EASTERN CARIBBEAN SUPREME COURT
COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2014/0002

BETWEEN:

LIAO HWANG HSIANG

Appellant

and

LIAO CHEN TOH

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On Written Submissions

Ms. Nadine Whyte for the Appellant
Mr. Ian Mann for the Respondent

2018: November 26;
Re-issued: November 30.

Civil appeal – Administration of estate – Freezing injunction – Whether the learned judge erred in the exercise of discretion

Liao Hwang Hsiang ("LHH") was granted full Letters of Administration appointing her as the administrator of her late husband's, Liao Yo-Chang ("LYC"), estate. On 7th February 2014, the respondent, Liao Chen Toh "(LCT") filed an application for an order directing LHH to, inter alia, refrain from distributing the estate until the method of distribution has been determined by the court in Taiwan ("Application for Directions"). The Application for Directions was set to be heard on 14th April 2014.

On 18th February 2014, LCT filed another application against LHH for a freezing injunction which was heard on 5th March 2014. On 6th March 2014, the learned judge refused the application but directed LHH to take no further steps to distribute the BVI portion of LYC's estate until a method of distribution has been decided in ongoing related Taiwan

proceedings. The learned judge also ordered that the Application for Directions be disposed of and the hearing of that application be vacated ("Directions Order"). As at 6th April 2014, LHH had not yet filed evidence in response to LCT's Application for Directions.

LHH has appealed the Directions Order alleging that the judge erred in the exercise of her discretion in disposing of the two applications as she did.

Held: allowing the appeal; setting aside paragraph 2 of the order of the learned judge; ordering that the freezing injunction and Application for Directions be reheard by a different judge, that:

1. The circumstances in which an appellate court will interfere with the judge's exercise of discretion are (i) where the judge in exercising his or her judicial discretion erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (ii) as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

   Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

2. The main issue before the court on 5th March 2014 was whether LCT had met the evidential burden to support the assertion that there was a real risk that assets would have been disposed of. The Application for Directions sought to have the court direct LHH to refrain from dealing with LYC's BVI estate until her adjustment to her spousal entitlement had been approved in Taiwan. Such an application would have required the court to consider to what extent the proceedings in Taiwan could have affected LHH's grant of Letters of Administration. It would not have been necessary to consider this if the only issue being dealt with is whether there is a risk of the BVI assets being disposed of. The effect of the ongoing related Taiwan proceedings on the grant to LHH of Letters of Administration was an irrelevant consideration for the purpose of determining whether the freezing injunction should be granted. Further, this was an irrelevant consideration that the judge was clearly influenced by in making the Directions Order. Accordingly, an appellate court can intervene as the judge erred in the exercise of her discretion in granting the Directions Order at the hearing of the freezing injunction.

JUDGMENT

[1] BAPTISTE JA: This is an appeal against the oral judgment of the learned judge and paragraph 2 of the judge's order dated 6th March 2014 ("the Directions Order"). Paragraph 2 directed that the appellant, Liao Hwang Hsiang ("LHH"),

take no further steps in the distribution of the BVI portion of the estate of her late husband, Liao Yo-Chang ("LYC"), until a method of distribution of the estate is decided in ongoing related legal proceedings in Taiwan ("the Taiwan Proceedings").

[2] The present appeal first came up for consideration by this Court on 21st March 2014. On that occasion, only LHH filed submissions in support of the appeal. The respondent, Liao Chen Toh ("LCT"), had only filed a notice of opposition to the appeal on 31st March 2014. On 4th August 2014, the Court found in favour of the appellant, citing its reasons for so doing and also noted that no submissions had been filed by the respondent and that the time for doing so had expired. LCT subsequently applied on 7th August 2014 to have the Court's decision of 4th August 2014 set aside and for permission to file skeleton submissions in respect of the appeal. The respondent requested that the appeal be reconsidered with its recently filed submissions being taken into account, and that any determination or order made in relation to this matter be reissued. The Court now reconsiders the appeal in light of LCT's new submissions.

