COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/FP/00055

B E T W E E N

RUSTY JEROME NEWMAN

Claimant

AND

GRAND SUN INVESTMENTS LIMITED

First Defendant

FREEPORT OIL COMPANY LIMITED

(FOCOL)

Second Defendant

FOCOL HOLDINGS LIMITED

Third Defendant

Before: The Honourable Justice Andrew Forbes

Appearances: Ms. Pleasant Bridgewater, for the Plaintiff

Mr. Laurel Hanchell, for the Defendants

Hearing Dates:

RULING ON LEAVE TO APPEAL APPLICATION

FORBES, J

[1.] This application before the Court is for leave to appeal this Court's decision made on 6 December, 2024. In which the Court made the following ruling:

> The Court accedes to the Defendants' Application that the Writ of Summons be struck out on the grounds that there is no cause of action and it is an abuse of the Court's process. The Plaintiffs action is, therefore, dismissed and, too, is the application filed on 17 May, 2024 seeking substitution of the Plaintiff.

[2.] This application for Leave to appeal the Judgement was filed on 20 December, 2024. There was no Affidavit evidence filed in support of this application.

[3.] The grounds of appeal are replicated below:

GROUNDS FOR APPEAL are as follows:

1. The Learned Judge erred in that he failed to take into consideration all of the relevant facts and surrounding circumstances of the case;
2. The learned Judge erred in fact and in law when he failed to take into consideration all of the elements of an agreement or contract.
3. That the matter was handled in a way that disadvantages the Claimant and creates an unjust outcome;
4. That the Claimant has a good claim on the merit and has a reasonably good cause of action;
5. That having a legitimate claim on the merit the Learned Judge failed to allow the Claimant to have an opportunity to be heard or to have his day in court;
6. That the Claimant's applications are not prejudicial and are not an abuse of the Court's process;
7. That having regard to all of the circumstances and issues involved the Ruling of the Learned Judge is unfair;
8. That the Ruling to Strike Out both the Claimant's Writ of Summons and application seeking substitution of the Claimant be dismissed and that both the Writ of Summons and the application seeking substitution of the Claimant/Claimant be reinstated as they both go to the heart of the matter;
9. Any other grounds which the Claimant might consider appropriate in the circumstances and after seeking legal counsel.

SUBMISSIONS

[4.] Submissions were received by the Court on the date of the hearing 10 February, 2025. Claimant's Counsel in brief submits the following:

a. That a summary judgement is an interlocutory order (see **Junkanoo Estates Ltd. v. UBS Bahamas (In Voluntary Liquidation)** [2017] UKPC 8);
b. That the Court's order was an interlocutory order and requires leave to appeal (see **Ms Amlin Corporate Member Limited V Buckeye Bahamas Hub Limited** 2020/COM/adm/00016);
c. That the Court may exercise its power to grant leave to appeal if the following grounds are met: (i) the grounds have a real prospect of success, or (ii) there is a compelling reason that an issue raised should be examined in the public interest;

d. That the Defendant was negligent that it was vicariously liable for the acts of its employees (see **Lister and Others (AP) v Hesley Hall Limited** [2001] UKHL 22);
e. That there was no agreement between the parties as there was no proper consideration nor meeting of the minds (see **Nadvia Diversified Investment Inc. v. Agbeko,** 2018 ONSC 2466 (CanLII); **Schluessel v Margiotta**, 2018 ABQB 615 (CanLII));
f. That the Claimant indicated that he never accepted the sum of $350.
g. That based on his the Claimant's conduct there was no agreement (see **Gibson v Manchester City** Council [1979] 1 All ER 972);
h. That the Claimant was not provided with full settlement based on the consideration received and that the Court did not take into consideration all of the elements of an agreement;

[5.] Defendant's Counsel submits the following, in part:

a. For the Court to grant leave to appeal the Court must be satisfied that the Applicant can demonstrate a prima facie case of error (see **Pang Hon Chin v. Nahar Singh** [1986] 2 MLJ 145 [(1907) 123 L.T. Jo 202);
b. That, with reference to ground 2, the Claimant does not specifically state what relevant facts the Applicant is alleging the Court did not consider;
c. That Ground 2 is devoid of specificity and that all the elements of a contract were met;
d. That Ground 3 lacks specificity and the remaining grounds amount to submissions;
e. That leave to appeal would be granted if there is a reasonable prospect of success (see **Smith v Cosworth Casting Process Ltd.** [1997] 4 All E.R. 840);
f. That any hearing of the matter would be prejudicial to the Defendant, not only because the hearing of the matter would be approaching some 10 years after the alleged cause of action, but also because the Claimant is deceased and cannot be cross-examined;

LAW

[6.] Firstly, the requirement for leave to appeal only applies to interlocutory orders. Section 11(f) of the Court of Appeal Act states:

> "11. **No appeal shall lie** ...,
> (f) **without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court 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 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 Companies Act in respect of misfeasance or otherwise; or
> (vi) 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."

