

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

**CAUSE NOS. FSD 142 of 2014 (IMJ)
and FSD 89 of 2016 (IMJ)**

BETWEEN

LAKATAMIA SHIPPING CO LIMITED

PLAINTIFF

AND

NOBU SU

DEFENDANT

IN CHAMBERS

**Appearances: Mr. A Jackson of Appleby on behalf of the Plaintiff
Mr. M Wingrave of Dinner Martin on behalf of the Defendant**

Before: The Hon. Justice Ingrid Mangatal

Heard: 13 January 2017

Draft Judgment

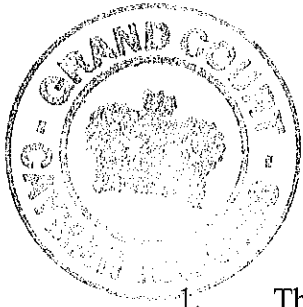
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HEADNOTE

Foreign judgment and Consequential Orders - Application for summary judgment - Order 14 of the Grand Court Rules (1995 Revision) - Whether defence with real prospects of success - whether fair or reasonable probability of real or bona fide defence - Judgment not being impeached on grounds of fraud - but impeached on grounds of public policy - Whether violation of right to a fair trial - Section 7 of the Bill of Rights, Cayman Islands Constitution Order 2009 - Whether judgment capable of being impeached on grounds obtained in breach of natural justice

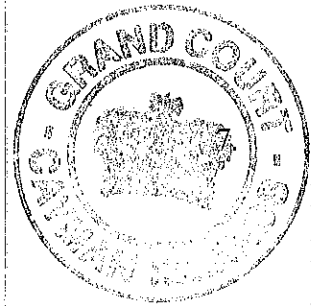


JUDGMENT

1. The application that I heard in January was the Plaintiff Lakatamia Shipping Co Limited's ("**Lakatamia**") summons seeking that it be granted summary judgment on the whole of its claim pursuant to O. 14 r. 1 of the Grand Court Rules 1995 (Revised Edition) (the "**GCR**").
2. I wish to thank Counsel on both sides for the quality of their submissions and their patience in awaiting the Judgment.

Background

3. On 3 August 2016, I made an order, pursuant to Order 4, r. 4(1) of the GCR, that Cause Nos. FSD 142 of 2014(IMJ) ("**the first action**") and FSD 89 of 2016(IMJ) ("**the second action**") be consolidated.
4. In the first action, Lakatamia sought to enforce a judgment in its favour given by the High Court of England and Wales (the "**English Court**"), together with interest.
5. On 16 January 2015, following the commencement of the first action, a further hearing took place in the English Proceedings (defined below) to determine matters consequential upon the trial of the action. The second action was commenced by Lakatamia to enforce the consequential judgment as well as a judgment of the Court of Appeal of England and Wales.
6. The Amended Statement of Claim in the first action, pleads that on 24 March 2011, proceedings were issued by Lakatamia, as first claimant, against the Defendant Nobu Su ("**Mr. Su**"), in the English Court with cause number 2011 Folio 357 (the "**English Proceedings**").

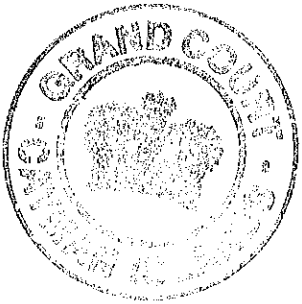


Six companies connected to Mr. Su were joined as second to seventh defendants to the English Proceedings. In addition to Lakatamia there were three other Claimants in the English Proceedings, but none of those claimants, the pleading states, have obtained a judgment or order from the English Court which may be enforced in the Cayman Islands and accordingly they do not presently seek to participate in these proceedings.

8. Lakatamia sought in the English Proceedings to recover damages from Mr. Su and the other Defendants to those proceedings for breach of contract.
9. The English Proceedings were deemed served on Mr. Su in accordance with the order of the English Court dated 8 January 2013 and Mr. Su submitted to the jurisdiction of the English Court in respect of those proceedings. In particular Mr. Su participated fully in the English Proceedings to contest the claims against him and instructed solicitors and leading and junior counsel to represent him, including at a trial of the substantive merits of the claim. This took place over 8 court days in October and November 2014. Mr. Su gave evidence in chief by his witness statement and attended the trial for cross-examination.
10. The Amended Statement of Claim pleads that Mr. Su is therefore bound by the English Judgment and the English Order (each defined below), for the reasons set out in paragraph 9, above.
11. Following the substantive trial in the English Proceedings, the presiding Judge, Mr. Justice Cooke, handed down a fully-reasoned judgment dated 5 November 2014 (“the **English Judgment**”). In addition the English Court handed down an Order (entitled “**Judgment**”), also dated 5 November 2014 (the “**English Order**”).
12. With respect to Lakatamia’s claim for damages, paragraph 1 of the English Order provides that judgment is given against Mr. Su and his co-defendants, jointly and severally, for the sum of US\$37,854,310.24 (the “**Judgment Debt**”).

13. Paragraph 2 of the English Order required Mr. Su and his co-defendants, jointly and severally, to pay the Judgment Debt to Lakatamia by 4:00 p.m. on 19 November 2014.
14. On 16 January 2015, a further hearing took place in the English Proceedings to determine matters consequential upon the trial of the action. At that hearing, the English Court made an Order (the “**Consequential Order**”) that Mr. Su and his co-defendants jointly and severally, are to pay to Lakatamia:

- (a) The additional sums of US\$2,321,300.50 and US\$7,520,900 (the “**Consequential Debts**”) in accordance with paragraph 163 of the English Judgment by 4:00 p.m. on 13 February 2015; and
- (b) Interest on the Judgment Debt at the judgment rate (being the statutory rate of 8% per annum, or US\$8,296.84 per day) from 20 November 2014, and at the same rate on the Consequential Debts from 13 February 2015.

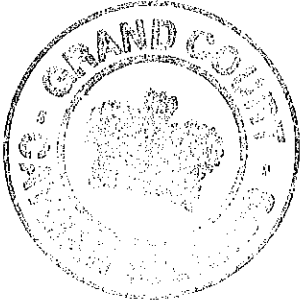


15. By reason of Mr. Su and his co-defendants pursuing an appeal against the English Judgment, Appeal Ref: 2014/4180 (the “**English Appeal**”), the execution of paragraph 2 of the English Order (to which paragraph 13 above refers) and the enforcement of the entitlement to interest on the Judgment Debt under the Consequential Order were ultimately stayed until 12 June 2015, when the Court of Appeal of England and Wales made an Order, amongst others, that the stay of execution ceased to have effect.
16. On 22 July 2015, the English Court made a further Order upon consent (the “**CFO Order**”) that the sum of US\$7,379,204.28, which was then held in the Court Funds Office (the “**CFO Sum**”) to the credit of the sixth defendant to the English Proceedings, be paid to Lakatamia in part satisfaction of the debts due to it.
17. The CFO Sum was received by Lakatamia on 6 August 2015 and applied toward the payment of post judgment interest which had accrued on the Judgment Debt and the Consequential Debts up to that date, and towards the partial payment of the Consequential Debts.

