EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2013/0011

IN THE MATTER OF the Leeward Isles Resorts Limited

and

IN THE MATTER OF an Application under Section 211 of the Companies Act R.S.A. c. C65

and

IN THE MATTER OF the Court Supervision of the Liquidation of Leeward Isles Resorts Limited

BETWEEN:

[1] BRILLA CAPITAL INVESTMENT MASTER FUND SPC LIMITED (A Cayman Island segregated portfolio company, for and on behalf of Brilla Cap Juluca Segregated Portolio M, a segregated portfolio thereof)
[2] ANGUILLA HOTEL INVESTORS LIMITED

Appellants

and

[1] LEEWARD ISLES RESORTS LIMITED (in liquidation)
[2] CHARLES HICKOX
[3] LINDA HICKOX
[4] CAP JULUCA L&C LIMITED
[5] WILLIAM TACON (the former joint liquidator of Leeward Isles Resorts Limited)
[6] STUART MACKLIAR (the former joint liquidator of Leeward Islets Resorts Limited
[7] JOHN GREENWOOD (the liquidator of Leeward Isles Resorts Limited
[8] REGISTRAR OF COMPANIES

Respondents

IN THE MATTER OF Maundays Bay Management Limited

and

IN THE MATTER OF an Application under Section 211 of the Companies Act R.S.A. c. C65

and

IN THE MATTER OF the Court Supervision of the Liquidation of Maundays Bay Management Limited

BETWEEN:

[1] BRILLA CAPITAL INVESTMENT MASTER FUND SPC LIMITED (A Cayman Island segregated portfolio company, for and on behalf of Brilla Cap Juluca Segregated Portolio M, a segregated portfolio thereof)
[2] ANGUILLA HOTEL INVESTORS LIMITED

Appellants

and

[1] MAUNDAYS BAY MANAGEMENT LIMITED (in liquidation)
[2] CHARLES HICKOX
[3] LINDA HICKOX
[4] CAP JULUCA L&C LIMITED
[5] WILLIAM TACON (the former joint liquidator of Leeward Isles Resorts Limited)
[6] STUART MACKLLAR (the former joint liquidator of Leeward Isles Resorts Limited
[7] JOHN GREENWOOD (the liquidator of Leeward Isles Resorts Limited
[8] REGISTRAR OF COMPANIES

Respondents

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mde. Gretel Thom — Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Robert Levy, QC, Mr. Edward Knight and Mr. Ravi Bahadursingh
for the Appellant
Mr. Allan Wood, QC and Ms. Tan'ania Small Davis for the second, third and fourth Respondents
Ms. Dia Forrester for the seventh Respondent
Ms. Mary Clare Haskins for the eighth Respondent

2014: June 27.

Civil appeal – Whether master erred in the exercise of his discretion – Stay of proceedings – Whether master erred in granting a stay

Leeward Isles Resorts Limited ("LIR") and Maundy's Bay Management Limited ("MBM") ("the Companies") were engaged in the management, and owned part of the assets, of Cap Juluca Resort, Anguilla. The Companies were placed in voluntary liquidation and Joint Liquidators ("JLs") were appointed. On 29th March 2012, the JLs made an application for leave to sell the Companies' assets to the successful bidder in a sale process. The appellants and respondents were bidders in this process.

On 30th April 2012, the trial judge made an order granting permission to the JLs to sell the Assets to the second, third and fourth respondents. This resulted in the formation of a sale and purchase Agreement ("SPA") dated 2nd May 2012. On 18th May 2012, the appellants appealed against the decision of the trial judge granting the JLs permission to sell the Assets ("Set-Aside Application"). The appellants sought to set aside the SPA on the principal ground that the JLs' act was manifestly disadvantageous to the general body of creditors. The Set-Aside Application was issued on 11th June 2012.

Meanwhile, the respondents applied to the court to stay the Set-Aside Application on the main basis that it amounted to parallel proceedings which challenged the order of the trial judge. The learned master, exercising his discretion, granted the application to stay the respondent's Set-Aside Application. The appellants, dissatisfied with the order of the learned master appealed to the Court of Appeal.

Held: dismissing the appeal and awarding costs to be assessed, if not agreed, to the second, third, and fourth respondents, that:

1. In seeking to challenge the exercise of a judge's discretion it is necessary to show that the judge has exceeded the generous ambit within which a reasonable disagreement is possible. It must be shown that the judge has either erred in principle in his approach or has considered irrelevant factors or that his decision is plainly wrong. Once this is shown, it is up to the appellate court to exercise its discretion afresh in arriving at a decision.