Therefore, a final order does not require leave to appeal.

[7.] When determining what is a final order the decision of **Peace Holdings v First Caribbean Bank** [2014] 2 BHS J No. 73 is helpful, as it applied the Privy Council ruling of **Salaman v Warner and Others** [1891] 1 QB 734 at 735, the Court of Appeal determined that:

> 'The **question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final.** On the other hand, **if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final but interlocutory**'."

[Emphasis added.]

[8.] The Court struck the pleadings of the Claimant and thus disposed of the matter. Had the Court ruled differently the matter would have continued on to trial. Therefore, the Order of this Court was interlocutory and required leave to appeal.

[9.] The law concerning leave to appeal is well established. The test to be applied for the consideration for the grant of leave to appeal is stated in **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)** [1999] 1 WLR 2 at para 10-11:

> "The general test for leave
>
> 10. **[T]he general rule applied by Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success.** A fanciful prospect is insufficient. **Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.**
>
> 11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, **if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave."**

[Emphasis added.]

[10.] Further, when examining what is considered an 'exceptional circumstance' **Smith v Cosworth Casting Process Limited** (1997) 4 All ER 840 as the principles established are as follows:

> (1) The **court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal.** This test is not meant to be any different from that which is sometimes used, **which is that the applicant has no arguable case.** Why however, this court has decided to adopt the former phrase is because **the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
>
> (2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. **For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."**

[Emphasis added]

[11.] The test is further summarized in the case of **Keod Smith v Coalition to Protect Clifton Bay** SCCivApp. No. 20 of 2017 at paragraph [23] where it is stated the considerations before the Court are:

> "whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying".

[12.] Thus, for leave to be granted, the Court must be satisfied that there is a reasonable chance of success or more plainly an arguable case. Moreover, where there is no reasonable

prospect of success the Court may grant leave in exceptional circumstances as a concern of public interest or interpretation of law.

ISSUES TO BE DETERMINED

[13.] The issues to be determined are as follows:

a. Whether there is a reasonable prospect of success; and/or
b. Whether the issue before the Court is one of exceptional circumstances.

APPLICATION

Whether there is a reasonable prospect of success?

[14.] As the Claimant pleaded no evidence the Court is bound to rely on the pleadings to make out the grounds of appeal before this Court. Grounds 1-7 as pleaded seemingly makes out the ground that the Claimant is of the view that it has a reasonable prospect of success. In the view of the Claimant the Court was unfair, did not take into account all the surrounding circumstances and relevant facts.

[15.] The first Ground of appeal stated that "The Learned Judge erred in that he failed to take into consideration all of the relevant facts and surrounding circumstances of the case". At the hearing of a strike-out application, the Court is concerned with the pleadings put before the Court, it is not to dive into the strength of the evidence. In essence, the question put to the Court to be answered is whether there is an arguable case to be answered.

[16.] The Court at the time of making its decision had considered the pleadings on its face; and on its face the Defendants stated:

> 5. Save that the First Defendant agrees that Roderick Smith made to the Plaintiff an ex-gratia payment, not in the sum of Three Hundred Dollars ($300.00), for the Plaintiff's bus repair, the First Defendant denies paragraph four (4) of the Statement of Claim. Alternatively, the Defendant avers that the payment made by Roderick Smith was in full satisfaction for the Plaintiff to repair his bus and avers further that it was the negligent repair of the bus that caused the Plaintiff's alleged loss, if any.

[17.] This matter began in 2021. At that time the Rules of the Supreme Court governed the action and there is a negative effect where a Claimant does not file a Reply. In the case of **Glendon Rolle (T/A Lord Ellor & Co) v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294, *Charles J* observed the application of the RSC and the effect of no Reply:

