Registrar. In particular, the issue of public importance is said to be whether lawyers can properly act and claim fees in relation to litigation for foreign clients who have made champertous arrangements which are legal according to the laws of their own country. They submit that such arrangements are illegal based on established principles and the consequences of that illegality should be the inevitable setting aside of the costs orders. Reference is made in this regard to the comments by Lord Denning MR and Pearson LJ in **Re Trepca Mines** where they characterized similar issues raised in that case as being of public importance and of general interest to the legal profession [at 258, 268].

Court's analysis and conclusions

56. As discussed, assessment of the application for leave to appeal requires me to consider whether there is a realistic prospect that an appellate court would consider the **Ladd v Marshall** test satisfied in respect of the further evidence sought to be adduced. The rationale behind the test is to ensure that there is finality to litigation, against the countervailing principle of seeking to avoid any potential injustice to a party who through no fault of their own has failed to adduce relevant evidence at the hearing. All of the cases speak with one voice that the Court should be diligent in the application of the **Ladd v Marshall** principles in seeking to balance those competing interests.

57. In **Gaydamak and Anor. v. U.B.S. (Bahamas) Ltd. and Anor** [2007] 1 BHS J No. 61, the Court of Appeal said that "*Strict adherence to the principle* [*Ladd v Marshall*] *must be observed*" [at 61], citing with approval the UK Court of Appeal decision in **Rudra v Abbey National Plc and Stickley & Kent** [1998] WL 1043596, where that Court refused an application to adduce further evidence because the appeal failed to show that the evidence could not have been obtained with reasonable diligence.

58. In my judgment, and despite the protestations of the applicants, I am of the view that this "evidence" could have been obtained with reasonable diligence for use during the hearing of the consequential matters. In fact, Matteo's short response to the applicants' contention as to lack of knowledge is that the *La Repubblica* article merely restates "*what the parties have long known, namely that Matteo is in receipt of third-party funding*."

59. It is reasonably clear from the history of these proceedings that the applicants were sufficiently aware of Matteo's "liquidity crisis" (as it was put) and the probability of third-party funding to have obtained that evidence with reasonable diligence if they considered it vital to deploy it at the February hearing on the costs of the arbitration appeals. In fact, the representations made to the Court by Mr. Simms during the hearing in February of this year (and embraced by Mr. Black), show beyond peradventure that the applicants were alive to the issue of litigation funding, which they suspected was champertous. However, they seem to have taken a strategic decision not to pursue the issue at that hearing as that was said "*not to be a proper time to deal with it*", and to defer it to "*taxation or separate proceedings to get to the bottom of the issue*."

60. Further, in my view, Gabriele's reliance on the averments of Simone (contained in his second affidavit) as to his knowledge of the litigation funding arrangement as credible evidence of its existence to satisfy the third *Ladd v Marshall* criterion is a double-edged sword. As pointed out by Matteo, the position of Simone has been unwaveringly to side with Gabriele and Delanson in all respects in these proceedings (see First Affidavit dated 9 July 2020). Although the affidavit of Simone never reveals the date when he acquired knowledge about the funding arrangement, I entertain a considerable degree of skepticism that Simone would have been aware of the funding

arrangement and would not have disclosed it to those in whose corner he stood once the issue of funding became an issue in the proceedings.

61. Strictly speaking, my finding that the applicants do not have a realistic prospect of surmounting the first **Ladd v Marshall** hurdle before the Court of Appeal is fatal to their application. But in case I am wrong, and in any event for completeness, I will look at the second criterion.

62. On this point, I accept the criticisms of Matteo as to deficiencies in the evidence that is the sole ground for appeal. As noted, the *La Repubblica* article is only evidence that Matteo is in receipt of third-party funding, which is said to be on terms for more than triple the amount invested. It contains no evidence of the terms of the funding arrangement on which the allegations of champerty and breach of the indemnity principle could be proven. Neither is there any indication as to the date of this agreement, which is of some importance to this matter. Further on this point, the affidavit of Simone, for all its claims of knowledge of the arrangement, is also tellingly devoid of any indication as to its terms or when it was struck. It is clear from the cases (see **Davey v Money**) that the assessment required to be performed by the Court is fact-sensitive, and there is no evidence before the court of the precise nature of the agreement that would facilitate this assessment.

