

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Application No. BBCV2015/002
BB Civil Appeal No. 18 of 2014**

BETWEEN

**BATTALEYS (BARBADOS) LIMITED
(IN RECEIVERSHIP)**

APPLICANT

AND

**KAUPHUNG SINGER & FRIEDLANDER LIMITED
CHRISTOPHER SAMBRANO
CRAIG WATERMAN &
BM HOLDCO LIMITED**

RESPONDENTS

Before The Honourables

**Mr Justice R Nelson
Mr Justice J Wit
Mr Justice D Hayton**

Appearances

Mr Alair Shepherd, QC and Mr Andrew Clarke for the Applicant

**Mr Garth St E W Patterson, QC, Ms Tammi Pilgrim and Mr Bartlett Morgan for
the first three Respondents**

**JUDGMENT
of
Justices Nelson, Wit and Hayton
Delivered by
The Honourable Mr Justice Hayton
on the 20th day of March 2015**

JUDGMENT

[1] There are three applications by Battaleys (Barbados) Limited (“Battaleys”) before the Court: (1) an application for an extension of time to file an application for special leave; (2) an application filed on 28th January 2015 for special leave to appeal the decision of the Court of Appeal of Barbados dated 16th December 2014 refusing injunctive relief; (3) if both those applications are granted, an application for injunctive relief pending resolution of the appeal proceeding to this Court. At the end of the hearing this Court refused to grant the first two applications, so that the third application also failed, and stated that it would give its reasons later. These are those reasons.

The Background

[2] The dispute underlying this application arises from two loans made to Battaleys by Kaupthung Singer & Friedlander Limited (“Kaupthung”) for US \$11,868,000 and US \$2,800,000 and secured by two legal mortgages over Battaleys’ lands. Battaleys defaulted on the loans and Kaupthung under its apparent powers as mortgagee appointed Christopher Sambrano and Craig Waterman (the Second and Third Respondents) to be receivers with a view to sale of the mortgaged lands. By a Claim Form and Statement of Claim filed on 17th January 2014 Battaleys commenced proceedings (the “Prime Proceedings”) against Kaupthung and the Second and Third Respondents. Battaleys claimed declarations that the two loans and the two mortgages were “null and void and unenforceable” and the appointment of the two receivers “of no effect”, and sought an interim and a permanent injunction restraining Kaupthung and its two receivers from proceeding further in any way. The basis for these claims was the allegation that Kaupthung in granting the loans and taking security therefor had been conducting business without a licence in breach of the Financial Institutions Act, Cap 324A.

[3] Mr Alair Shepherd QC informed the court that at one stage B M Holdco Limited (“Holdco”), the Fourth Respondent, had itself joined as a defendant in the High

Court proceedings, but subsequently it filed an application to withdraw and discontinue its participation. Its counsel was ill at the scheduled hearing of this application which was then adjourned and has not since been heard. No one appeared before this Court to represent Holdco, Mr Garth Patterson QC stating that he had heard from Holdco's counsel that Holdco wanted no further part in the proceedings.

- [4] Kaupthung responded to the Prime Proceedings by filing an application on 29th January 2014 for summary judgment and/or for Battaleys' claim to be struck out. On 19th June 2014 Cornelius J dismissed the application and Kaupthung, with the requisite leave of Cornelius J, then filed an appeal to the Court of Appeal (the "Kaupthung Appeal").
- [5] Meanwhile, Battaleys had applied in the Prime Proceedings for an interim injunction, till its case was heard, restraining the sale, mortgage or alienation of any of its assets by any of the Respondents, their servants or agents. On 4th July 2014 Cornelius J in an oral judgment refused to grant the interim injunction on the basis that Battaleys would be adequately compensated by the award of damages if it turned out that Battaleys' claim succeeded in the Prime Proceedings, though the judge provided no written judgment.
- [6] On 7th July 2014 Battaleys, needing no leave from Cornelius J, filed an appeal in the Court of Appeal against the 4th July judgment (the "Battaleys Appeal"). It also filed with that Court an application pursuant to Rule 62.16(1)(c) of the Supreme Court (Civil Procedure) Rules. The Rule enables a judge to "make orders for "(c) an injunction restraining any party from disposing of or parting with possession of the subject matter of an appeal pending the determination of the appeal." Battaleys sought the following Order, "That an injunction be granted restraining the defendants by themselves their servants or agents in any way whatsoever from selling mortgaging or alienating in any way any of the assets of the claimant."