> [31] RSC Order 18 rule 3 deals with service of reply and defence to counterclaim. It provides:
>
> **"(1) A plaintiff on whom a defendant serves a defence must serve a reply on that defendant is it is needed for compliance with Rule 8; if no reply is served, rule 14(1) will apply".**
>
> [32] While it is not obligatory to file and serve a reply, the necessity to do so in order to mount an affirmative case in answer to a defence was discussed in the following passage in **The Supreme Court Practice 1999, Vol.1, at para.18/3/1-2:**
>
> **"Effect of rule - This rule distinguishes sharply between a "reply" and a "defence to counterclaim", and at the same time it defines the circumstances in which a reply is necessary. Both are pleadings which it is for the plaintiff to serve, the reply in answer to the defence, and the defence to counterclaim in answer to the counterclaim. If, as is more often the case, the plaintiff desires to answer both the defence and the counterclaim, he must serve only one document incorporating both the reply and the defence to the counterclaim (para. (3). The practice is to entitle the whole pleading, "reply and defence to counterclaim," but to divide it**

into two sections, the first headed "reply" and the second headed "defence to counterclaim," but with a continuous numbering of the paragraphs in both sections.

Where reply necessary - It is unnecessary to serve a reply if the plaintiff only wishes to deny the allegations contained in the defence, since if no reply is served, all material facts alleged in the defence are put in issue (r. 14 (1)). A reply merely "joining issue" is therefore unnecessary, and the Court may order the costs to be disallowed on taxation (O 62 rr. 3 (3) and 10 (1).

On the other hand, it is frequently necessary for the plaintiff to set up some affirmative case of his own in answer to the facts alleged by the defendant. Thus, a reply is necessary if it is required to comply with r. 8, i.e. the plaintiff must serve a reply and plead specifically any matter for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality which he alleges makes the defence not available or which might otherwise take the defendant by surprise or raises issues of fact not arising out of the defence (r.8. (1)." [Emphasis added]

[18.] The Court understands the case of the Plaintiff to be an affirmative one and due to not filing a Reply to the Defence made cannot be considered. This, therefore, in the presence of the pleadings of the Defendant acts as an admission, as there is no case to refute and affirm the claims which the Claimant wishes to rely upon now.

[19.] This was the basis of the Court's decision to strike out. That the law is clear as it relates to settlement, and on the face of the pleadings there was a settlement of the matter. Moreover, there was also an assertion that there was an intervening act, however, once again the Claimant had not replied to this.

[20.] Further, Counsel for the Claimant states that the Court handled the matter in a way that was unfair and disadvantaged the Claimant. On her feet, at the hearing of the matter, Counsel for the Claimant argued that the Court drove the Claimant from the judgment seat by not considering the elements of agreement or contract. In her written submissions, she argues that there was no contract/agreement as there was allegedly no meeting of the minds. However, in the hearing of the matter Counsel stated "the Defendant's agreed to pay for the repairs". Therefore, there was in this Court's view, an agreement, meeting of the minds, and consideration in the amount of $350, which based on the pleadings were not disputed. Therefore, this Court took into consideration the relevant elements of a contract, as pleaded in Ground 2.

[21.] Therefore, with consideration to the above-mentioned, this Court sees no reasonable prospect of success as there is no arguable case of merit that is likely to have an outcome on appeal.

Exceptional Circumstances

[22.] Counsel for the Claimant, on her feet, argued that this matter is one of exceptional circumstances, submitting that it is in the public interest that this matter be further explored and citing the Consumer Protection, Act.

[23.] The grounds proffered by the Claimant and pleaded for this application make no mention of this ground and there is no specificity as to how this ground would be applicable in the current circumstances. As previously stated, the law as it relates to contracts and settlement of the same is well established and no specific question of law was put forth by the Claimant

[24.] which requires clarification. Therefore, this ground too fails as the Court is not satisfied that the current matter meets the requirement of an exceptional circumstance, because it does not demonstrate that the issue to be determined is of great public importance nor that there is a law that needs clarification.

DISPOSITION

[25.] The Court refuses the application of the Claimant and denies leave to appeal.

[26.] This Court follows the principles articulated in the Court of Appeal case of **Junkanoo Estates Ltd. Yuri Starostenko, Irina Tsareva Starostenko and UBS (Bahamas) Ltd (In Voluntary Liquidation)** SCCivApp. No. 24 of 2018 where the Court at paragraph 12 said the following: ***"The general principles are that costs are in the discretion of the court and generally follow the event with the unsuccessful party paying the costs except when it appears to the court that in the circumstances of the case some other order should be made. These principles are not novel. They are helpfully set out by Lord Justice Nourse in Re Elgindata Ltd (No. 2) [1992] 1 WLR 1207 at page 1214: "The principles are these: (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."***

[27.] In the circumstances this Court will award cost to the Defendants to be taxed if not agreed and certified for one (1) Counsel.

Dated the 6th day of May 2025

Andrew Forbes
Justice of the Supreme Court