



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

CAUSE NO. FSD 54 of 2020 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)

**AND IN THE MATTER OF ADENIUM ENERGY CAPITAL, LTD. (IN OFFICIAL
LIQUIDATION)**

**Appearances: Mr. Brett Basdeo of Walkers on behalf of the Joint Official
Liquidators**

**Mr. Laurence Aiolfi of Mourant on behalf of KSB Capital (Offshore)
SAL**

Before: The Hon. Justice Cheryll Richards KC

Heard: 25th November 2022

Draft Judgment: 20th April 2023, 21st August 2023

HEADNOTE

Section 6 (f) of the Court of Appeal Act (2023 Revision), Leave to Appeal

JUDGMENT

1. By Summons dated 27th June 2022 the Applicant, KSB Capital (Offshore) SAL (“KSB”) seeks leave to appeal paragraph 5 of the Order of the Court made on the 13th June 2022 and an order that this paragraph be stayed pending the conclusion of the appeal. Paragraph 5 of the Order required KSB to pay the costs of Adenium Energy Capital Ltd. (in Official Liquidation) (“the Company”) on the standard basis to be taxed if not agreed. This was in respect of costs arising from three Summonses dated 15th October 2020, 20th November 2020 and 15th January 2021.
2. On the 12th September 2022, the Company applied for taxation of its costs and an Interim Costs Certificate. The Taxing Officer issued this certificate on the 28th September 2023. On the 12th October 2022, the Applicant applied for the setting aside or review of the Interim Certificate.
3. The draft grounds of appeal are in summary that in the exercise of its discretion on the facts of the case the Court erred in two material respects. These are a failure to give proper weight to the usual principle that a successful party is entitled to its costs and in taking into account or giving too much weight to the conduct of the Applicant in respect of certain matters. It is said that there were three Summonses before the Court which were separate applications which could be regarded separately for the purpose of cost orders and that as the Applicant was wholly unsuccessful in only one aspect of one of the three Summonses, the Court was wrong to award costs against it.
4. The background facts are set out in the earlier judgment and are not rehearsed herein. In summary, by the October Summons, the Joint Official Liquidators of the Company (“JOLs”) sought declarations that three transfers made by the Company to the Applicant in May and June of 2020 are void pursuant to s.99 of the *Companies Act*. A winding up order placing the Company into liquidation was made on the 27th July 2020. By the November Summons, the Applicant sought to be added as a respondent to the October Summons and declarations as to the non-applicability of s.99 of the *Companies Act* to the transfers. By the January Summons the Applicant sought the strike out of the October Summons and in the alternative that it be granted leave to bring Declaratory Applications. The underlying issue is the status of certain lenders who were parties

to a Debenture Agreement with the Company dated 30th May 2019 and thus whether s.99 of the *Act* was engaged.

5. There is no dispute between the parties as to the test for the grant of leave to appeal. Counsel for the Applicant refers to the case of *Telesystem International Wireless Incorporated and Another v. Cvc/Opportunity Equity Partners L.P. and Three Others*¹. It is whether the appeal has a realistic prospect of success. It was held: -

“The general test of whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? (Swain v. Hillman, [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.”

6. The Order as to costs was made pursuant to the exercise of a discretion as provided for by s.24 of the *Judicature Act* (2021 Revision) and the Grand Court Rules (“GCR”) Order 62. Counsel for the Applicant relies on the decision of the Court of Appeal in the case of *Traded Life Policies Fund (in Official Liquidation) and Others v. Jeremy Leach and Others*² in which the Appellate Court said that in challenging the exercise of a discretion it will be necessary to show that the Judge erred in principle or omitted or considered some factor that should or should not have been considered or that the decision was wholly wrong.

¹ [2001 CILR Note 21]

² CICA 18 of 2021, 21st December 2021

7. Counsel also relies on the dicta of the English Court of Appeal in the case of *Roache v. News Group Newspapers Limited and Others*,³ that the Appellate Court will in respect of an appeal as to costs adopt the same approach as on any other appeal against the exercise of a judge's discretion.
8. There is disagreement between the parties as to the inferences which may reasonably be drawn from the conduct of the Applicant prior to the hearing of the Summons. Counsel for the Applicant submits that the Court failed to take into account that the Applicant had endeavoured to avoid the need for issuing the January Summons by seeking the consent of the JOLs in relation to leave to bring the Applications. It is said that it is the action of the JOLs in refusing to agree to this and their opposition to the Leave Application which caused unnecessary costs to be incurred. Counsel submits that it was not appropriate for the Court to have had regard to the conduct of the Applicant in the way in which it did. It is submitted that: -

“23. To the extent that the Judge relied on KSB's failure to bring a validation application earlier, it was improper for the Judge to cast the failure to seek a validation order as misconduct such as to justify ordering that the Appellant pay the cost of all the applications. KSB has been granted leave to argue a position that would establish it was not required to seek a validation order as a matter of law and that the secured lenders were entitled to enforce their security outside the liquidation.