18. Lakatamia pleads that the English Order is final and conclusive and for a certain sum, being the Judgment Debt.
19. In the first action, the relief sought by Lakatamia is the entry of a judgment in the Grand Court against Mr. Su in the amount of the Judgment Debt (US\$37,854,310.24).
20. Alternatively, without prejudice to Lakatamia's primary position, as pleaded at paragraph 19 above, if the CFO sum must be treated as having been applied upon the date of receipt only toward payment of the Judgment Debt, Lakatamia seeks the entry of a judgment in this Court against Mr. Su in the sum of US\$30,475,105.96.
21. Lakatamia also claims interest pursuant to section 34 of the Judicature Law (2013 Revision) at such rate and for such period as the Court thinks fit.
22. In the second action, the relief sought by Lakatamia is entry of a judgment in this Court against Mr. Su in the following amounts:



- a) US\$4,987,228.80 (being the balance of the Consequential debts following the application of the CFO Sum on 6 August 2015 as aforesaid);
- b) US\$350,881.89 (being interest on the balance of the Consequential Debts from 7 August 2015 to 22 June 2016 inclusive: 321 days at the rate of \$1,093.09 per day);
- c) US\$2,663,285.64 (being interest on the Judgment Debt due under the English Order from 7 August 2015 to 22 June 2016 inclusive: 321 days at the rate of \$8,296.84 per day);
- d) £1,259,498.54 (being the total of the Costs and the Appeal Costs);
- e) £130,953.97 (being interest on the Costs from 16 January 2015 to 22 June 2016 inclusive: 523 days at the rate of £250.93 per day); and
- f) £2,130.61 (being interest on the Appeal Costs from 1 April 2016 to 22 June 2016 inclusive: 83 days at the rate of £25.67 per day).



23. Alternatively, without prejudice to Lakatamia's primary position, as set out in paragraph 22 above, if the CFO Sum must be treated as having been applied upon the date of receipt only toward payment of the judgment debt due under the English Order, Lakatamia seeks the entry of a judgment in this Court against Mr. Su in the following amounts:

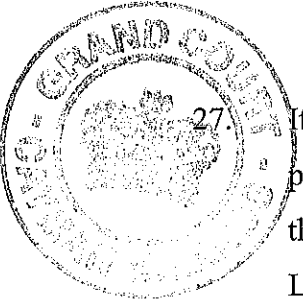
- a) US\$9,842,200.50;
- b) US\$1,069,966.24 (being interest on the Consequential Debts from 13 February 2015 to 22 June 2016 inclusive: 496 days at the rate of \$2,157.19 per day);
- c) US\$4,207,778.86 (being interest on the Judgment Debt due under the English Order prior to and following the application of the CFO Sum, calculated as follows: \$2,157,178.40 from 20 November 2014 to 6 August 2015 inclusive: 260 days at the rate of \$8,296.84 per day; \$2,144,113.08 from 7 August 2015 to 22 June 2016 inclusive: 321 days at the rate of \$6,679.48 per day);
- d) £1,259,498.54 (being the total of the Costs and the Appeal Costs);
- e) £130,953.97 (being the interest on the Costs from 16 January 2015 to 22 June 2016 inclusive: 523 days at the rate of £250.39 per day); and
- f) £2,130.61 (being interest on the Appeal Costs from 1 April 2016 to 22 June 2016 inclusive: 83 days at the rate of £25.67 per day).

24. Further, or in the alternative, Lakatamia claims interest pursuant to section 34 of the *Judicature Law (2013 Revision)* at such rate and for such period as the Court thinks fit.

25. Mr. Jackson indicated that for the purposes of this Summary Judgment application, his client is prepared to accept Judgment in the lower sums claimed in the alternative, and to accept that the CFO Sum should be treated as properly applied upon the date of receipt towards payment of the Judgment Debt.

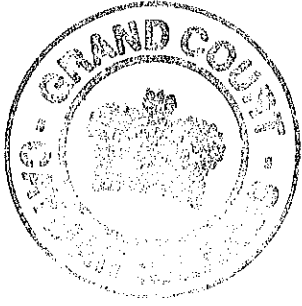
Mr. Su's Defence

26. At paragraph 3 of the Defence filed 5 August 2016, Mr. Su denies that the English Judgment and the Orders, or any of them, are binding on him for the reasons alleged in the respective Statements of Claim or at all.



It is Mr. Su's pleaded case that the orders are not final and conclusive because he sought permission to appeal against the English Judgment in the English Court of Appeal within the time permitted by the Court for the purpose and leave was granted to appeal by Longmore and Jackson LJJ against the English Order on all aspects of the matter, on 19 March 2015.

28. However, the grant of leave was made conditional upon the lodgment of US\$22 million at Court within two months of that permission.
29. On 12 June 2015 the English Court of Appeal indicated that the appeal had automatically lapsed and no further date was to be set.
30. According to Mr. Su's pleaded case, the English Appeal does not stand dismissed and has not been determined on its merits.
31. Further, that the remainder of the Orders are all predicated upon and flow from the English Judgment being correct. If, therefore, the English Judgment is not final and conclusive, the remaining Orders cannot be so.
32. At paragraph 3b of the Defence, it is pleaded further, or in the alternative, that it would be contrary to public policy to enforce the Orders in the Cayman Islands because:
 - a) At the time it was joined in the proceedings, Slagen Shipping Co Ltd ("**Slagen**"), being a company within Lakatamia's group of companies, had been dissolved and had not been restored to the Register, as a consequence of which it had no legal personality and no standing to become a Claimant at Liberian law;
 - b) Slagen's lack of standing was not disclosed to the English Court at any material time;
 - c) Without Slagen's participation as a Claimant, the award of damages would necessarily have been reduced by approximately US\$17 million;



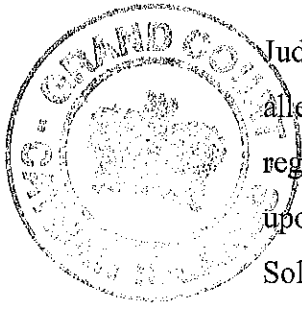
- d) Had Slagen's lack of standing been disclosed to the English Court the learned Judge's assessment of the credibility of the witnesses could have arrived at a different result;
- e) The Defendant was granted leave to appeal on all issues arising from Slagen's lack of standing but was prevented by impecuniosity from pursuing the appeal;
- f) Had the trial taken place in the Cayman Islands the facts alleged above would amount to a denial of the defendant's right to a fair hearing pursuant to section 7(1) of the *Cayman Islands Constitution Order* 2009;
- g) It is contrary to public policy to enforce a foreign judgment in circumstances which, if they had occurred in the Cayman Islands, would amount to a breach of the *Cayman Islands Bill of Rights*; and
- h) The remainder of the Orders are all predicated upon the correctness of the English Judgment. If the English Judgment is not capable of enforcement by reason of public policy, the remainder of the Orders are equally unenforceable in the Cayman Islands.