AEI Rediffusion Ltd v Phonographic Performance Ltd (costs) [1999] 1 WLR 1507 applied; Enzo Addari v Edy Gay Addari Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2005/0021 (delivered 23rd September 2005, unreported) applied; Quillen and Others v Harney et al (No.2) (1999) 58 WIR 147 applied.

2. In the totality of the circumstances, the learned master erred in exercising his discretion since he took into account irrelevant factors including that there was the possibility of an amicable resolution of the dispute. The learned master also erred in finding that the decision of the learned judge dated 30th April 2012 and the Set-Aside Application were parallel proceedings and quintessentially the same.

3. It therefore is open to the appellate court to exercise its discretion afresh and in so doing, taking into account all of the relevant factors, there is a real possibility that a decision from Her Majesty in Council could impact on the Set-Aside Application. As such, the interests of justice require that the Set-Aside application be stayed pending the determination of the appeal to Her Majesty in Council.

ORAL JUDGMENT

[1] BLENMAN JA: This is the judgment of the court.

[2] This is an appeal against the order of Tabor M. dated 13th December 2013, by which the learned master allowed the application of Charles Hickox, Linda Hickox and Cap Juluca L&C Limited to stay an application filed by Brilla Capital Investment Master Fund SPC ("Brilla"). Brilla, on 11th June 2012, filed an application ("the Set-Aside Application") to set aside the sale and purchase agreement dated 2nd May 2012("SPA").

Background

[3] Leeward Isles Resorts Limited ("LIR") and Maundy's Bay Management Limited ("MBM") ("the Companies") were engaged in the management, and owned part of the assets of Cap Juluca Resort, Anguilla.

[4] On 7th November and 29th November 2011, the Companies were respectively placed in voluntary liquidation and Messrs. William Tacon and Stuart Mackellar were appointed as Joint Liquidators ("JLs"). On 12th November 2011 and

11th January 2012, the respective voluntary liquidations were placed under the supervision of the court on the application of the JLs.

[5] On 26th March 2012, the JLs initiated a sale process for the assets held by the Companies, i.e. 3½ villas (Nos. 4, 5, 6 and the top floor of 8), a small parcel of land, various fixtures and equipment as well as their business and goodwill ("the Assets").

[6] On 29th March 2012, the JLs made an application for an order pursuant to the Companies Act[1] for leave to sell the Assets to the successful bidder in the sale process that they had initiated; alternatively, leave to cease trading and to close Cap Juluca Resort because there were insufficient funds remaining in the liquidation to continue to trade.

[7] The matter came before Jacques J [Ag.] between 19th and 30th April 2012, at the conclusion of which the learned judge granted permission to the JLs to sell the Assets to the 2nd, 3rd and 4th respondents. The appellants stressed that the judge, on 2nd May 2012, had only granted permission; his order did not oblige the JLs to sell the Assets to the respondents, or any other party. The respondents argued that the learned trial judge's order compelled the JLs to sell the Assets to the 2nd, 3rd and 4th respondents.

[8] On 2nd May 2012, the JLs purported to sell the Assets to the 4th respondent ("the Sale"), notwithstanding that by this time, the appellants had made a substantially higher offer.

[9] The appellants are substantial creditors in the liquidation of the Companies and the owners of several villas on the Cap Juluca Resort.

[1] Cap. C65, Revised Laws of Anguilla 2000.

[10] On 18th May 2012 the appellants appealed against the decision of Jacques J [Ag.] dated 30th April 2012, granting the JLs permission to sell the Assets ("the Appeal").

[11] On 24th April 2013, the Court of Appeal unanimously allowed the appeal and set aside the order of Jacques J [Ag.] because it was "irrational" and the judge had "acted in a manner which we consider that no reasonable judge would have acted".

[12] On 6th May 2013, the respondents applied for permission to appeal to Her Majesty in Council ("permission Appeal"). On 4th December 2013, the respondents were granted such permission (to which they were entitled as of right). Shortly before that hearing, the respondents abandoned their application for a stay of the order of the Court of Appeal (setting aside the order of Jacques J [Ag.]).

[13] The Set-Aside Application was issued on 11th June 2012, in which the appellants sought to set aside the sale on the principal ground that the JLs' act was so manifestly disadvantageous to the general body of creditors that it was sufficiently reasonable that the court should set the SPA aside, or otherwise reverse it.

[14] In the Set-Aside Application Brilla sought the following orders:

(1) An order setting aside the SPA dated 2nd May 2012 between the first, second and third respondents.

(2) Questions for the JLs so as to ensure the proper and orderly sale of assets that form the subject of SPA.

[15] It is noteworthy that when the Set-Aside Application first came on for hearing the parties had agreed for it to be adjourned in order to await the determination of the appeal of the order of Jacques J [Ag.] by the Court of Appeal.

