

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/023

BETWEEN:

**[1] RUDY LIM
[2] UTARYO SUWANTO
[3] EKA SINTO KASIH TIJA**

Appellants

and

**[1] PRECIOUS TREASURE GLOBAL INC.
[2] TRISTAR GLOBAL HOLDINGS CORPORATION
[3] AMS TRUSTEES LIMITED**

Respondents

Before:

The Hon. Mde. Indra Hariprashad-Charles

Justice of Appeal [Ag.]

REASONS FOR DECISION

[1] The third, fourth and fifth Defendants apply for:

- (i) Leave to appeal Order of Olivetti J. dated 5th November 2008;
- (ii) Order that the proceedings be stayed pending determination of the application for leave to appeal
- (iii) In the event that leave to appeal is:
 - (a) granted, an order that the proceedings in the High Court (Claim No. BVI HCV 2008/311) be stayed and against all Defendants until the hearing of the appeal; or
 - (b) refused; an order extending the period for the Third, Fourth and Fifth Defendants to file a defence such that

the Defence is due 28 days after the date of any refusal of this Applications for leave to appeal.

Grounds of Appeal

- [2] The learned Judge erred in failing to stay these proceedings, and against all Defendants, pending referral of the dispute to arbitration and after the issuance of any award and/or Judgment from the arbitrators presiding therein.
- [3] The Claimant/Respondent opposes the application for leave to appeal as well as stay of the present proceedings in favour of a reference to arbitration.

The Test

- [3] As this purported appeal is procedural leave to appeal must be obtained before a Notice of Appeal is filed.
- [4] The appellant has applied within time for leave to appeal.
- [5] Leave to appeal will only be granted when the applicant establishes that the intended appeal has a realistic prospect of success: **Othniel Sylvester v Faellesege**, A Danish Foundation (St. Vincent & the Grenadines) Civil Appeal No. 5 of 2005.
- [6] As a starting point, the court needs to know if there is an argument capable of being advanced; **First Caribbean International Bank (Cayman) Ltd. V Starkey** (BVI Civil Appeal No. 23 of 2005).
- [7] In the present case, the sole basis upon which the present application hinges is Clause 15.2 of the Shareholder's agreement between the parties. The appellant argues that the effect of this provision is to justify a stay of proceedings in favour of arbitration. The application is flawed for two (2) reasons.

- (i) The appellant's argument identifies the wrong agreement:

The claim is brought upon a share charge – copy of share charge exhibited in Mr. Schilder's 2nd affidavit dated 3rd November 2008.

(ii) Insufficient evidence:

There is insufficient evidence to trigger the arbitration clause as drafted.

[8] In conclusion, the challenge is untenable and the stay application accordingly fails.

[9] The order of this Court will be:

Order

(1) Application for leave to appeal against the Order of Olivetti J. dated 5th November 2008, pursuant to **CPR** 62.2, refused.

(2) Time extended to 15th January 2009, that is, 28 days from the making of this Order hereof for the third, fourth and fifth defendants to file a defence.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]
17th December 2008