33. Affidavit evidence in support of the application for Summary Judgment has been filed on behalf of Lakatamia, in particular, that of Russell St. John Gardner, Solicitor, of Hill Dickinson LLP, whose firm represented Lakatamia in the English litigation which produced the Orders that Lakatamia now seeks to enforce.

34. Affidavit evidence opposing the application was filed on behalf of Mr. Su, including that given by Mr. Su, and by Nigel Kushner of W Legal Limited, whose firm represented Mr. Su in the English litigation. An affidavit was also filed from Deirdre Brown, of Hoover Slovacek LLP, whose firm represented Mr. Su in certain proceedings in Texas, USA.

Modification/Clarification of Mr. Su's case at the start of the hearing

35. Mr. Wingrave, who represented Mr. Su, at the start of the hearing, indicated that for the purposes of this proceeding, Mr. Su accepts that the English Court had jurisdiction over him, and Counsel also indicated that he would not be pursuing the argument that the



Judgment was not final. He also wished to make it clear that there are no direct allegations of fraud against Lakatamia itself, although certain conduct that his client regarded as questionable, on the part of Slagen, bordering on dishonesty, was being relied upon. He also indicated that he and his client accept the statements made by the English Solicitors, Hill Dickinson LLP, when they say that they had no knowledge of the issues surrounding Slagen.

Lakatamia's arguments

36. This case properly comes within O. 14, and Lakatamia has satisfied all of the preliminary requirements of Order 14, r. 1. These considerations having been satisfied, Lakatamia submits that it has established a prima facie case, and has become entitled to judgment. The burden, as it were, shifts to Mr. Su to satisfy the Court why judgment should not be given against him - *1999 Supreme Court Practice*, O. 14/1/4.

37. Mr. Andrew Jackson, who appeared for Lakatamia, submitted that the proper approach for the Court to take in a case such as the present, where an Order 14 application is opposed and there is conflicting or competing affidavit, was explained in the decision of the Cayman Islands Court of Appeal in *Merren v Cayman National Bank* [2008] C.I.L.R. 428. Vos J.A,

38. At paragraphs 5-6, and 8 of the Judgment, Vos J.A. provided guidance as follows:

"The proper approach to an O.14 application where there is a conflict of evidence

5. *The proper approach to an O.14 application, where there is conflicting or competing affidavit evidence, was settled in England in National Westminster Bank plc.v Daniel., in which Glidewell L.J. reviewed the history, and concluded by applying the dictum of*



Ackner L.J. in *Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray.*, where he said ([1984] 1 Lloyd's Rep. at 23):

"It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence which does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence"

6. Glidewell LJ himself concluded ([1993] 1 W.L.R. at 1457):

"I think it right to ask, using the words of Ackner LJ in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?'. The test posed by Lloyd LJ in the Standard Chartered Bank case.... "Is what the defendant says credible?", amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."

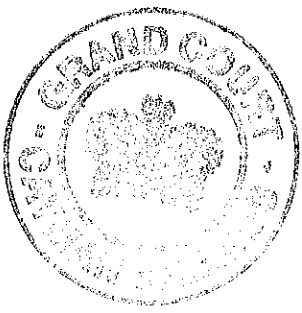
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....

8. *...For my part, however, I would prefer to regard the test as simply requiring the court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide defence..."*

39. Mr. Jackson went on to submit that whilst the word "may" is used in O. 14 r 3(1), where there is no defence, judgment ought to be given for the plaintiff. Reference was made to the *Supreme Court Practice* (1999) Vol 1, 14/4/2 where it is stated as follows:

"The policy of O. 14 is to prevent delay in cases where there is no defence (per Robert Goff LJ in European Asian Bank AG v Punjab and Sind Bank (No.2) [1983] 1 WLR 642 at 654...), and therefore notwithstanding the use of the word "may" in r.3(1), once the Court concludes that there is



no triable issue or question or that for some other reason there ought to be a trial, it will ordinarily give judgment for the plaintiff."

40. Mr Jackson submitted that under Cayman Islands law, the relevant Orders are enforceable at common law, there being no statutory regime in this jurisdiction for such orders to be recognized and enforced. Reference was made to the decision in ***Masri v Consolidated Contractors*** [2010] 1 CILR 265 at 271, where Jones J stated:

*"it is well established that foreign in personam judgments are recognized and enforced by the Grand Court on the basis of what is called " the doctrine of obligation". There is no other basis upon which a foreign judgment can be enforced at common law. The classic formulation is stated in ***Schibsby v Westenholz*** as follows ([1870] L.R. 6 Q.B. [155] at 159, per Blackburn J.):*

"We think thatthe true principle on which the judgments of foreign tribunals are enforced in England is... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce: and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action".

41. Reference was made to Rule 42(1) of *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed.) at 673, which encapsulates the principles which the Court will apply in a case such as the present to determine whether a foreign judgment is enforceable at common law:

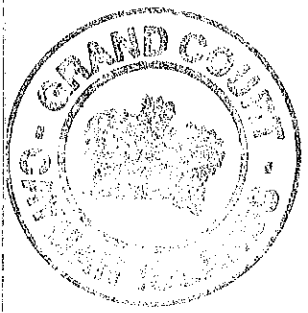
"42(1) Subject to the Exceptions hereinafter mentioned...a foreign judgment in personam given by the Court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment is:



- a) *for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and*
- b) *final and conclusive, but not otherwise.*

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the country where it was given."