- [7] On 10th July 2014 Sir Marston Gibson CJ granted that injunction without any notice having been given to the Respondents, who therefore on 15th July filed an application with the Court of Appeal under s 53(3) of the Supreme Court of Judicature Act, Cap 117A, to have the injunction discharged.
- [8] On 10th December 2014, after Mr Alair Shepherd QC for Battaleys had conceded that the Chief Justice's order was a nullity, the Court of Appeal discharged the order. It then heard Mr Shepherd QC's application for the grant of an injunction, pending the hearing of the Battaleys Appeal.
- [9] On 16th December 2014 it held that the above wording of the injunction sought by Battaleys amounted to the permanent injunction sought by Battaleys in the Prime Proceedings waiting to be heard by the High Court. The Court of Appeal had no jurisdiction to grant such an injunction because this "would be tantamount to this Court making a final determination of a matter still before the High Court."
- [10] Mr Shepherd QC complained to this Court that he had actually argued the matter before the Court of Appeal on the basis he was seeking an interim injunction, not a permanent one, though admitting he had not sought an amendment of his notice of appeal to reflect this. Mr Garth Patterson QC in his written submissions states that he "very definitively pointed out that the Applicant was seeking a permanent injunction", though Mr Shepherd QC in his written reply states that "it is not my recollection that this point was taken in the Court of Appeal." In any event, it appears that, in carefully reading the formal notice of appeal a few days later when writing the reasoned judgment of the court, Burgess JA focused upon the wording of the sought-after injunction. He thus stated, "Framed like this, and not limited by duration, the injunction sought by Battaleys amounts to a permanent injunction." The formal state of the record cannot be contradicted and so fully justified Burgess JA's rejection of the application.
- [11] Burgess JA could have stopped there but, instead, entered upon dangerous waters under the heading "(ii) An Injunction where the Applicant's Substantive Action is based on Illegal Contract." Here he dealt with the issue of illegality at the heart of

(i) the Prime Proceedings due to be heard by Cornelius J, (ii) the Kaupthung Appeal and (iii) the Battaleys Appeal. Assuming that Battaleys was right that the loans and mortgages had been granted without Kaupthung having the requisite licence under the Financial Institutions Act to engage in such business, he considered that the loans and mortgages were “tainted with illegality” and that both parties were “equally involved”. He then held, citing *Holman v Johnson*¹, *Muckleston v Brown*² and *Tinsley v Milligan*³, that it followed from hallowed principles that Battaleys had “not come to the court with clean hands” and so could not invoke the aid of the courts. He stressed that even if Battaleys had otherwise been able to satisfy the requirements for obtaining an interim injunction under the principles in *American Cynamid v Ethicon Ltd*⁴ and *Toojays Ltd v Westhaven*⁵ its claim must still fail because its involvement in illegality precluded it from asserting that those requirements had been satisfied.

[12] Thus Burgess JA was, in effect, determining the Battaleys Appeal and, on the assumption Battaleys established the absence of a required licence, implicitly determining the Prime Proceedings and the Kaupthung Appeal where Cornelius J’s refusal to strike out the Prime Proceedings or give summary judgment for Kaupthung indicated that it had not established that Battaleys’ claim had “no real prospect of succeeding” (as required under Part 15 of the Supreme court (Civil Procedure) Rules 2008). Moreover, Burgess JA did not deal with complex case law as to instances where one party who innocently entered into a contract made illegal by statute was entitled to invoke the assistance of the court to protect his interests favoured by such statute. It follows that, in the outstanding proceedings between the parties, the trial judge and the Court of Appeal should exercise an independent judgment unfettered by the above remarks of Burgess JA on illegality.

¹ (1775) 1 Cowp 341 at p.343.

² (1801) 6 Ves 53 at pp.68-69.

³ [1994] 1 AC 340 at p.357.

⁴ [1975] AC 396.

⁵ [2012] 2 LRC 65.

The Appeal to the CCJ

- [13] At the hearing before us leave was given to Mr Shepherd QC to amend the basis of Kaupthung's application from s 7 of the Caribbean Court of Justice Act, Cap 117, which was applicable only to seeking leave from the Court of Appeal, to s 8 applicable to seeking leave from the CCJ.
- [14] He first relied upon affidavit evidence for providing a full explanation as to why his notice of appeal was filed only one day late so that an extension of time should surely be granted. Any decision on this, however, was deferred until there had been consideration of the grounds for special leave to appeal being granted. In a case where a substantive appeal is bound to succeed (as in the case of a mathematical error having been made by the Court of Appeal in assessing compensation, as conceded by the respondent in *Somrah v Att-Gen of Guyana and The Police Commission*⁶), the Court has exercised its discretion, under rules 1.3 and 1.4(2) of the CCJ (Appellate Jurisdiction) Rules to prevent a substantial miscarriage of justice, by granting an extension of time even after a delay of over three months not caused by unforeseeable circumstances. Mr Shepherd QC, indeed, referred in his written submissions to *Kampta Narine called Mohan v Gupraj Persaud*⁷ where this Court stated that it would "grant special leave if there has been an egregious error of law or a substantial miscarriage of justice", and that "the possible merits of the appeal" need to be "weighed in the balance ...in deciding whether to extend the time for filing an appeal." Most recently, this Court had occasion to review matters in *System Sales Ltd v Browne-Oxley*⁸, and made clear that there has to be a real possibility of the applicant succeeding in his appeal if special leave is to be granted.
- [15] At the hearing Mr Shepherd QC, who had successfully appeared for the respondents in *System Sales*, accepted that he had to show that his client had a real possibility of succeeding in his appeal if special leave were to be granted.