Background facts

[3] The Taiwan Proceedings were commenced by LHH for two purposes: to determine her spousal entitlement following her husband's demise, and to partition her late husband's estate. On 14th September 2011, LHH filed a claim in the British Virgin Islands for an order that she be appointed administrator of her husband's estate. The trial of this claim took place in October of the following year, with judgment in the matter being delivered on 2nd July 2013. The finalised, settled order for the proceedings was made on 8th July 2013 and by this order, the learned judge granted LHH's application for Letters of Administration conditional upon her express waiver of her spousal entitlement under Taiwan law as it related to the BVI portion of LYC's estate ("the BVI Estate"). The BVI Estate comprised the shares formerly held by LYC in three BVI companies, namely Triple Dragon Limited ("TDL"), New Success House Co. Ltd. ("NSH") and Loyal International

Enterprises Co. Ltd. ("LIE"). The order dated 8th July 2013 was appealed by LCT the following day, but the appeal was dismissed by this Court on 16th January 2014.

[4] LHH obtained the full grant of Letters of Administration on 24th January 2014 and subsequently, on 29th January 2014, she executed three share transfers for each one of the three companies[1] and submitted them to the companies for registration. Directors of TDL approved the share transfers for that company on the same day, and two days later, gave the beneficiaries of LYC's estate, notice of its intention to register the share transfers. The register of members was updated on 21st February 2014 to reflect the transfers relevant to that company. In respect of the companies LIE and NSH, in keeping with directors' resolutions passed on 14th February 2014, the companies gave notice to the beneficiaries of LYC's estate of their intention to register the relevant share transfers.

[5] On 7th February 2014, LCT filed an application for an order directing LHH to:

(1) refrain from executing the grant issued pursuant to the order dated 8th July 2013 until her adjustment to her spousal entitlement dated 17th October 2013 had been approved by the National Taxation Bureau of Taiwan;

(2) abide by succession laws of Taiwan and refrain from distributing the estate until the method of distribution has been determined by the court of Taiwan, in proceeding No. "101st Year Zhong Jia Su Zi No. 35"; and

(3) inform LCT once she enters her name into the share registers of the BVI companies.

The application for directions was set to be heard on 14th April 2014 and LHH was informed of this on 18th February 2014.

[1] One share transfer for each beneficiary, the beneficiaries being Liao Chen Toh, Liao Wen Toh and the appellant herself, Liao Hwang Hsiang.

[6] On 18th February 2014, LCT filed another application against LHH, LWT and the BVI companies, for a freezing injunction to:

(1) prevent LHH and LWT from disposing of, dealing with or diminishing the value of the shares in TDL, LIE and NSH ("the BVI Companies") without prior written consent from his legal representatives;

(2) prevent the BVI Companies from effecting or allowing any changes, variations or amendments to its share registers;

(3) reverse any directors' or shareholders' resolutions passed on 14th February to amend the shareholders' registers of the BVI Companies, in order to restore the status quo ante until the hearing fixed for 17th March 2014 (this order contemplated that the hearing of the application for directions would occur on 17th March 2014, when ultimately, it was set for 14th April 2014);

(4) prevent the BVI Companies from convening any further meetings to amend their share registers until the hearing on March 17th 2014.

[7] The application for the freezing injunction was heard on 5th March 2014 and the following day, the learned judge made the following order, defined in paragraph 1 above as the Directions Order:

> "IT IS HEREBY ORDERED THAT:
>
> 1. Liao Chen Toh's application filed on 18 February 2014 is refused.
> 2. Liao Hwang Hsiang is directed to take no further steps to distribute the BVI estate until a method of distribution has been decided in Taiwan proceedings known as "no. 101st Year Zhang Jia Su Zi No 35";
> 3. The application made on 7 February 2014 by Liao Chen Toh is disposed of and the hearing listed for 14 April 2014 vacated;
> 4. No order as to the costs of the application made on 7 February 2014 by Liao Chen Toh;
> 5. Liao Chen Toh do pay the represented respondents' costs of the application dated 18 February 2014 to be assessed if not agreed."

[8] Paragraph 2 of the Directions Order was precisely the relief which had been sought by the LCT in his application for directions dated 7th February 2014, which application was not actually before the court, but rather, scheduled to be heard at a later date – 14th April 2014. The Directions Order also made clear that the Application for Directions was disposed of, and the hearing of that application which was scheduled for 14th April 2014 was vacated. As at 6th March 2014, the date of the above order, LHH had not yet filed evidence in response to LCT's application for directions.

[9] LHH appealed to this Court.

Issues on appeal – Grounds of appeal

[10] The appellant sets out the following 6 grounds of appeal:

(i) The learned judge erred in making the Directions Order without giving the appellant an opportunity to be heard.

(ii) The learned judge erred in making the Directions Order without the appellant being given an opportunity to file evidence in opposition to the respondent's application for directions.