42. Mr. Jackson submitted that it is plain that the Orders which Lakatamia seeks to enforce evidence debts of sums certain. Reference was made to *Dicey*, at page 675, where, citing *Beatty v Beatty* [1924] 1 KB 807(CA), it is stated that if a mere arithmetical calculation is required for the ascertainment of the sum, it will be treated as ascertained.
43. It was also submitted that the Judgment and Orders are final and conclusive. Although originally, Mr. Su had put that in issue in the affidavits and in his Defence, his Counsel has indicated that this is no longer in issue. I should just state that in any event, even if the concession was not made, I would have held the Judgment and Orders to be final and conclusive. To the extent that Mr. Su relied on the facts and matters averred in the Defence and stated in Mr. Kushner's affidavit (principally his intended grounds of appeal and that the appeal was not determined on its merits), I find that such matters do not provide a basis for saying that the Judgment and Orders are not final and conclusive.
44. As Mr. Jackson argued in his written submissions, at paragraph 44, it is trite law that a foreign judgment cannot be impeached on the basis that the foreign court made errors of fact and/or law. Reference was made to *Dicey*, Rule 48, at page 720, and page 721, where the point is made that this is consistent with the maxims that (a) it is in the public interest that there should be an end to litigation; and (b) no one should be sued twice on the same ground.
45. As regards Mr. Su's position that he was denied a fair hearing, making it contrary to Cayman Islands public policy to enforce the Orders, Counsel argued that the argument is misconceived. Lakatamia also argues that there is no bona fide defence that the Judgment



or Orders may be impeached on the basis that there has been a breach of natural justice as alleged by Mr. Su.

Mr. Su's arguments

46. Mr. Wingrave submits that under the common law, foreign judgments may be impeached in circumstances where:

- a) The judgment was obtained by fraud, either fraud on the part of the Court or the opposing party;
- b) That the foreign court was not competent;
- c) That the judgment arose in circumstances contrary to natural justice or where the rights of a party were grossly violated ; or
- d) It would be contrary to the public policy of the Cayman Islands to recognize or enforce the judgment.

47. Mr. Su relies upon grounds c) and d) above. Counsel went on to say that reference will be made to dishonesty and poor conduct, but for the sake of clarity, wished to point out, that such allegations are not intended to amount to an allegation of outright fraud against Lakatamia itself.

48. *Dacey* also discusses these tenets of the common law in Rules 50-52 (inclusive). Rule 50 addresses fraud. However, the Defence does not plead that the Judgment and Orders were obtained by fraud, and Counsel has expressly indicated that this is not Mr. Su's case.

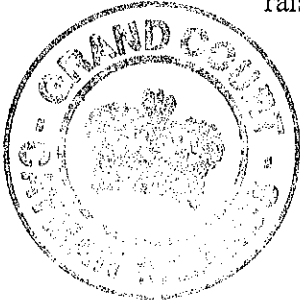
49. Rules 51 and 52 read as follows:

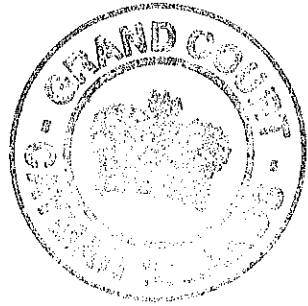
"Rule 51: A foreign judgment is impeachable on the ground that its enforcement, or, as the case may be, recognition, would be contrary to public policy.

Rule 52: A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice.

50. It was submitted, in line with the *Merren* approach, that the defendant need only show a real or bona fide defence. Adopting the expression of Lord Lindley in the old House of Lords decision in *Codd v Delap* (1905) 92 L.T. 510, it was argued that Mr. Su need only show that the defence put forward is more than “*moonshine*” in order to be given leave to defend the action.

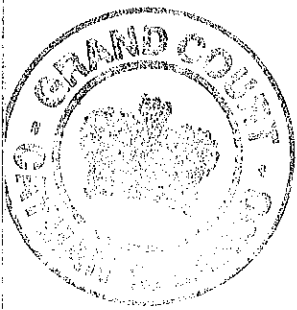
51. Mr. Wingrave submitted that the evidence filed on behalf of Mr. Su establishes or at least raises the following broad evidential propositions:

- 
- a) That the Defendant obtained permission to appeal against the English Judgment, which he was prevented from pursuing as a result of being unable to meet the financial conditions attached to that permission;
 - b) That the English Judgment against Mr. Su, in his personal capacity, was founded on evidence attributed to Mr. Karakoulakis, which was misleading or otherwise untruthful, if not outright dishonest. This is crucial to these proceedings because in these proceedings, unlike in the English Proceedings, Mr. Su alone is pursued. In the English Proceedings, a number of his corporate vehicles were also pursued and the English Judgment was levied against all of those named defendants, not just Mr. Su alone;
 - c) That the addition of Slagen to the English proceedings was wrongful, in that the company was not then capable of being joined to the action according to Liberian law, and was undertaken in order to bolster Lakatamia’s claim in circumstances where a large portion of the damages claimed would have been lost if Slagen had not been joined in the action. This indicates, on an unfavourable interpretation, a willingness to mislead the English Court as to the ability of Slagen to be joined in the proceedings, for financial gain;
 - d) That Lakatamia engaged in unethical behavior in Bankruptcy proceedings in Texas, taking advice from an attorney in a position of direct conflict, having at that time been told that he should not be advising them for professional conduct reasons;



- e) That Lakatamia abandoned an attempt to enforce the English Judgment in Texas, following the revelation of “c” and “d” amongst other things, to the Texas Court by Mr. Su in pleadings.

- 52. Mr. Wingrave submitted that the test for summary judgment and the test for granting permission to appeal by the English Court of Appeal are not that different. He points out that Mr. Su was granted permission to appeal in connection with the Slagen point, among others, and the point must therefore have been considered to be properly arguable. He submitted that the fact that the Court of Appeal, without having heard full argument, did not consider the prospects of success to be very high is utterly irrelevant for present purposes. It was submitted that the Slagen point goes beyond the mere safety of the English Judgment and goes to the very propriety of the English Judgment itself.
- 53. Reference was made to the Judgment of Cooke J (paragraphs 60-62 in particular) where the Judge found that a personal relationship existed between Mr. Su and the individual behind the Plaintiff, Polys Haji-Ionnau, over-arching the arrangement between the corporate bodies involved in the matter. This finding, it was submitted, was based in large part, on evidence that was attributed to Mr. Karakoulakis and recorded in the (hearsay) documents attached to the English Judgment as Appendices 2 and 3.
- 54. Mr. Su exhibits to his affidavit opposing the application for summary judgment, an excerpt from a conversation between enquiry agents and Mr. Karakoulakis. Mr. Wingrave submits that there, Mr. Karakoulakis stated that the transaction was between companies, meaning that he must have understood at the material time that he was negotiating on behalf of the Defendants’ companies and not the Defendant in his personal capacity. This, it is said, is directly contrary to the Judge’s findings, which were based on a completely different account put forward as being Mr. Karakoulakis’ evidence. It was postulated that, though the dishonesty in question here is not the Lakatamia’s, it was Lakatamia that put forward this evidence as being Mr. Karakoulakis’. It was submitted that this false evidence thoroughly taints the English Judgment and that it is clearly



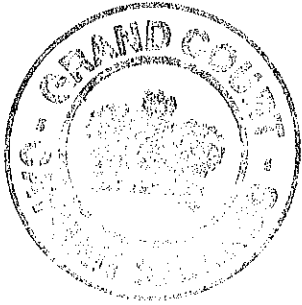
contrary to natural justice and/or public policy to allow enforcement of a foreign judgment that is based upon dishonest evidence.