63. I agree that the applicants are inviting the Court to enter into the realm of speculation and inference by asking it to conclude that the funding agreement savours of maintenance and/or champerty, simply on the basis of what was reported in *La Repubblica*. Neither is there any evidence before me of the participation of Matteo's lawyers in the drafting of the agreement, to buttress the argument that they are precluded from claiming costs under that agreement. There was only speculation and inferences that the lawyers were involved in this agreement, and Mr. Martin stoutly rebuffed any suggestion that he had made any concession in this regard.

64. Further, as indicated, there is no date as to when the funding agreement was executed, which has important ramifications for this matter. Without evidence of when the alleged agreement was entered into, the Court cannot know at what stage the proceedings are said to have been infected by the alleged illegal funding agreement, so as to potentially render any costs orders unenforceable. For example, evidence was led in these proceedings (by the applicants themselves) that Matteo received some $20 million from his mother, which was used partially to assist with funding the arbitration/litigation. There is no indication as to up to what point those funds were used to fund the proceedings, and at what point funds were used from the commercial funder. There is, therefore, simply no basis on which the Court would be able to determine whether or not the costs orders sought to be appealed are caught by the alleged champertous arrangement or otherwise.

65. Therefore, in my view, the contention that the fresh evidence sought to be adduced would have made a difference as to costs Orders made by this Court does not rise to a realistic prospect of success for appeal. Further, and this is a point of some significance, it cannot escape notice

that it is Gabriele and Delanson who have invoked champerty and maintenance as a shield. It is not a matter raised by any of the parties to the alleged illegal agreement, say, in an attempt to resist its enforcement. Gabriele and Delanson are the paying parties, and the payment of costs by them does not involve enforcing or giving effect to an alleged champertous (and hence illegal) agreement.

66. It is true that the applicants further argue that requiring them to pay would entail a breach of the indemnity principle. But as indicated, there is not any clear evidence before the Court that Matteo is not on the hook for the payment of costs. As expressed, the fact that there is no indication of when the funding agreement was entered into also means it is impossible to determine (even if the applicant's arguments on the indemnity point were to be accepted) at what point Matteo actually ceased paying costs.

67. As to the public policy argument, I accept that the question of whether a funding arrangement that is lawful in the jurisdiction where it is entered into but which is regarded as champertous and/or maintenance under the common law position here, might be worthy of judicial consideration and comment. But the public policy threshold for leave cannot be surmounted if the Court concludes (as I have) that there is no realistic prospect that leave to adduce the fresh evidence—on which the entire edifice of the application for leave to appeal is premised—would be obtained. In any event, it cannot escape the attention of this Court that the applicants have already raised in broad outline the public policy issues before the Court of Appeal.

68. Further on the public policy point, and notwithstanding the common law position here, Matteo invites the Court to follow the lead of courts in the common law world that have adumbrated a modern and progressive approach to maintenance and champerty, seeking to balance allegations of illegal funding arrangements with the fundamental constitutional right of access to the court. I am not of the view that these applications require the Court to embark on any re-evaluation or re-assessment of the common law position on maintenance and champerty against the backdrop of constitutional rights for their proper disposal. That issue is perhaps better left for another day and another application.

Application for Extension of Time

69. Pursuant to Rule 11 of the Court of Appeal Rules, the deadline for filing a notice of appeal (not being an interlocutory decision) is six weeks after "*judgment or order of the court below was pronounced or made*". The Court delivered its oral ruling on 6 February 2024 and reasons on 22 May 2024. The deadline was either 19 March 2024 (six weeks after the delivery of the oral judgment), in which case both applications are out of time, or 3 July 2024, which is six weeks after delivery of the written judgment, in which case they are in time.

70. Gabriele seeks an extension of time pursuant to CPR 26.1(k), and s. 11 of the Court of Appeal Act. To the extent that an extension of time to appeal may be necessary, I drew to the attention of counsel for the applicants that it appears to be settled in this jurisdiction that this Court

does not have any power to extend time for the purposes of an appeal under s. 11. It can grant leave in an appropriate case, but extension of time is a matter within the province of the Court of Appeal. CPR 26.1(k) deals with extension of time by the Supreme Court in the context of its case management powers and has no relevance to onward appeals. As to s. 11, lead counsel for Gabriele submitted that the provision in s. 11 which provides that "*no appeal lies from such an extension* [of time to appeal]" clearly contemplates extensions of time for appealing being granted by the Supreme Court. I think this is a clearly erroneous reading of this provision, and the reference there can only be to extensions of time granted by the Supreme Court in its role as an appellate court pursuant to Part 57 (appeals from magistrates' court), Part 58 (appeals from Registrars) and Part 66 (appeals under various Acts).

