COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00621

BETWEEN

NOMIKI DROSOS TSAKKOS

First Claimant

AND

PETER DROSOS TSAKKOS

Second Claimant

AND

PANTELIS TSAKKOS

(As Executor of the Will of the late Emmanuel Pantelis Tsakkos)

First Defendant

AND

ADITA BOY

Second Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Michael Scott KC with Marnique Knowles for the Claimants
Sophia Rolle-Kapousouzoglou with Valdere Murphy for the First Defendant
Kelli Ingraham for the Second Defendant

Hearing date(s): 29 November 2024

RULING

WINDER, CJ

This my brief decision on the Claimant's application for leave to appeal this court's decision (the Decision) dated 30 September 2024.

Brief background

[1.] The First Claimant (Nomiki) and the Second Claimant (Peter) (together "the Claimants") are the children of the late Drosos Tsakkos ("DT") and the sole beneficiaries under his Will. The late Emmanuel Pantelis Tsakkos (EPT) was the brother, executor and trustee of DT. On EPT's death the First Defendant (Pantelis) became his sole executor.

[2.] The Claimants commenced this action against Pantelis alleging fraud, breach of trust and/or duty and/or devastavit by EPT. The Claimants later amended the claim to include EPT's widow, Adita Boy (Adita) as the Second Defendant.

[3.] The Defendants applied to the Court for the striking out of the action or alternatively summary judgment. The Defendants asserted that the claim:

(a) did not disclose any reasonable ground for bringing a claim, and/or
(b) is scandalous, frivolous and vexatious; and/or
(c) is otherwise an abuse of the process of the court; and/or
(d) under the inherent jurisdiction of the Court as the claims are statute barred.

The Defendant asserted that the Claimants are barred by their own laches, delay and acquiescence from maintaining any claim and that the Claimants have no real prospect of succeeding on the claim;

[4.] The Defendants succeeded only on a portion of the claim as it related to Peter. Nomiki has nonetheless also appealed the decision. The relevant part of the Decision provided at paragraphs 51-59 as follows:

> [51] I accept the contention of Pantelis that it would be manifestly unjust in the circumstances to allow Peter to pursue the claims as against EPT, as it relates to losses which flowed through THL. Pantelis understandably also argues that the alleged fraud and theft which Peter now claims was discoverable by reasonable diligence. Peter was on the Board of Directors of THL since 2 December 2003 and an officer of THL since 2003 and must be taken to have been content with the existing state of affairs and/or there was in fact acquiescence on Peter's part relative to the affairs of THL.
> [52] As a director of THL, Peter had actual and/or constructive knowledge of the affairs of which he now complains, as it relates to losses in THL. These is no documentary evidence

of any complaints or demands of EPT during his lifetime as to the alleged breaches of trust and/or duty and/or devastavit. Peter was in a prime position to observe the management of the trust property and there is no real evidence that he objected to the alleged fraudulent breaches during EPT's lifetime.

[53] In the circumstances I find that there had to have been acquiescence on the part of Peter in respect of the losses which he now claims, flowing from THL and that any part of the claim which asserts such losses must be struck.

[54] The Claimants are ordered to file an Amended Claim in accordance with my decision to strike out such claims which asserts losses flowing from THL, by Peter.

...

Whether the claim or any part thereof has any reasonable prospects of success such that summary judgment ought not to be granted.

[57] Having regard to my findings above, I am satisfied that it could not be said that the Claims (other than those identified against Peter above) have no reasonable prospects of success to warrant the grant of an order for summary judgment.

Conclusion

[58] The application for striking out and for summary judgement as against Nomiki is dismissed.

[59] The application for striking out and for summary judgment in relation to Peter is granted in the limited context as identified at paragraphs 54 and 55 above as it relates to claims which asserts losses flowing from THL, by Peter.

[5.] The Notice of Appeal relies on two grounds. The first ground asserts that there was an error in law and/or in fact in failing to address or find in favor of the allegation that the First Defendant did not have locus standi. The second ground asserts that there was an error in law and/or in fact in the exercise of its discretion and striking out the claim on the basis of acquiescence.

[6.] The test to be utilized for the grant of leave to appeal is fairly well settled. A concise statement of that test is to be found in the Court of Appeal case of **Rt. Hon. Perry G. Christie and others v The Queen; The Coalition to Protect Clifton Bay and others** SCCiv App No. 63 of 2017. At paragraph 15 of the decision, per Isaacs JA (as he then was):

> ... The Court has considered this issue of leave to appeal before. The principles involved ought not to be controversial. An applicant seeking leave to appeal must show that he has a "realistic prospect of succeeding on the appeal.... the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient." (Per Lord Woolfe MR) in Smith v. Cosworth Casting Processes Ltd. [1997] 4 All ER 840.

Nomiki's Appeal

[7.] Nomiki was entirely successful on the application but nonetheless appeals. In the circumstances leave for her to appeal ought to be refused, without more. For her, the appeal is purely academic.

Ground 1 - Locus standi

[8.] I am not satisfied that there is any realistic prospect of succeeding on this ground.