55. As regards the allegedly wrongful joinder of Slagen, reference was made to the expert evidence of Ousman Fritz Feika. Mr. Jackson, on behalf of Lakatamia, in his written submissions indicated that the Court is not asked to ignore Feika on this application, notwithstanding that it was prepared for the permission to appeal application in the English Court of Appeal and was not directly given in evidence to this Court. The Court is instead invited by Lakatamia to consider Feika for the purposes of this application when deciding whether the averments relating to the dissolution of Slagen and its possible effects on the trial in the English Proceedings, and the evidence given in support of those averments, show there to be any fair or reasonable probability of a real or bona fide defence to the claims in this action.

56. Mr. Wingrave summarises the points of crucial importance in the evidence of Feika, at paragraph 15 of his Skeleton Argument, as follows:

“ ...

- a. *At pages 33 to 34, the expert sets out that a Board resolution would have been required to empower a Liberian company in dissolution to join an action. Manifestly, this step was not taken, because Mr. Edwin Cheney, one of the English solicitors representing Slagen, states in terms at tab 9, page 58, paragraph 5 of his second witness statement, that his client (Slagen) was not aware of the proclamation of dissolution against it. It is therefore impossible that the Board of directors of Slagen resolved to join the action under the allowable actions of a company in Liberia in dissolution;*
- b. *At the bottom of page 34, the expert sets out that even if there had been a resolution of the Board of directors to join Slagen to the English action, that resolution would have been wrongful, because joining an action for the purposes of assisting another company to recover funds is not within the allowable actions of the Liberian company in dissolution;*



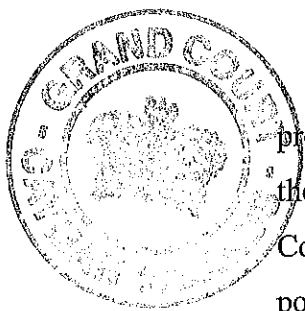
- c. *At page 35, the expert sets out that in order to join the English action for the purposes of recovering funds under the implied indemnity found by the Judge, it would first have had to make a claim against the Plaintiff. It did not take this action;*
- d. *At the bottom of page 35 and onto page 36, the expert sets out that reinstating Slagen post Judgment would not cure the wrongs done in joining the company to the English action improperly.”*

57. Counsel also refers to the fact that there is no expert evidence before the Court to rebut what Mr. Feika has written on these points.

58. It was argued that Slagen must have been joined to the English Proceedings in circumstances where it was wrongful to do so and where the officers of that company must have misled its English solicitors as to the propriety of doing so. Without Slagen being joined to the proceedings, it was submitted that US\$17 million of the Judgment would fall away. Counsel submits that this much is implicitly accepted by Mr. Gardner at paragraph 10.2 of his evidence, where he states that Slagen was joined so that the Defendant would not avoid liability for part of the then anticipated judgment sum.

59. The skeleton argument goes on to make the point that, though the improper action of Slagen is not fraud on the part of the Plaintiff, directly, Slagen acted in a dishonest manner or otherwise improperly in the furtherance of Lakatamia’s case. It was argued that these actions taint the entire Judgment because Lakatamia and the other Plaintiffs in the English action are all one group of companies with central controlling minds. Revelation of these points, it was submitted, should and would have had an impact on the credibility of Lakatamia in the English Proceedings, if the revelation had been made during or before the first instance trial.

60. For the avoidance of doubt, and in anticipation of Lakatamia’s reply to his submissions, Mr. Wingrave referred to the decision of the Court of Appeal of England and Wales in *Jet Holdings Inc & Ors v Patel* [1990] 1 Q.B. 335, at 344-345, as authority for the



proposition that the view of the Judge as to the importance of the Slagen point is thoroughly irrelevant. Accordingly, it was submitted that no weight is to be given to Cooke J's view, expressed in refusing permission to appeal, that the revelation of the true position in relation to Slagen would not have altered his overall decision.

61. Reference was also made to other instances of alleged impropriety, in relation to the Texas proceedings. It was conceded that these alleged actions, cannot, however, be proved to be the direct responsibility of Lakatamia, and can (for the most part), rather be seen as the actions of those connected with Lakatamia. Nevertheless, the argument runs, these actions taint the English Judgment, and are entirely contrary to the principles of natural justice and/ or offend against the public policy of the Cayman Islands.
62. Mr. Wingrave also made submissions in relation to section 7 of the *Bill of Rights of the Cayman Islands Constitution Order 2009*. That section provides that all persons shall have a right to a fair trial.
63. In that regard, reference was made to the Court of Appeal's grant of conditional leave to appeal. Counsel submits that at that time, Mr. Su and a number of his corporate entities were the subject of freezing orders, and which encompassed a significant proportion of Mr. Su's wealth. It was in those circumstances, it was submitted, that Mr. Su was unable to gather the funds required to prosecute his appeal.
64. In the circumstances, it was contended, the financial condition attached to permission to appeal, coupled with the freezing orders then operating on Mr. Su and his companies, rendered it impossible for him to make the arguments that he wished to deploy on appeal. It was argued that as a consequence, Mr. Su's right to a fair trial was infringed upon. Reference was made to the decision of the European Court of Human Rights in *Garcia Manibardo v Spain* App. No. 38695/97 as authority for the proposition that requiring too large a deposit of funds before an appeal may be proceeded with represents a breach of Article 6 of the *European Convention on Human Rights*, which is the European analogue of Section 7 of the *Bill of Rights*.



65.

Mr. Wingrave closes his submissions under this head by asserting that if this Court allows the English Judgment to be enforced in those circumstances, it would be an effective endorsement of the denial of Mr. Su's right to a fair trial in England. That such an action, particularly on a summary judgment application, would further represent an infringement upon Mr. Su's section 7 rights in this jurisdiction. Plainly, Counsel continues, such a result would be contrary to the principles of natural justice and/or would violate the public policy of the Cayman Islands.