24. Furthermore, there is no evidence that the JOLs would have acceded to any validation application brought by KSB at an earlier time, or that it would be any less costly, particularly in circumstances where the JOLs have expressed their doubts as to the validity of the Debenture (without having formally challenged its validity).

25. It was also improper to rely on KSB's conduct in not responding substantively to the JOLs queries as a basis for depriving KSB of any costs in the proceedings. There is no obligation on KSB to do so and it was therefore not misconduct. In any event, there was no basis to conclude that this would have avoided the October Summons and the subsequent proceedings.”

³ [1998] E.M.L.R. 161

9. In oral submissions by reference to the cases of *Autumn Holdings v. Renova Resources*⁴ and *Kupeli v. Kibris*⁵, Counsel said in summary that the exercise of the Court's discretion was not in keeping with the factual circumstances and that the Court failed to do justice between the parties.
10. In reply, Counsel for the Company noted the guidance provided by the English Court of Appeal in the case of *Jolly and Jay*⁶. This is that the response to an application such as this should be limited to whether the proposed appeal would meet the relevant threshold test or to pointing out if there are material inaccuracies raised by the Applicant.
11. Counsel submits that there is no real prospect of success in the proposed appeal. The Applicant was not the successful party as the primary relief of strike out was refused. The leave obtained was to bring Declaratory Applications in circumstances where the Applicant should have but did not obtain leave to bring such an application beforehand. It is further argued that the appeal does not raise a point of general principle and is not of a significance which would justify the resulting costs. It is submitted that the costs of the leave to appeal hearing alone is wholly disproportionate to the issues on which the Applicant is seeking leave to appeal.
12. As to the facts, Counsel submits that the Applicant's contention as to the rationale for the filing of the October Summons is not supported by the evidence. It is further submitted that it is a material inaccuracy for the Applicant to say that it sought to avoid costs and the necessity for issuing an application for leave. It was the Applicant who refused to seek leave to make an application for validation. Thus, it is said that the circumstances of the conduct of the Applicant was a relevant consideration for the Court. Counsel submits that the inescapable inference on all the facts is that the Applicant conducted itself in an improper manner.
13. There is another factor which is raised by the Company. This is the factor of delay. Counsel on behalf of the Company submits that while the Applicant's Summons for Leave to Appeal was served on the 27th June 2022, the Applicant took no steps to have the Summons listed until four months later, on the 14th October 2022. In the intervening period the JOLs' bill of costs was served on the 8th August 2022. It was only after the issue of the Interim Certificate on the 28th

⁴ [2017] (2) CILR 167

⁵ [2018] EWCA Civ. 1264

⁶ [2002] EWCA Civ. 277

September 2022 that the Applicant sought to list the Summons for Leave to Appeal for hearing. The reply of Counsel for the Applicant is that there is no prejudice to the JOLs in the delay for the listing of this application. The JOLs knew that it was the subject of appeal. While the taxation process is said to be in disarray, the fault lies with the JOLs for filing it at the time they did without a forthwith order. In any event they are entitled to continue the process.

14. Given the position that I have ultimately taken, I have not set out the very full and detailed arguments of both Counsel and do not propose to set out a detailed review of the factual circumstances. There is no point of principle involved here. There is no new point of law. This is the exercise of discretion as to costs in circumstances where it was found that the Applicant succeeded with respect to the alternative relief sought. That alternative relief was for retrospective leave to bring Declaratory Applications. The general approach to retrospective leave is that it may nevertheless attract costs even if a party is successful. This is discussed in cases cited by Counsel for the Company including the case of *Adorian v Commissioner of Police of the Metropolis*⁷.
15. The Applicant also raises additional arguments as to the reasonableness of the inferences drawn in relation to its conduct as detailed above. How should this Application be approached?
16. The case of *In the matter of Universal and Surety Company Limited*⁸ provides some guidance, Malone CJ referred with approval to the case of *The Iran Nabuvat*⁹ in which it was stated that in deciding whether an applicant has an arguable case on appeal the bias:-

“.. must always be towards allowing the Full Court to consider the complaints of a dissatisfied litigant.”