(iii) The learned judge erred in making the Directions Order without properly considering the relevant evidence before the Court.

(iv) Having found that administration of the BVI Estate, which includes distribution, is governed by BVI law and not Taiwan law, the learned judge erred in making the Directions Order.

(v) The learned judge erred in making the Directions Order in circumstances where the BVI Estate had already been distributed in accordance with Taiwan succession law – one third to each beneficiary.

(vi) Having found that there was no good arguable case made out in order to ground injunctive relief, the learned trial judge erred in granting the Directions Order which effectively gave the respondent the injunctive relief that he sought in his Application for Directions.

I shall deal with the 6 grounds of appeal based on the submissions of counsel for both parties.

Appellant**'s Submissions**

[11] LHH recognises that this is an appeal against the exercise of the learned judge's discretion in making the Directions Order. As such, the Court of Appeal will only interfere with the decision "if it is clear that that exercise was clearly wrong or exceeded the judge's discretionary remit."[2] In the case of Gregory Knight et al v First Caribbean International Bank Limited et al,[3] Mitchell JA explained:

> "The judge of first instance must not merely have preferred an imperfect solution which is different from an imperfect solution which the Court of Appeal might have adopted, but must have exceeded the generous ambit within which a reasonable disagreement is possible. … [T]he circumstances in which this court will interfere with the judge's exercise of discretion are (i) where the judge has misdirected himself or herself with regard to principles in accordance with which his or her discretion had to be exercised; (ii) where the judge in exercising his or her discretion took into account matters which ought not to have been taken into account or failed to take into account matters which ought to have been taken into account; and, (iii) where the judge's decision is plainly wrong. Where a judge has failed to give any reasons for the way in which she has exercised her discretion, then it falls to the Court of Appeal to reconsider the matter afresh and to exercise its own discretion and to give reasons for the manner of its exercise …"[4]

[12] LHH argues that the LCT's application for directions, which had been set for hearing on 14th April 2014, was not before the court on 5th March 2014 when the freezing injunction application was being heard. LHH submits that her

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[2] Per Mitchell JA in Gregory Knight et al v First Caribbean International Bank Limited et al, GDAHCVAP2012/0007 (delivered 8th June 2012, unreported) at para. 10.
[3] GDAHCVAP2012/0007 (delivered 8th June 2012, unreported).
[4] At para. 10.

submissions were tailored specifically to deal with the 5th March application, to maintain the status quo until the hearing of the 14th April application. Evidence filed for the 5th March hearing was simply for the purposes of demonstrating that LCT had not established that his application for directions disclosed a good arguable case to ground the grant of the freezing injunction. LHH argues that she was not required to, and in fact did not, substantively respond to the application for directions at the 5th March hearing, but yet the learned judge proceeded to dispose of the later application by making the Directions Order, and as such, did not give her a chance to be heard.

[13] LHH further argues that the judge ultimately based the granting of the impugned order on the mistaken premise that LHH had placed the distribution of the BVI Estate before the Taiwan Court "for approval". As a result of this mistaken premise, the judge concluded that the appellant should await a decision from the Court of Taiwan before taking any further steps to distribute the BVI estate. Additionally, LHH contends that while the judge relied on evidence of LCT's expert that LHH included the BVI Estate in her claim in the Taiwan Proceedings, she did not take into account LHH's reasons for so doing and neither did she take into account the evidence of LCT's expert that the Taiwan Proceedings were expected to conclude approximately at the end of 2014. Accordingly, LHH submits that the judge clearly failed to take into account matters which she ought to have taken into account in the exercise of her discretion in making the directions order and for this reason this Court is in a position to, and ought properly to, set aside the order.

[14] LHH states that the judge made the Directions Order on the basis that, the deceased having died domiciled in Taiwan with assets based in the BVI, it was reasonable for the court to take cognizance of any pending proceedings which may impact the local (BVI) estate and its distribution, which ultimately must be done in accordance with Taiwan law.[5] However, LHH submits that the judge was plainly wrong in doing this because: she had found that the administration of the

[5] See Transcript of Proceedings – Appeal Bundle 1, Tab 3, p. 174.

estate (as well as its distribution) was governed by BVI law and not Taiwan law; the BVI Court had appointed LHH as administrator of LYC's BVI estate with the duty to administer his estate; the shares in the BVI companies were within the jurisdiction of the BVI Court; the Taiwan Court did not have personal jurisdiction over the BVI companies; at the date of the hearing, LHH, in accordance with her duty as the duly appointed administrator of LYC's estate had distributed his BVI estate (i.e. the shares in the BVI companies) to the beneficiaries in accordance with Taiwan law; there was no allegation that the distribution was not in accordance with Taiwan succession law which requires that one third of the estate be given to each heir.