[16] Meanwhile, the Hickoxs applied to the court to stay the Set-Aside Application. The learned master having heard the application granted the stay of the Set-Aside

Application on the main basis that the Set-Aside Application amounts to parallel proceedings to this which challenges the order of Jacques J [Ag.].

[17] The appellants are dissatisfied with the decision of the learned master and have appealed against his decision on the following grounds:

(a) Had the master recognised as he should have, that the Set-Aside Application and the Privy Council Appeal were not parallel proceedings and did not involve the same issues, he would have exercised his discretion in favour of dismissing the applicants' application for a stay.

(b) Had the master recognised as he should have, that the Set-Aside Application did not require a review of the decision of Jacques J [Ag.], he would have exercised his discretion in favour of dismissing the applicants' application for a stay.

(c) Had the master properly considered as he should have, the merits of the Privy Council Appeal and the prejudice to all parties caused by delay in the Set-Aside Application, he would have exercised his discretion in favour of dismissing the applicants' application for a stay.

(d) Had the master recognised as he should have that the prospects of an amicable resolution of the litigation concerning Cap Juluca was irrelevant to his decision, and indeed there was no evidenced basis for him concluding that an amicable resolution was within sight, he would have exercised his discretion in favour of dismissing the applicants' application for a stay.

[18] Learned Queen's Counsel, Mr. Levy, urged the Court to allow the appeal on the basis that the master committed several errors.

[19] The appeal is strenuously opposed by learned Queen's Counsel Mr. Wood, primarily on the basis that the master did not err; alternatively the

master's decision was within the generous ambit in which a reasonable disagreement is possible. He urged the court to dismiss the appeal.

[20] Mr. Levy, QC further argued that the learned master failed to recognise the fundamental distinction between the two sets of proceedings is that the appeal concerns the decision of Jacques J [Ag.] whereas the Set-Aside Application concerns the actions of the JLs. The decisions must therefore be different as they engage different issues. There is no risk of inconsistency.

[21] Mr. Levy, QC also complained that the learned master was wrong to conclude that the Set-Aside Application would involve a review of the order of Jacques J [Ag.] which was impermissible in so far as the master and the learned judge exercised coordinate jurisdiction.

[22] Mr. Levy, QC argued that the master failed to take into account that the appeal to the Privy Council was wholly without merit and by so doing the learned master failed to exercise his discretion properly.

[23] Further, Mr. Levy, QC submitted that the learned master in staying the Set-Aside Application, failed to take into account the consequences of delay that would ensue. Therefore, the master failed to properly address his mind to the question of disadvantage or prejudice caused by the stay even though he repeatedly spoke about the need to avoid any further delay. In a word, the learned master simply failed to take into account the implications of the delay that would have been occasioned by granting the stay of Set-Aside Application. In support of this position Mr. Levy QC referred the Court to Reichhold Norway ASA and another v Goldman Sachs International (a firm)[2] where Lord Bingham approved the words of the judge below Moore-Bick J, who said:

[2] (2000) 1 WLR 173.

> "I do not accept however, that such a step should only be taken if there are very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff.[3]

[24] Mr. Levy, QC also referred the Court to Konkola Copper Mines Plc et al v Coromin Limited & others[4] where Rix LJ confirmed the above test and stated as follows-:

> "It is common ground that the Reichhold lays down the relevant test. Thus it is accepted that a case management stay is possible, but also that it requires rare and compelling circumstances."[5]

[25] Mr. Wood, QC denied that the learned master in coming to his decision took into account irrelevant factors. He argued that in the Set-Aside Application the court would have to examine the nature and parameters of the order of Jacques J [Ag.] in order to determine whether or not the JLs acted properly in entering the SPA.

[26] Mr. Wood, QC urged the Court to dismiss the appeal against the order of the learned master. He said that in the appeal to Her Majesty in Council it would be necessary for the Board to examine the proceedings that transpired before Jacques J [Ag.] in order to determine its true nature. There is the real possibility and every likelihood that the decision of the Board will impact on the decision that may be made in the Set-Aside-Application.

[27] Mr Wood, QC argued that the learned master was correct to stay the Set-Aside-Application and to await the decision of Her Majesty in Council in the appeal against the judgment of the Court of Appeal in relation to the order of Jacques J [Ag.]. Further, he argued that the learned master exercised his discretion in a proper manner and there was no basis for the appellate court to interfere with the exercise of his discretion in staying the Set-Aside-Application.

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[3] [1999] CLC 486, 492.
[4] (2006) EWCA Civ 5.
[5] At para. 63.

[28] In reply learned Queen's Counsel, Mr. Levy, maintained that in their appeal against the order of Jacques J [Ag.] to the Privy Council the appellants will not be challenging the validity of the order. Rather the position that will be adopted by the appellants is that the order was a valid and subsisting order when the JLs sold the assets. In fact the appellants' case is that the sale should be set aside notwithstanding the existence of that order.