17. It was held by the Grand Court that:-

“A judge granting leave to appeal from his own decision should consider whether the issues were of importance which would benefit from further argument and whether the

⁷ [2009] EWCA Civ 18

⁸ 1992-93 CILR 158

⁹ [1990] 3 All ER 10.

decision of an appeal court (particularly on a question of principle decided for the first time) would be to the public advantage. He should be inclined to allow the appeal court to consider the complaints of a dissatisfied litigant who should present an arguable case for leave but did not need to itemize his reasons for applying in terms of points of law. The court would be justified in refusing leave if it would be unfair to (a) the successful party to require him to defend the lower court's decision; (b) other litigants, by wasting the time of the appeal court; and (c) the appellant himself, who should be saved from his own folly in seeking to appeal the unappealable. It would not be proper to refuse leave merely because he felt his decision was right. Accordingly, as the issue for which the appeal was sought was one of public importance, the application for leave to appeal would be granted."

18. I am also mindful that in this case the Applicant's view as stated by Counsel is that the quantum of costs being claimed on the basis of the Order which was made justifies the application for leave to appeal and any subsequent appeal.
19. I accept that the Applicant is a dissatisfied litigant and thus where, as in this case it may be arguable that the Court was wrong in the exercise of its discretion and the costs involved are significant, the better course ought to be to afford the opportunity for review. Leave to appeal is therefore granted.

ADDENDUM

20. Following the issue of the draft judgment on the 20th April 2023, the Company has filed further submissions which in effect seek conditions on the grant of leave to appeal to the Applicant, KSB Capital Offshore SAL. The conditions sought are as follows: -
 - i. Security for the costs of appeal in the sum of \$250,000.00 to be paid into Court.
 - ii. Payment into Court of the amount assessed by the Taxing Officer as payable under an Interim Costs Certificate of US\$80,389.50 and Taxation fees.

21. Additionally in respect of the two Summonses filed by the Applicant in the taxation process, the Company submits that as a condition precedent for the hearing of these Summonses, the Applicant must comply with the requirements of GCR O.62, r.30(4)(c) and pay into Court the sum which is contested.
22. The Applicant opposes the imposition of conditions and says that the Taxation process is entirely separate from the application for leave to appeal.

THE COURT OF APPEAL ACT AND RULES

23. Section 19 (2) of the *Court of Appeal Act* (2023 Revision), provides for the making of orders for security for the costs of the appeal. It states: -

“The appellant shall, at the time of lodging the notice of appeal required by subsection (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for costs may be given by the appellant entering into a bond by themselves and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court.”

24. Section 19 (3) of the *Act* provides for payment of sums due from judgment and costs upon the grant of any stay: -

“No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court.”

25. By the *Court of Appeal Rules* (2014 Revision), a stay of execution of the decision of the Court is not automatic. Rule 20, provides: -

“20. (1) Except so far as the court below or the Court may otherwise direct — (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below; and (b) no intermediate act or proceeding shall be invalidated by an appeal. (2) On an appeal from the Grand Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court or a Judge otherwise orders.”

SEQUENCE OF EVENTS

26. There appears to be broad agreement as to the sequence of events to date.
27. On the 13th June 2022, the Court made an Order arising from the hearing of various Summonses as set out above. Paragraph 5 of the Order required the Applicant to pay the Company’s costs of the hearing.
28. On the 27th June 2022, the Applicant filed an application for leave to appeal that paragraph of the Order.
29. The Company’s position is that this leave application lay dormant, and that the Applicant did not actively pursue this. The Applicant’s position is that the Company had been served with the Summons for leave to appeal and either ignored or failed to respond to requests for dates to avoid so that the Summons could be listed.
30. Notwithstanding that the application for leave to appeal had been filed, the Company thereafter submitted its bill of costs for taxation.
31. The Taxation commenced on the 12th September 2022. The required fixed application and *ad valorem* fees totaling US\$2,004.51 were paid. Both sides made submissions to the Taxing Officer.

32. On the 28th September 2022 the Taxing Officer issued the Interim Costs Certificate for US\$80,389.50. The Company says that this is the minimum amount agreed by the Applicant in the Bill of Costs pursuant to GCR O.62, r 22 (1) (b). The Applicant says that any apparent agreement was without prejudice, being expressly stated to be subject to its preliminary legal objection to the Taxation process itself.
33. The Applicant thereafter filed two Summonses in the Taxation.
34. On 12th October 2022, the Applicant filed a Summons seeking the setting aside of the Certificate or a review of the Taxing Officer's decision pursuant to GCR O.62, r.22(1) (c) or GCR, O.62 r.30. A stay of the Interim Certificate is sought until the Summons is determined.
35. On 18th November 2022 a second Summons was filed. This seeks the overturning of the Taxing Officer's decision to proceed with the Taxation.