DISCUSSION AND ANALYSIS

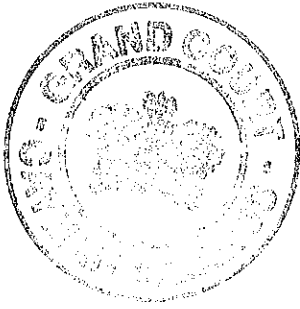
66. It seems to me that Mr. Jackson is correct, that if Mr. Su is not saying that the English Judgment should be impeached for fraud, then the matters raised about the evidence of Mr. Karakoulakis are irrelevant. It would therefore simply mean that the Judgment was factually incorrect, which is not a ground for impeaching a foreign judgment. This ground also cannot support an assertion that recognition of the Judgment would be contrary to the public policy of the Cayman Islands. So too it cannot fall within the rubric of the principles having to do with natural justice.

67. At paragraph 14-163 of *Dicey*, in discussing Rule 52, the point is made that this rule is really concerned with irregularity in proceedings. It also is not concerned with the admissibility of evidence. The paragraph states:

*“14-163 In a celebrated passage in his judgment in **Pemberton v Hughes** (a case on the recognition of a foreign divorce decree), Lord Lindley observed:*

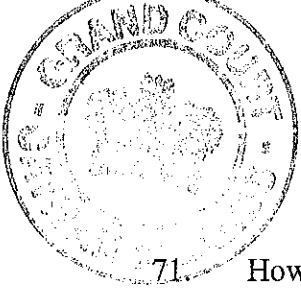
If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.”

This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign law, is not impeachable on that



ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England or otherwise followed a practice different from English law..."

68. Importantly, no reason has in any event been put forward by Mr. Su as to why he did not call Mr. Karakoulakis as a witness at the trial. At paragraph 2 of the English Judgment, Cooke J makes the point that neither party sought to call Mr. Karakoulakis to give evidence.
69. Equally, it seems to me, that the evidence of Ms. Brown in relation to the Texas proceedings becomes irrelevant if Mr. Su is not relying on fraud. This comes nowhere near the matter of public policy. In any event, I accept Mr. Jackson's submission that there may be any number of reasons why the application to recognize the judgment in the Texas Court may have been withdrawn and it would not be proper for me to draw an inference that Lakatamia abandoned the enforcement proceedings because of alleged revelations about Slagen or alleged unethical behaviour.
70. As regards the joinder of Slagen, Lakatamia (in particular at paragraphs 57-61 of its submissions) disputes Mr. Su's claim that, without Slagen having participated as a claimant, the award of damages would necessarily be reduced by approximately US\$17 million. In my judgment, Lakatamia does have a convincing argument, amongst other matters, that the implication of a contract to indemnify between Lakatamia and Slagen (and Kition) was the basis on which Cooke J concluded that Lakatamia was itself entitled to recover the full amount of the loss from Mr. Su and his co-defendants – see paragraph 150 of the English Judgment. Recovery on that basis would not require Slagen (or Kition) to be a co-claimant, and therefore Slagen's participation as co-claimant cannot have impacted the issue of quantum. It is however accepted that Lakatamia needed to be under an existing obligation to indemnify Slagen when it made its claims in the English Proceedings in order to recover the amount of the indemnity which Slagen owed. In that regard, I accept the reasoning in Lakatamia's submissions (at paragraphs 57-61).



71

However, in my view, this Court does not even need to go into all of that detail. What of the maxim that it is in the public interest that there should be an end to litigation? Given the fact that the English Judgment is not being impeached on the grounds of fraud, and that Mr. Su was granted leave to appeal by the Court of Appeal, on the Slagen and other points, what is this Court to make of this issue?

72.

Can this Slagen point by itself provide any basis for saying that the English Judgment should be impeached? I think Mr. Jackson is correct in saying that in a sense, Mr. Su's arguments attempt to "shoe-horn" fraud into the defences having to do with natural justice and public policy, and that cannot be permitted. It is sort of a "rolled-up" attempt to pray in aid the benefit of the effect of fraud on the impeachability of a foreign judgment, but without so pleading and relying outright. It is trite law that fraud should not be raised without careful consideration (this is no doubt why Counsel has been properly clear and specific in avoiding making such an allegation), and also that it must be specifically pleaded and particularized. This is also no less the case in relation to impeachment of a foreign judgment on the grounds of fraud.

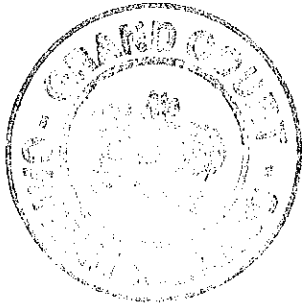
73.

I think one example from *Dicey* will suffice to show some of the limits to a defence based on public policy (the footnotes and cases there referred to are also in my view relevant). At paragraph 14-155, it is stated as follows:

" In Israel Discount Bank of New York v Hadjipateras it was suggested that it might be contrary to public policy to enforce a judgment based on a contract which had been executed as a result of undue influence. But the decision has been convincingly criticized on the grounds that it is the recognition of the judgment which must be contrary to public policy and not the underlying contract on which the cause of action is based; and that as a matter of domestic English law the enforcement of a contract obtained by undue influence is not contrary to public policy, although it may be rescinded in equity. " (My emphasis)

74. However, Mr. Su is saying that had a trial in these circumstances taken place, it would have amounted to a denial of Mr. Su's right to a fair hearing contrary to section 7 of the *Cayman Islands Constitution Order 2009*.

75. Reference was made by Mr. Jackson to *Zuckerman on Civil Procedure*, 2nd Edition, at page 55, where the right to a fair trial under Art. 6 of the **ECHR** is described as follows:

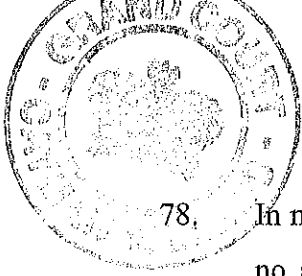


"The general right to a fair trial established by ECHR, Art. 6, consists of a bundle of specific rights. These may be divided into two groups: rights that are expressly mentioned in the ECHR, Art. 6 and rights which have been held to be implicit in it by the ECHR. There are four express rights: the right to a fair hearing; the right to a public hearing, including the right to the public pronouncement of judgment (subject to exceptions); the right to a hearing within a reasonable time; and the right to an independent and impartial tribunal. In addition the ECHR has held the following rights to be implied in the right of a fair trial: the right of access to court, the right to an adversarial hearing, the right to equality of arms, the right to fair presentation of the evidence, the right to cross-examine and the right to a reasoned judgment."