[29] We have examined the pleadings in the case at first instance, the judgment of the learned master, the documents that have been filed in this appeal together with the very helpful written submissions from both learned Queen's Counsel. We have also given deliberate consideration to the lucid oral submissions of both counsel.

Discussion and Analysis

[30] It is common ground that this appeal amounts to a challenge to the exercise of the learned master's discretion. The court accepts that in seeking to challenge the exercise of discretion it is necessary to show that the judge has "exceeded the generous ambit within which a reasonable disagreement is possible".[6]

[31] The test has alternatively been expressed by Lord Woolf MR in AEI Rediffusion Ltd v Phonographic Performance Ltd (costs)[7] as follows:

> "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the factors fairly in the scale".[8]

[32] The appeal court will also interfere where the judge's decision was plainly wrong.[9]

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[6] See Tafern Ltd. v Cameron Mc Donald and Another Practice Note (2000)1 WLR 1311.
[7] [1999] 1 WLR 1507.
[8] At p. 1523.
[9] See Jeffery Charles Stuart v Stephen Goldberg et al (2008) EWCA Civil 2; Enzo Addari v Edy Gay Addari, Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2005/0021 (delivered 23rd September 2005, unreported); Quillen and Others v Harney et al (No.2) (1999) 58 WIR 147 at 150-151.

[33] We are not of the view that the appeal to the Privy Council from the unanimous decision of the Court of Appeal, which quashed the decision of Jacques J [Ag.] in the order dated 30th April 2012 and the Set-Aside Application amount to parallel proceedings. Neither are we of the view that as stated by the learned master, the two sets of proceedings are quintessentially the same.

[34] We are also convinced that the learned master appeared to have taken into account irrelevant considerations such as the possibility of an amicable resolution of the dispute of the litigation over the Cap Juluca Resort.

[35] Equally, the learned master erred when he opined that the decisions in each of the above actions could not be assumed to be different. While we agree that in the Set-Aside-Application the question to be determined is whether the JLs acted properly in going ahead with the sale, we have no doubt that in seeking to determine this issue the trier of the case may well have to examine any pronouncements of Her Majesty in Council on the order of Jacques J [Ag.] order. The burden is upon those who argue for a stay to demonstrate, through cogent evidence, sound reasons for a stay in all the circumstances.[10]

[36] There is no doubt that the learned master in exercising his discretion took into account irrelevant matters. He therefore erred in the exercise of his discretion.[11]

[37] It therefore behoves this Court to exercise the discretion afresh since the learned master erred in principle in his approach and has taken into account matters that he ought not to have taken into account. In so doing, we have taken into consideration all of the submissions made by both Queen's Counsel and are of the considered opinion that in determining the permission Appeal, Her Majesty-in-Council may well have to examine the nature and parameters of the order that was made by Jacques J [Ag.]. This we see as necessary since they will be called upon

[10]See Andrew Wakefield v Channel Four Television Corporation et al (2005) EWHC 2410.
[11] See Tafern Ltd v Cameron MacDonald (2000)1 WLR 1311.

to determine whether the learned judge acted properly in granting the JLs permission to sell the Assets to the respondents on the terms directed.

[38] Given the totality of the circumstances, there is no doubt that a decision from Her Majesty in Council could well impact on the Set-Aside-Application. There is also the real possibility of tension between a judgment which could be rendered by that court and a decision that may well be made in the Set-Aside-Application. Indeed, in the latter claim the High Court may well have to examine some of these same matters in assessing the conduct of the JLs in entering into the SPA.

[39] The general principle is that litigants are entitled to bring their claims before the court.[12]

[40] However, taking into consideration all of the relevant factors to which we were referred by both Queen's Counsel and exercising our discretion afresh bearing in mind all that we have said in our exchanges with counsel and above in this judgment, we are satisfied that the interests of justice require that the Set-Aside-Application be stayed pending the determination of the appeal of the decision of the Court of Appeal to the Privy Council.

[41] Accordingly, we are of the view that the decision of the learned master staying the Set-Aside-Application should be upheld.

[42] It is noteworthy that even though the seventh and eighth respondents appeared through counsel, they took no active part in this appeal.

Conclusion

[43] For the above reasons, the appeal against the learned master's decision is dismissed and the decision is affirmed.

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[12] See Johnson v Gore-Wood & Co (2002) 2 AC 1.

[44] The second, third and fourth respondents are to have their costs assessed, if not agreed within 21 days.

[45] The court gratefully acknowledges the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

Gertel Thom
Justice of Appeal [Ag.]

Paul Webster
Justice of Appeal [Ag.]