[15] Finally, the appellant submits that the learned judge having found that there was no good arguable case made out for the grant of a freezing injunction, she proceeded to grant the Directions Order, which, by its terms, effectively granted the very injunctive relief which she had found there was no good arguable case made out for.

[16] Therefore, for all of the reasons set out above, the learned trial judge's decision to make the Directions Order was plainly wrong.

Respondent**'s** Submissions

[17] LCT, in response, submits that LHH did have sufficient time to file her evidence in response to his application for directions. Notwithstanding that the said application was fixed for 14th April 2014, on 26th February 2014, the parties had been informed of the hearing of the application for the injunction on 5th March 2014. LCT concedes that the Civil Procedure Rules 2000 ("CPR") does not provide a time limit for filing evidence in response to ordinary applications before the High Court generally. However, he states that if the time limit of 14 days (which is applicable to the Commercial Court in relation to evidence in answer to an ordinary application) is applied and one takes into consideration the fact that LHH was served with the evidence in support of the application for directions on 7th February

2014, the time for filing evidence in response would have expired by 26th February 2014, which was well before 5th March 2014. LCT submits that therefore, LHH's position that she did not have an opportunity to file evidence is plainly misleading.

[18] LCT further submits that it is incorrect to say that the learned judge failed to take into account the evidence of the respondent's own expert that the Taiwan Proceedings were expected to conclude approximately at the end of 2014. The court was clearly invited to consider the contention and did in fact respond to that submission, having considered it. At the hearing of the freezing injunction application, LHH indicated that it was likely that the Taiwan Proceedings would be wound up by the end of 2014 and further stated that the application was "just another way to stretch out the administration of [the] estate".[6] The learned judge, in response, stated: "Yes. That does not change my view on the matter."[7] LCT submits that furthermore, just after the learned judge had indicated that the court would make an order directing that LHH take no further steps in distributing the BVI Estate until her proposal for distribution has been adjudicated upon by the Taiwan courts, she stated: "While the Court recognises that this will continue to delay the final administration of this estate, the Court thinks that this is the most just and convenient course given all the circumstances of the case".[8] Thus, the effect that the order would have on the final administration of the estate, namely delay, was considered and at the forefront of the learned judge's mind. LCT states that the fact that the judge was aware of the possibility of delay would also address LHH's submission that she did not have an opportunity to adduce evidence (from her own expert, Ms. Fang-Wan Yang) refuting the evidence of LCT's expert. This is so because the main point that LHH's expert evidence would have sought to demonstrate was that there was a possibility that the judge's order could cause further delay to the proceedings.

[6] See Transcript of Proceedings – Appeal Bundle 1, Tab 3, p. 181, lines 24-25.
[7] See Transcript of Proceedings – Appeal Bundle 1, Tab 3, p. 182, lines 2-3.
[8] See Transcript of Proceedings – Appeal Bundle 1, Tab 3, p. 174, lines 18-22.

[19] LCT submits that the learned judge was fully aware of the issues and applications before her. In particular, the learned judge recognised that the applications before the court were similar and made enquiries as to why they were not consolidated to be heard simultaneously.[9] The judge maintained the view that the two applications involved the same proceedings despite LCT's counsel clarifying that the proceedings before the court on 5th March 2014 were only for a freezing injunction to maintain the status quo until the hearing of the application for directions on 14th April 2014. LCT submits that it was within the learned judge's discretion to direct the administrator to certain actions. The two applications were similar, ought to have been heard together, and, being an officer of the Court, the judge took the view that a direction would be more appropriate than an injunction. LCT referred to CPR 26.1(2)(w) in making the point that the court, pursuant to its case management powers, may "take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective". He also referenced CPR 1.1(1) and 1.1(2), which (respectively) deal with the fact that cases ought to be dealt with justly and expeditiously.

[20] The issues before the court at the hearing of the injunction included determining whether LCT had a good arguable case in the Application for Directions. LCT concedes that the application for an interlocutory injunction should not be a mini-trial of disputed issues of fact and that the court ought to do the best it can on a provisional basis, with the relatively modest aim of reducing so far as possible the risk of the provisional decision ultimately proving to have produced an unjust result.[10] However, despite this, it is still within the court's powers to render decisions at the interim level in a manner which would cause the matter not to go to a final hearing. LCT cites the case of NWL Ltd v Woods[11] in support of this point.