[9.] The court is not required to deal with every issue raised by a party in a decision (See **Eagle Trust Co. Ltd. V Pigot-Brown and another** [1985] 3 All E R 119). This issue was not treated with in the judgment as the arguments were entirely untenable and had been dealt with in the 24 November 2023 judgment of Brathwaite J. Having pressed counsel for the Claimants on the issue at the oral hearing, the Court was content simply to deal with the considerable amount of other viable arguments which required the attention of the Court. Perhaps in hindsight some mention ought to have been made of this issue, but this fact does not make the argument any more tenable.

[10.] By this locus standi argument, the Claimants were asserting that Pantelis was incapable of acting to defend the matter or make the application for striking out or summary judgment without the consent of his co-executor, who he says is Myong Tsakkos, DT's widow. The co-executor issue arose out of a section 77 Trustee application made by Pantelis for the opinion advice and direction of the court for the purpose of an indemnity. Charles SJ (as she then was) gave the opinion advice and direction that Pantelis ought to defend the action with a co-executor. The headnote specifically states:

> The Executor should continue to defend the Main Action on behalf of the estate of EPT with a co-executor, be it a family member or a professional accountant, to be nominated by the Plaintiffs; that the issue of whether to appoint a surveyor and an accountant should be left to the trial judge in the Main Action and the Executor ought to be indemnified for the costs incurred thus far in the Main Action and reasonable costs of this Section 77 Application from the Estate. Thereafter the two executors acting jointly will be indemnified from EPT's Estate for future costs of defending the Main Action.

[11.] The real facts were that there was no appointment of Myong Tsakkos, judicially or otherwise, as co-executor for the estate of DT. Myong Tsakkos was nominated by the Plaintiff and not surprisingly, as the mother of the Claimants, Pantelis rejected the nomination. Charles SJ, since January 2023, in clarifying her decision specifically stated that she never identified the name of the person to be appointed and indicated that as there was a dispute the Plaintiff should make a formal application for an appointment of a co-executor.

[12.] Since January 2023, almost 2 years later, the Claimants have not made the application referred to by Charles SJ for appointment of a co-executor. Brathwaite J refused to grant a stay of

this action or to consolidate this action with the Section 77 application. Having been sued by the Claimants as sole executor, in an action which is not stayed, any suggestion that he lacks standing to defend himself, is entirely without merit. Pantelis is not precluded from defending the action, he merely risks the ability to be indemnified from EPT's Estate for the future costs of defending this action.

Ground 2 - Error in the exercise of discretion to partially strike out Peter's claim

[13.] It is well settled that an appellate court will only interfere with the exercise of a judge's discretion where it can be shown that the discretion has been exercised on some wrong principle or was plainly wrong. In **Maria Iglesias Rouco and another v Juan Sanchez Busnadiego and another** [2021] 1 BHS J No 52 Charles SJ (as she then was) stated as follows:-

> 59 The approach of appellate courts to the review of judicial discretions and case management decisions is well-established.
>
> 60 An appellate court will not interfere with the discretion of a lower court unless it is satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a different way or unless clearly satisfied that there has been a miscarriage of justice. In *Ratnam v Cumarasamy* [1964] 3 All ER 933, Lord Guest giving the advice of the Privy Council stated at page 934:
>
> > "The principles on which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: *Charles Osenton & Co v Johnston* ([1941] 2 All ER 245 at p 257; [1942] AC 130 at p 148), per Lord Wright. The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice: *Evans v Bartlam*."
>
> 61 As Mr. Deal correctly submitted, appellate courts will rarely allow appeals against case management decisions and will uphold robust and fair case management decisions. By its nature, case management is "quintessentially" a matter for the first instance judge seised of the proceedings. In *Wembley National Stadium Limited v Wembley (London) Limited* [2000] Lexis Citation 2361, Parker LJ said at paragraph 54:
>
> > "The issue whether to grant expedition, and if so how much and on what terms, was a matter essentially for the discretion of the judge. As is well-known, this court will not lightly interfere with the exercise of judicial discretion. That applies, in my judgment, with particular force to case management decisions. The whole purpose of case management would be frustrated if an appeal route against case management decisions were thought to be readily available to the dissatisfied party. The reality is quite the contrary, in my judgment. Case management rarely involve issues of principle, and the onus on a dissatisfied party to demonstrate that a case management decision is plainly wrong cannot be easily discharged. By its nature, case management is quintessentially a matter for the court in which the proceedings are being conducted, and the scope for intervention by an appellate court in relation to case management decisions taken by that court is necessarily limited, in my view. Only in the most compelling circumstances, as I see it, would intervention of that kind be warranted."

62 However, an appellate court may interfere with a case management decision if satisfied that the judge has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong. In *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, Lewison LJ said at paragraph 51:

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

63 The breadth of the court's case management powers is self-evident in Order 31A itself but nowhere more than in O.31A, r. 18 (s). The wide terms of this open-ended section expressly states that the Court may "take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."

[14.] I am therefore not satisfied that there is any merit in this ground of appeal or any realistic prospect in the Claimants succeeding on it.

[15.] In the circumstances, the application for leave to appeal is refused.

Dated this 16th day of December, 2024

Sir Ian Winder
Chief Justice