THE SUBMISSIONS OF THE COMPANY

36. Counsel for the Company submits that the Taxation is valid and cannot be set aside. Reliance is placed on the case of *Bernardo v. R¹⁰*, which is said to be analogous to the instant circumstances. In that case the applicant challenged the decision of the Taxing Officer to set aside a default costs certificate and argued that it had been properly obtained. The Court determined that it could intervene as part of its inherent jurisdiction, notwithstanding that the only provision dealing with a power of review was GCR O.62, r.30 which did not apply to the circumstances under consideration. The Court concluded following its review that the application to set aside the default cost certificate had not been properly brought. The Taxing Officer had not complied with the procedural requirements before setting it aside. The Court overturned the Taxing Officer's decision to do so. The Court held that in any event the setting aside of the certificate would not have affected the validity of the already properly served bill of costs and that the taxation proceeding would have been restored to the stage that it was immediately prior to the grant of the certificate¹¹.

¹⁰ [2017] (2) CILR 877

¹¹ Ibid paragraph 47

37. Based on this decision, Counsel argues that it is not possible to grant a stay of paragraph 5 of the Court's Order as the Applicant has sought, because the Taxation was validly commenced. It is only possible to stay the execution of the Certificate. It is argued that if a stay is not granted of this, the Company will be seeking to enforce it, while at the same time an appeal is being pursued against the Order for costs. The result says the Company would be otiose.
38. It is also submitted that in this case where the Company's liquidation estate is penniless a stay should not be granted without payment into Court of the costs of the appeal. These are estimated to be \$250,000.00.
39. In the case of *Shanda Games Ltd. v. Maso Capital Invs. Ltd*¹², the Cayman Islands Court of Appeal ("CICA") stated that on an application for a stay of execution the Court has a wide discretion to impose terms on any such grant. If it is determined that a stay ought to be granted, the Court having considered the relevant factors such as the strength or weakness of the grounds of appeal, ought usually to require payment into Court of the whole sum due under the judgment which is appealed against.

THE TAXATION SUMMONSES

40. Counsel refers to the case of *In Re Otu*¹³ and submits that the Taxation Summonses cannot be entertained unless the Applicant satisfies GCR O.62, r. 30(4)(c). The Applicant must first pay the amount in dispute into Court which is a strict procedural requirement and also comply with the other requirements of the Rule.

THE SUBMISSIONS OF THE APPLICANT

41. The Applicant's first point is that the submissions of the Company seek to raise and litigate new matters of substance which were not previously argued at the hearing and are in breach of Practice Direction 1 of 2004.

¹² CICA Civil Appeal no. 12 of 2017 (unreported judgment dated 18th August 2017)

¹³ [2013] 2 CILR 128

42. The primary submission is that in any event the Applicant does not seek a stay of paragraph 5 of the Order or of the Taxation process. Counsel for the Applicant notes that the Company has put forward no submissions in support of the attachment of conditions to the grant of leave where there is no application for a stay.
43. In reply to the specific conditions sought by the Company, the Applicant submits firstly, that it would be inequitable to make leave conditional on the payment of an Interim Certificate which is disputed. Secondly, that the issue of security for costs is being raised as a “*postscript to the Draft Judgment*” and has not been done in the proper way, by summons supported by evidence, which would have provided notice and afforded a full opportunity to respond at a hearing.
44. On the issues raised as to the Taxation, the Applicant’s response is that these are matters for the Taxation proceedings and fall to be determined within those proceedings. They do not relate to the Summons for Leave to Appeal.
45. Counsel submits that the Applicant raised a preliminary objection to the Taxation and that any apparent agreement on any aspect of the claim for costs was subject to its position on the preliminary objection. This is that a forthwith order is required failing which the order for the payment of costs should await the outcome of the entirety of the proceedings. Secondly, that the case of *Bernardo* is distinguishable in that no taxation has taken place in the instant case. Counsel says that the Company chose to pursue the Taxation after the Summons for Leave to Appeal had been filed and could have and could still seek a stay of the Taxation process.
46. Having reviewed all the submissions, I consider that the arguments of the Applicant are persuasive. No arguments are made by the Company as to the imposition of conditions in the absence of a stay. A stay is not sought by the Applicant. I accept that the issues with respect to the Taxation process are not directly related to the issues on leave to appeal and are more appropriately dealt with as part of that process. I make no observations or decisions with respect to these matters.

47. While section 19 (2) of the *Act* appears to require a minimum mandatory payment as security, payment of additional amounts for security for the costs of the appeal appears to be discretionary, being such amount as the Judge may direct. Counsel for the Applicant raises the point that they were given no notice of an application and had no opportunity to present any evidence or to make full arguments at the hearing. The amount suggested by the Company is not insignificant. Applying natural justice principles, I think that it would be wrong to consider this now given the way in which it has arisen. I decline to do so.

Dated this the 30th day of August 2023



**The Hon. Justice Cheryll Richards KC
Judge of the Grand Court**