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[9] See Appeal Bundle 1, tab 2, p. 16, lines 13 – 16. See also p. 176, line 22 to p. 177 lines 1 and 2. [para. 30].
[10] Barnsley Brewery Co Ltd. v RBNB [1997] FSR 462 (Ch D).
[11] [1979] 1 WLR 1294.

[21] LCT submits that the threshold for an appellate court to hold that a judge has exceeded his/her discretionary limit is a high one, and an appellate court will only interfere with the exercise of discretion if it is clear that the exercise was wrong. In the case at bar, that is not the case – the judge did not exceed her discretionary limit and did not err in granting the Directions Order when she found that there was no good arguable underlying case for injunctive relief.

[22] The respondent states that the appellant submitted that it is in the court's contemplation at trial that the distribution be made swiftly. However, the judge rightly found that the Taiwanese proceedings were still relevant, even if the distribution would be delayed as a result of them.

Analysis

[23] The main issue for consideration by the Court is whether the learned judge erred in the exercise of her discretion in disposing of the two matters as she did. The appellant is seeking to persuade the Court that she was not given an opportunity to be heard in relation to LCT's directions application as a result of the learned judge taking it upon herself to deal with both the freezing injunction and directions applications on 5th March 2014.

[24] In order for this Court to interfere with the learned judge's exercise of discretion, it would have to be shown that (i) in exercising her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (ii) that, as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.[12]

[12] Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.

[25] LCT has argued that the "prejudices" highlighted by LHH in her submissions are not material, because the judge was alive to these issues at the hearing, and dealt with them appropriately. Further, in the circumstances, the judge did not exercise her discretion incorrectly.

[26] The hearing on 5th March 2014 was for a freezing injunction. As such, the main issue that the court would have had to consider was whether there was a real risk that LHH would dispose of or in some way diminish the value of the shares in the BVI companies. The main consideration for the judge would have been whether LCT had met the evidential burden to support the assertion that there was a real risk that the assets would have been disposed of.

[27] By the Application for Directions, LCT sought to have the court direct that LHH refrain from dealing with the assets of the BVI Companies until her adjustment to her spousal entitlement had been approved in Taiwan. Such an application would have required the court to consider to what extent the Taiwan Proceedings could have affected LHH's grant of Letters of Administration dated 8th July 2013. However, it would not have been necessary to consider this if the only issue being dealt with is whether there is a risk of the BVI assets being disposed of. I find that the effect of the Taiwan Proceedings on the grant to LHH of Letters of Administration was an irrelevant consideration for the purpose of determining whether the freezing injunction should be granted. Further, this was an irrelevant consideration that the judge was clearly influenced by, in making the Directions Order.

[28] It is also to be noted that the learned judge, apart from (more than once) expressing the view that the two applications raised similar issues and ought to be dealt with together, did not formally indicate that she was minded to make the consolidation order of her own initiative. This would have necessitated giving any party affected (in this case, certainly LHH) a reasonable opportunity to make representations either orally, in writing, or by any other means that the court

considered reasonable, pursuant to rule 26.2 of the CPR. This would certainly have been the point in time at which the appellant could have made the point that she was aggrieved by this course of action. However, this was not done by the learned judge. After the order had been made, she simply stated:

> "The Court also notes that this [order made] will also effectively dispose of the extant application before the Court which was filed on the 7th of February, 2014. … Rather than just injunct the administrator, the Court is prepared to give her the necessary directions as indicated."[13]

[29] Notwithstanding that the learned judge may have had very good reason to consolidate the two applications, it was important that she follow proper procedure in doing this. She ought to have addressed her mind to the procedure set out in CPR 26.2 if she was minded to take such a course of action in the hearing, in order to ensure that none of the parties were adversely affected by it.

[30] For the reasons outlined above, I find that the judge did err in exercising her discretion in granting the Directions Order at the hearing of the freezing injunction. In particular, the irrelevant considerations taken into account by the judge led her to decide on issues which were not properly before the court for determination. This made her decision plainly wrong. The interests of justice require that paragraph 2 of the order of the learned judge be set aside and the freezing injunction and Application for Directions be reheard by a different judge.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar

[13] See Transcript of Proceedings – Appeal Bundle 1, Tab 3, p. 174, lines 23-25 and p. 175, lines 12-14.