76. Mr. Jackson also referred to page 74 of *Zuckerman*, where the learned author opines:

"Article 6 requires the State to respect certain due process principles when adjudicating upon [rights existing under the domestic law]. Thus, the Court is duty bound to conduct a proper examination of the submissions, arguments and evidence adduced by the parties while maintaining the due process standards dictated by ECHR, Art. 6."

77. Reference was also made by Mr. Jackson to other extracts from *Zuckerman*, under the heading "*The Right to Fair Trial*". At paragraphs 2.188 to 2.203, the learned author discusses the sub-topic of the right of access to evidence.



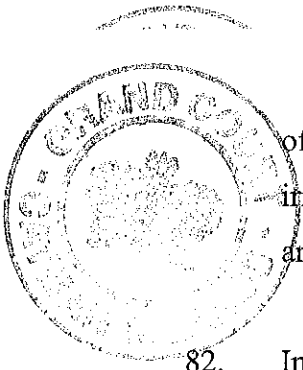
78. In my view, this argument on behalf of Mr. Su falls woefully short of the mark. There is no allegation of fraud against Lakatamia, nor is there any explanation as to why it is alleged that Lakatamia was itself under a duty to discover and disclose that Slagen was dissolved. In any event, there is evidence (Feika's evidence) as to the fact that upon dissolution, Liberian companies continue in existence for a period of three years, and the directors are able to act, albeit as trustees.

79. Perhaps more importantly, for reasons of practicality, Courts proceed on the basis that proper procedure has been followed unless the contrary is shown. As Arden LJ stated in *Aeroflot v Berezovsky* [2014] EWCA Civ 20, at paragraph [57], cited by Mr. Jackson:

"Courts must for reasons of practicality proceed on the basis that until the contrary is shown they can assume that procedural steps were done properly. Likewise, courts attach no significance to procedural irregularities that have no material effect. In my judgment, they are entitled to do the same in relation to violations of article 6. Such a presumption is not inconsistent with the rule of law."

80. *"It has even been held that it is no defence to plead that since the date of the judgment the defendant has discovered new evidence which he could not, with reasonable diligence, have discovered earlier and which shows the judgment is erroneous"* – *Dicey*, paragraph 14-167, citing the old case of *De Cosse Brissac v Rathbone* (1861) 6H & N. 301.

81. In my judgment, this Slagen point was one to be taken and pursued in the Court of Appeal of England and Wales. Indeed, Mr. Su was granted permission to argue this point, amongst others. Subject to what this Court determines in relation to the public policy/natural justice issues as to whether Mr. Su was deprived of his right to a fair hearing because of the financial condition attached to the permission to appeal, there is in my judgment, nothing in the Slagen point that suggests that recognition of the Judgment would be against public policy, or that the English Judgment or any other aspect of the proceedings is so tainted as to offend against the rules of natural justice. The authorities suggest that the existence of a remedy in the foreign court will be assessed in the context



of the broader merits – see paragraph 14-167 of *Dicey*. In my view, there is no irregularity here, without more as Mr Su was granted a remedy ie. permission to appeal, and he had a further remedy, ie. an appeal.

82. In the absence of an allegation of fraud, and Mr. Su not choosing to pursue his appeal, it seems to me that if Mr. Su were to be allowed to attack the judgment on the grounds that it is tainted, would be to allow a collateral attack on the merits of the English Judgment to be brought in the Grand Court. That is clearly not permissible.

83. At the heart of Mr. Su's case is therefore the matter of whether in the English Court of Appeal proceedings, Mr. Su has been deprived of his right to a fair trial contrary to the principles of natural justice, or in circumstances where recognition of the English Judgment would offend the public policy of these Islands.

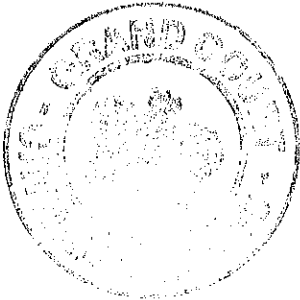
84. In *Dicey*, the *Human Rights Act* 1998 (of England and Wales) is discussed under Rule 51, that is, under the rubric of public policy. Paragraph 14-159 states as follows:

"14-159 Human Rights Act 1998. The 1998 Act gave the force of law to the European Convention on Human Rights. If the enforcement of a foreign judgment would be contrary to the European Convention, enforcement will in principle be refused. Indeed, such a case is not really an example of recognition or enforcement being refused on grounds of public policy, but is rather because primary legislation produces that result. On the other hand, in cases which fall under the 1982 Act, or under the Brussels I Regulation and the Lugano Convention, the application of the European Convention is not specifically provided for, and any non-recognition has to be accommodated under the rubric of public policy. "

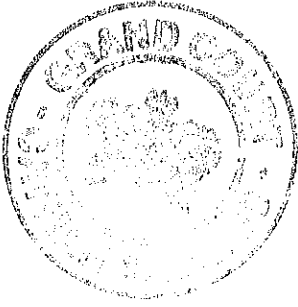
85. Mr Wingrave relies upon the decision of the *ECHR* in *Garcia Manibardo v Spain*. In that case, the Court held that an appellant who had qualified for legal aid, but had not been granted it in sufficient time due to negligence of a judicial body, was deprived of

her right of access to the Court when the Appeal Court had held that her appeal was inadmissible, owing to her failure to deposit the amount which statute required that persons other than those in receipt of legal aid were required to deposit.

86. On 10 October 1990 the applicant's husband was killed in a road-traffic accident when a car and a lorry collided. At paragraphs 15-18, and 42-45, the *ECHR* discussed the relevant issues as follows:



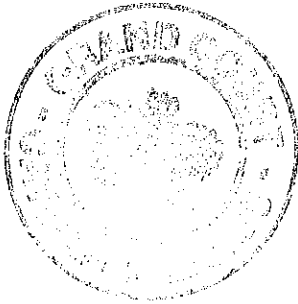
- "15. In a judgment of 20 December 1994 Amposta District Judge No. 1 found that the driver of the car involved in the collision had been the applicant's husband, not the claimant's, and ordered the former's heirs and the vehicle insurers jointly and severally, or, in the alternative, the heirs of the owner of the vehicle. To pay Mrs. P and her two children the sum of ESP 18,000,000.*
- 16. All of the parties appealed against that decision. In a decision (providencial) of 16 January 1995, Amposta District Judge No. 1 gave the applicant permission to appeal on condition that she deposited the amount awarded in the judgment at first instance, in accordance with supplemental section 194) of Basic Law no. 3/1989 of June 1989 updating the Criminal Code.*
- 17. On 25 February 1995 the applicant lodged an application with Amposta District Judge No. 1 to have that decision set aside (reposición) on the ground that it was impossible for her to deposit the sum requested by the Audiencia Provincial. On 5 April 1995 the application was declared admissible in accordance with the Constitutional Court's case-law on the subject....and the applicant exempted from the obligation to deposit the amount concerned prior to lodging the appeal. The district judge took into account the applicant's domestic and financial circumstances "as set out in the court file" in reaching his decision.*
- 18. In a judgment of 2 September 1996 the Tarragona Audiencia provincial declared the appeal lodged by the applicant's opponent*



