

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 140 OF 2019 (CRJ)

4 BETWEEN

5 **(1) TRADED LIFE POLICIES FUND (IN OFFICIAL LIQUIDATION)**
6 **(2) MICHAEL PENNER (IN HIS CAPACITY AS A JOINT OFFICIAL LIQUIDATOR OF**
7 **TRADED LIFE POLICIES FUND)**

Plaintiffs

9 AND

- 10 **(1) JEREMY LEACH**
- 11 **(2) WILLIAM MCCLINTOCK**
- 12 **(3) MANAGING PARTNERS LIMITED**
- 13 **(4) TAURUS ADMINISTRATION SERVICES S.L.**
- 14 **(5) MPL ASSET MANAGEMENT SA**
- 15 **(6) PRAESIDIUM INVESTMENT FUND**
- 16 **(7) SOVEREIGN HIGH SECURITY FUND SPC**
- 17 **(8) CORINTHIAN GROWTH FUND**
- 18 **(9) TRADED POLICIES FUND**



Defendants

Appearances: **Mr. James Eldridge and Mr. Justin Naidu of Maples and Calder (Cayman) LLP for the Plaintiffs**

Mr. Christopher R. Parker Q.C. instructed by Mr. Richard Annette of Stuarts Walker Hersant Humphries for the First and Third to Ninth Defendants

27 Before: The Hon. Justice Cheryll Richards Q.C.

28 Heard: **22nd April 2021**

29 Draft Judgment: 10th June 2021

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HEADNOTE

32 *Section 6 (f) of the Court of Appeal Act (2011 Revision), Leave to Appeal*

JUDGMENT

1. This is an application for leave to appeal in respect of an Order made on the 26th February 2021, granting security for costs to the Defendants.
 2. The general test on an application for leave to appeal is set out in the case of *Telesystem International Wireless Incorporated and Another v. CVC/Opportunity Equity Partners L.P. and Three others*¹. It is:

“Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? (Swain v Hilla, [1999] T.L.R. 745, dicta of Lord Woolf, M.R. applied). In exceptional circumstances, leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration. The relative significance of the issues and the costs necessary to examine them will be a relevant factor...”



In an appeal on a point of law (including on the ground that a finding of the lower court is unsupported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case...

... Leave will also rarely be granted to appeal on the basis of the court's wrongful exercise of its discretion, unless the case raises a point of general principle requiring the opinion of the appellate court. "

3. The test on an application for leave to appeal in the context of interlocutory orders is set out in the case of *CVC/Opportunity Equity Partners Limited v. DeMarco Almeida*²:

“Leave to appeal from an interlocutory order will be refused, even when the appellant has a realistic prospect of success, if (a) the point raised by the appeal is not sufficiently significant to justify the resulting costs; (b) if the significance of the point is outweighed by the procedural consequences, e.g. the loss of an existing trial date; or (c) it will be more convenient to determine the point at or after the trial.”

¹ 2001 CILR Note 21

² 2001 CILR Note 20

1 4. Counsel has also drawn to my attention the English ***Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments***³. I bear this in mind, in particular the considerations set out in paragraph 17 thereof.

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5 5. Counsel for the Plaintiffs' central point on this application for leave to appeal is that the Plaintiffs ought not to have to show on a security for costs application that the cause of its impecuniosity is unrelated to the pleaded case. Counsel submitted that the Plaintiffs have a real and not fanciful prospect of success on appeal in that this Court erred in law in not taking into account the impecuniosity factor in coming to its decision on security for costs. The submission is that had the Court done so this would have been "a heavy factor" in favour of refusing the Defendants' application for security for costs. Reliance was placed on the case of ***Re Arnage Holdings Limited and Others v. Walkers (a firm)***⁴.

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14 6. Counsel for the Defendants in response pointed out that in the factual circumstances of that case, impecuniosity was considered a heavy factor because there had already been a finding as to causation in that summary judgment had been entered against the Defendants. Thus the decision was not inconsistent with the earlier case of ***J.M. Bodden and Son International Limited v. Dettling and Sparks***.⁵

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20 7. The Defendants also submitted that five matters dictate the refusal of permission in this case:

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- 22 i. The appeal is against the exercise of discretion;
- 23 ii. There was no error of Law;
- 24 iii. An appeal is not simply a second bite of the cherry;
- 25 iv. No prospect of success has been demonstrated; and
- 26 v. There is little practical benefit to the appeal.



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28 8. I do not propose to detail herein those arguments for and against the application as referenced above. Doing so may be of limited assistance. This given the ultimate conclusion reached which was based on the alternative argument raised by the Plaintiffs.

³ 1999 1 WLR 2

⁴ Unreported Grand Court 8th August 2002

⁵ 1990-91 CILR 220



- 1 9. Counsel on behalf of the Plaintiffs submitted in the alternative that even if it cannot be shown
2 that the appeal has a realistic chance of success, leave ought to be granted where the appeal
3 will determine an important point of law irrespective of whether or not that application is with
4 respect to the exercise of discretion. In this case the important point is said to be the true
5 meaning and scope of the impecuniosity factor in the context of applications for security for
6 costs in this jurisdiction.
- 7
- 8 10. Counsel submitted that the decision has major consequences in respect of claims brought by
9 insolvent companies and would also represent a significant departure from English Authorities.
10 Counsel placed reliance on the case of ***Deleclass Shipping Company Ltd. v. Ingosstrakh***
11 ***Insurance Company Ltd.***⁶, a case which was not cited during the earlier hearing. In that case
12 the English High Court rejected the submission that the impecuniosity factor applies only
13 where either the claimant can show that there is a strong case on the merits or the impecuniosity
14 is unrelated to the subject matter of the case.
- 15
- 16 11. The Defendants in opposing this application referred to Cayman Islands Authorities cited
17 during the hearing as well as to a number of English authorities including ***Automotive Latch***
18 ***Systems v. Honeywell international Inc.***⁷ which have taken a contrary view.
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- 20 12. Counsel for the Plaintiffs submitted that the very fact that there are contrary views expressed
21 in various decisions suggests that there is a need for further consideration and clarification of
22 the issue. In support of this argument Counsel drew my attention to the recent decision of the
23 Cayman Islands Court of Appeal on a leave application in the case of ***China Shanshui Cement***
24 ***Group Limited v. Tianrui (International) Holding Company Limited***⁸. The Court referred to
25 the complexity of the issue which was in dispute in that case and the fact that there were
26 differing views in relation thereto as a basis for the grant of leave.
- 27
- 28 13. In the instant case it is argued that there will be practical benefit to the Joint Official Liquidators
29 in pursuing this appeal not least because of the financial implications. Other aspects to be
30 considered on the grant of a leave application do not tip the balance. A stay has not been
31 sought, the first tranche of security payments ordered has been made. The Plaintiffs have

⁶ 2018 EWHC 1135 (Comm)

⁷ 2006 EWHC 2340 (Comm)

⁸ CICA Civil Appeal 11 of 2021 Cause No. FSD 93 of 2019, 8th April 2021

1 indicated that there will be no procedural consequences on the substantive proceedings. The
2 trial will not be delayed.

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4 14. Against this background, given what is said to be the import of the decision affecting claims
5 by insolvent companies and the differing views expressed in decided cases, in my view the
6 balance is in favour of the grant of leave to appeal.

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8 15. Leave is therefore granted as requested.

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10 **Dated this the 16th day of June 2021**

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13 **Honourable Justice Cheryll Richards Q.C.
14 Judge of the Grand Court**

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