71. For his part, counsel for Delanson, Mr. Simms, gave rather faint support to the submission on extension of time—he indicated that he did not "actively" support the submissions. In my view, Mr. Simms was right not to press those submissions on behalf of Delanson, as the principles with respect to the extension of time for an onward appeal from the Supreme Court can be said to have been settled from as early as the Privy Council's decision in **Junkanoo Estate Ltd. and others v UBS Bahamas Ltd. (In Voluntary Liquidation)** [2017] UKPC 8, where Lord Sumption said (in a case of an application for leave in respect of an interlocutory decision):

> "…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…".

See also, the Court of Appeal's decision in **Belgravia International Bank & Trust Company Ltd. and Anor. v. Bretton Woods Corporation and Anor** (SSCivApp. No 75 of 2021).

72. In my judgment, I clearly do not have any ability to grant an extension of time if one is needed for the purposes of s. 11 of the Court of Appeal Act.

Stay of execution

73. I am also asked to stay the payment of the costs of the consolidated action and the interim payment on account of costs I ordered in favour of Matteo, pending hearing of the appeal if leave is granted.

74. The principles relative to the grant of a stay are familiar and have been set out in a number of cases which are cited by counsel for the applicants: **Old Fort Bay Property Owners Association Ltd. v Old Fort Bay Company Ltd.** [BS 2022 SC 022]; **Finlayson v Caterpillar Financial Services Corporation** SCCivApp No. 99 of 2022; and **Bahamas Real Estate Association v George Smith** SCCivAppeal No. 109 of 2015.

75. They do not need to be rehearsed here, in particular having regard to the conclusion this court has come to on the application for leave to appeal. In summary, the court will weigh the balance of prejudice on the facts available, in particular whether the grant or refusal of the stay will create greater prejudice to one or more of the parties. But the normal rule is for no stay to be granted, although where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal: see, **Leicester Circuits Ltd. v Coates Brothers Plc** [2002] EWCA, cited with approval by the Court of Appeal in **Rouco v Busnadiego** BS 2022 CA 094.

76. Delanson sets out a comprehensive list of factors which are said, in the balance of justice, to plainly favour a stay, and which basically subsume the factors listed by Gabriele:

i. The evidence indicates that Matteo will be unable to personally satisfy any costs orders against him;
ii. Matteo's failure to disclose the details of the alleged champertous agreement, including whether his funder has agreed to be liable to meet his costs liability or whether Matteo has taken out an ATE insurance to meet an adverse costs order;
iii. Delanson [and presumably Gabriele] does not know the name of the third-party funder (which is outside the jurisdiction of the Bahamian courts) and so it cannot contemplate how it may go about recovering any amounts from it;
iv. There is no prejudice to Matteo, as he is not out of pocket because he has not paid his own legal costs;
v. Matteo appears to be able to meet his living and litigation costs from outside sources, and will suffer no prejudice from the lack of receiving money under the costs orders; and
vi. To the extent that Matteo suffers any prejudice, he is the author of his own misfortune by agreeing to an unlawful agreement.

77. I have set out these allegations for completeness, as I have concluded that this is not a case in which leave to appeal should be granted, based on the tenuous nature of the further evidence sought to be admitted. I am not of the opinion that there is any realistic prospect that this evidence will satisfy the Court of Appeal that leave should be granted to adduce it on an appeal. But even if I were wrong in this, I am not persuaded to grant a stay. Delanson and Gabriele have not shown by any evidence that unless a stay is granted and the appeal succeeds (and the Court's view is that the evidential foundation for the appeal is anemic, as well as the grounds) they will have no real prospect of recovering the money paid to Matteo.

CONCLUSION AND DISPOSITION

78. For all the reasons given above, I would dispose of the applications by Gabriele and Delanson as follows:

(i) I refuse the application for leave to appeal the Orders of the Court awarding costs of the consolidated appeals to Matteo, as well as the interim payment on account of costs;

(ii) I dismiss and refuse the application for extension of time to appeal on the ground that this Court has no jurisdiction to grant an extension of time for the purposes of s. 11 of the Court of Appeal Act;

(iii) I dismiss and refuse leave to rely on further evidence pursuant to the **Ladd v Marshall** principle on the ground that this is matter within the province of the Court of Appeal;

(iv) I refuse the application for a stay.

79. In the circumstances, I order that the applicants pay the cost of and occasioned by these applications, to be taxed if not agreed.

80. I will invite the parties to provide a draft Order reflecting the decision of the Court.

Klein J.,

29 October 2024