partly admissible, upheld the judgment of the District Judge and declared the Applicant's appeal inadmissible on the ground that she had not deposited the requisite sum or shown that she had tried to find other means - such as a bank guarantee as suggested by the Constitutional Court in its judgment...of complying with that obligation. As regards the district judge's ruling that the appeal was admissible and his decision to exempt the applicant from the obligation to deposit the monies, the Audiencia Provincial explained that, since the appeal had been examined even though it should have been declared inadmissible, the grounds for a finding of inadmissibility had become grounds for dismissing the appeal.

....

42. The Court notes in that connection that it was possible under Article 30(3) of the Code of Civil Procedure and the case-law of the Constitutional Court for the financial position of the persons concerned to be taken into account and for them to be exempted from the obligation to deposit monies if they had been granted legal aid. In the present case, the applicant was not granted legal aid in sufficient time owing to negligence on the part of a judicial body which was therefore not attributable to her while on the face of it she satisfied all the conditions for eligibility for legal aid as, indeed, was subsequently confirmed.
43. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see the *Airey v Ireland* judgment of 9 October 1979, Series A No. 32, pp. 12-14, δ 24). In the circumstances of the case, the applicant's appeal was declared inadmissible owing to her failure to deposit the requisite amount. She was thus deprived of a remedy which could have proved decisive for the outcome of the dispute.
44. In the instant case, the applicant's appeal was declared inadmissible owing to the statutory duty on persons other than

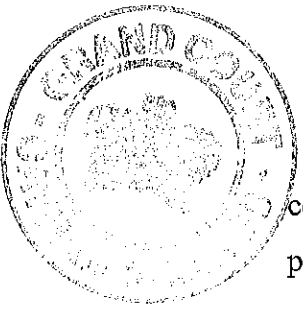


those who are in receipt of legal aid to deposit with the Audiencia Provincial a specific amount (namely, the compensation award) as a condition precedent to their being permitted formally to lodge an appeal.

45. *The Court finds that by obliging her to pay the amount ordered, the Audiencia Provincial prevented the applicant from using an existing and available remedy, such that a disproportionate hindrance was put in the way of her right to access to a court. Consequently, there has been a violation of Article 6 δ1."*

(My emphasis)

87. However, that case does seem readily distinguishable on the facts. In the instant case, there is no evidence that Mr. Su was at the time impecunious when he sought leave to appeal; indeed, he does not even say that in his own affidavit in opposition to the instant application for summary judgment. There is nothing to show that Mr. Su was not simply unwilling to pay the financial deposit required; there is no evidence that Mr. Su sought to have the freezing injunctions varied, which he plainly could have done.
88. In addition, in his affidavit Mr. Su states that following the result of the litigation between Lakatamia and himself, he commenced proceedings in the English High Court against Clarksons, (the company which he says arranged the deal with which the Court in the English litigation was concerned), and against Mr. Karakoulakis (the individual agent responsible). There is no suggestion that Mr. Su did not expend money in doing that.
89. Further, as Mr. Jackson points out, although this point is obviously not determinative, there is no evidence that Mr. Su has taken steps to pursue this issue of there being a violation of his right to a fair trial before the *ECHR*.
90. In any event, the *Manibardo* decision does not at all support a proposition that it is in any way unconstitutional generally, for financial conditions, even substantial financial



conditions, to be attached to permission to appeal; quite the contrary in the case of a person not entitled, or qualifying for legal aid.

91. In *Manibardo*, the applicant told the Court of her financial inability to make the payment. That is not the case here. Indeed, in the Order declaring the automatic lapse of the appeal, Longmore LJ expressly records that no difficulties in making the payment had been raised with the Court. The Order reads as follows:

“On consideration of the application for an extension of time for paying money into court

And on consideration of the papers and without an oral hearing

Decision:

Appeal has automatically lapsed and no further date to be set.

Reasons

It is now evident that the appellants cannot pay into court the sum required as a condition for proceeding with their appeal. The offer of alternative security has been reasonably rejected by the respondents for the reasons given in Mr. Russell Gardner’s witness statement of 29th May 2015 and in the submissions of Mr. Casey also of 29th May 2015 on the respondents’ behalf. In these circumstances the appeal has now lapsed and the current stay of execution on the judgment and order of Mr. Justice Cooke of 5th November 2014 and 16th January 2015 shall cease to have effect.

It is noteworthy that the difficulties experienced by the appellants were not foreshadowed in the Appellants’ application for permission to appeal on 19th March 2015. They ought to have been “(My emphasis)

92. It would in any event have been for Mr. Su to demonstrate a bona fide defence that the financial condition attached to permission to appeal amounted to a disproportionate hindrance on his right to access to the Appeal Court. This he has wholly failed to do. Indeed, in granting permission to appeal, Longmore LJ observed that some of the matters sought to be argued on behalf of Mr. Su on appeal were “*matters of great technicality*”,



and on other aspects of the matter, he commented that “*in light of the judge’s findings of fact that is a very difficult appeal*”. It was in those circumstances, that the Court was prepared to give permission to appeal. “*but only on stringent conditions*”.

93. In my judgment, this is a clear case. Mr. Su has wholly failed to demonstrate that he has a defence with any real prospects of success, and has failed to show that he has a fair or reasonable probability that he has a real or bona fide defence. At the end of the day, despite the very elegant and attractive arguments advanced by Mr. Wingrave on behalf of Mr. Su, when scrutinised closely, the defence does seem to be “*practically moonshine*”.
94. In my judgment, Lakatamia is entitled to summary judgment in the amounts stated in its alternative claims, predicated on the basis that the CFO should be treated as applied upon the date of receipt towards payment of the Judgment Debt.
95. Pre-judgment interest is awarded pursuant to section 34 of the *Judicature Law* (2013 Revision) on the principal sums awarded (namely, in respect of the Judgment Debt and the Consequential Debts) and the Costs and the Appeal Costs, at the full pre-judgment rates from the date that the second action was commenced up to the date of judgment.
96. Costs are awarded to Lakatamia on the standard basis, to be taxed if not agreed.


THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