⁶ [2009] CCJ 5 (AJ).

⁷ [2012] CCJ 8 (AJ) at [12] and [25].

⁸ [2015] CCJ 1 (AJ).

Does the appeal have a real possibility of success?

[16] As is clear from [9] and [10] above, in the light of the formal record the only course open to the Court of Appeal was to refuse the application before it for an injunction that was not temporary but permanent. It follows that the appeal has no possibility of success. While the Court of Appeal has wide powers under s 61 of the Supreme Court of Judicature Act, Cap 117A, including all the jurisdictional powers of the High Court (including, under s 44, issuing injunctions where it appears to the court to be just or convenient to do so), it could not exercise those powers to grant the permanent injunction sought in the Prime Proceedings since that “would be tantamount to making a final determination of a matter still pending before the High Court.” It follows that since the application before the Court of Appeal was not for the grant of an interim injunction, no issues arise as to when it is just or convenient to grant such an injunction, taking account of cases like *American Cyanamid Co v Ethicon Ltd*⁹, *Toojays Ltd v Westhaven Ltd*¹⁰, *Erinford Properties Ltd v Cheshire County Council*¹¹ and *Novartis AG v Hospira UK Ltd*¹².

[17] Mr Shepherd QC contends that it is wrong to penalise Battaleys for the mistaken wording of the injunction sought on its behalf, but the wording of injunctions is often crucial to the success or failure of applications for an injunction and so should be the focus for counsel and courts. It is no function of a court to take sides to plead an applicant’s case for it and to rehabilitate it if the applicant does not seek an amendment, especially where experienced counsel are before it in a commercial matter of much significance.

Any extension of time for filing the application to the CCJ ?

[18] Since the application for special leave has no chance of success no extension of time will be granted.

⁹ [1975] AC 396.

¹⁰ [2012] 2LRC 65.

¹¹ [1974] 2 All ER 448.

¹² [2013] EWCA Civ 583, [2014] 1 WLR 1264.

- [19] Some comment, however, on applications for an extension of time is needed. The basis for requesting an extension of time was that Battaleys was negotiating with the Respondents over the Xmas and New Year holiday period and had high hopes of settling matters so that no appeal to the CCJ would prove to be necessary. Moreover, its attorneys were only one day late. Nevertheless, experienced lawyers in major commercial matters must appreciate that settlement negotiations often come to nought so that an eye must be kept on deadlines for filing appeals, especially over a lengthy holiday period likely to lead to delays in any dialogue. Such a period makes it all the more necessary to keep a watchful eye on the deadline for filing notices of appeal to the CCJ, just like deadlines for keeping within limitation periods. A basic notice of appeal needs to be prepared for filing before the deadline with the possibility of amendment if necessary.
- [20] Mr Patterson QC did not object to the possibility of an extension of time, remaining studiously neutral. Agreements, non-objections or abstentions of counsel, however, cannot be used to ensure that the CCJ will grant extensions of time. For the efficient operation of a system of justice as a case progresses and so that parties know where they stand, time limits must be observed unless, as stated in Rule 5.3 of the Appellate Rules, there were unforeseeable circumstances that caused the relevant delay. The circumstances put forward on Kaupthung's behalf were eminently foreseeable.

Disposition of the Applications

- [21] The applications of the Applicant, Battaleys (Barbados) Limited, for (1) an extension of time to file its application to the CCJ for special leave, (2) the grant of special leave to appeal the decision of the Court of Appeal of Barbados dated 16th December 2014 and (3) the grant of an interim injunction pending the resolution of the above appeal by the CCJ are refused. It follows that the

Applicant is to pay the costs of the First, Second and Third Respondents, to be taxed if not agreed.

/s/ R Nelson
The Hon Mr Justice R Nelson

/s/ J Wit
The Hon Mr Justice J Wit

/s/ D Hayton
The Hon Mr Justice D Hayton