COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01354

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

H. GODFREY WAUGH
WAUGH CONTRACTING COMPANY LIMITED
DOUGLAS PRUDDEN
(OR OTHER OWNER OR OWNERS OF UNIT NO. 1105)

Defendants

AND

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01355

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

GREGG WAUGH
WAUGH CONTRACTING COMPANY LIMITED
DOUGLAS PRUDDEN
(OR OTHER OWNER OR OWNERS OF UNIT NO. 1103)

Defendants

AND

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2020/CLE/gen/No. 01357

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION

Plaintiff

AND

JULIE GLOVER
DWIGHT GLOVER
(OR OTHER OWNER OR OWNERS OF UNIT NO. 907)

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Meryl Glinton for the Plaintiff
	Harvey Tynes QC, with Tanisha Tynes-Cambridge for the Defendants
Hearing dates:	Determined on written submissions (submissions lodged 15 March 2022).

Practice and Procedure—Leave to Appeal—Summary Judgment—Principles—Realistic prospect of success or public interest issue.

RULING

Klein J:

INTRODUCTION AND BACKGROUND

Introduction

[1] On 7 March 2022, the Court delivered a Ruling ("the Ruling") in a conjoined hearing of the three actions at caption in which it held that the plaintiff was entitled to summary judgment against the defendant owners in respect of charges which had been registered against three sets of units in the Lucayan Towers South Condominium ("LTSC"). At the conclusion of handing down that Ruling, counsel for the defendants sought leave to appeal.

[2] Consequently, the Court invited the defendants to file the necessary application for leave and for both parties to submit brief written submissions in respect of the application, which the parties subsequently agreed to have heard on the basis of written submissions. The summons for leave to appeal was filed on the 9 March 2022 and both parties lodged written submissions on 15 March 2022. On 18 March 2022, the Court via email announced its decision refusing leave, and promised to provide brief reasons as soon as practicable.

[3] These are my reasons.

DISCUSSION AND ANALYSIS

Jurisdiction and Principles

[4] Appeals to the Court of Appeal from interlocutory rulings or orders can only be done with the leave of the Supreme Court or, failing that, the leave of the Court of Appeal (s. 11(f) of the *Court of Appeal Act*). In this regard, Rule 27(5) of the *Court of Appeal Rules* provides that:

> "Wherever under the provisions of this Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."

[5] There is no dispute that a summary judgment ruling is an interlocutory order. As the Privy Council had occasion to observe in *Junkanoo Estates Ltd. v. UBS Bahamas (In Voluntary Liquidation)* [2017] UKPC 8 [at para. 5]:

> "It is common ground that for this purpose [leave to appeal] an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in *White v Brunton* [1984] QB 570 and has been applied for many years in the Bahamas."

Principles

[6] The general approach of the court to the exercise of its power to grant leave to appeal are well known. Broadly stated, leave to appeal will only be given where: (i) the grounds have a real prospect of success, or (ii) there is a compelling reason that an issue raised should be examined in the public interest.

[7] Many expositions of the principles start with the guidance given by Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd.* [1997] 4 All ER 840, where he stated:

> "(1) The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. This test is not meant to be very different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful or an unrealistic argument is not sufficient.
>
> (2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."

[8] These principles have been accepted and applied in a number of cases in the Supreme Court and Court of Appeal (see, for example, *In the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust)* [2016/CLE/qui/01564), Charles J.; *R v. The Rt. Hon. Perry G. Christie et. al., ex parte Coalition to Protect Clifton Bay* [2013/PUB/jrv/00012], Bain, J.; *Smith v Coalition to Protect Clifton Bay* (SSCivApp No. 20 of 2017), and *AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited* [2014] 2 BHSJ No. 53, Court of Appeal).

[9] I think that there are three guiding principles to be distilled from a reading of the authorities. The first is that leave will only be given where there are grounds with a real (i.e., a 'realistic' as opposed to 'fanciful') prospect of success (*Swain v Hillman* [2001] 1 All ER 91, at pg. 92-J). The second is that first instance courts have a duty to act as a filter to winnow out those cases which are without merit, to save judicial time and expense, although this has to be

balanced against unfairly stifling appeals simply on the basis that the grounds appear to be weak (see *Bethell v. Barnett and Ors.* [2011] BHS J. No. 64, per Isaacs, SJ). The third is that the public interest gateway is only to be used in exceptional circumstances, e.g., where there is some overarching issue of public interest raised that would benefit from a review by the appellate court. As stated in a UK Court of Appeal Practice Direction (*Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments*) [1999] 1 WLR 2), at paras. 10-11:

> "10. …[T]he general rule applied by the Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.
>
> "11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave." [Emphasis supplied].

Grounds of Appeal

[10] I turn now to consider the proposed grounds of appeal. In their grounds, the defendants assert that there are three main errors in the Ruling, which I set out as follows:

> "1: The learned Judge erred in ordering that summary judgment be entered in favour of the plaintiff in each of the three applications which were before him in the absence of an affidavit verifying the facts on which the plaintiff's claim was based as required by the provisions of Order 14, Rule 2(1) of the Rules of the Supreme Court.
>
> 2. The learned Judge erred in ordering that summary judgement be entered in favour of the plaintiff in each of the three applications which were before him in the face of affidavit evidence that the "Notice of Charge" had each been signed by persons who were no longer directors of the body corporate and had been removed from office by the written request made by 57.6% of the unit owners.
>
> 3. The learned Judge erred in ordering that summary judgment be entered in favour of the plaintiff in the face of unrefuted evidence that the defendants named in Action No. 01354 and Action No. 01355 were not owners of the units in the condominium complex."

Ground 1

[11] Although this ground of appeal states that there was "*no affidavit verifying the facts on which the plaintiff's claim was based*", it is clear that the defendants' complaint is really directed to the form of the affidavit. There is no dispute that the plaintiff did in fact file affidavits in

support of the summary judgment applications, the very purpose of which (presumably) was to comply with the Ord. 14 requirements. However, the defendants say that these affidavits do not conform to Ord. 14, r. 2(1), in that they do not "*verify*" or "*confirm*" the facts on which the plaintiff's claim is based. As indicated in the Ruling [para. 24], while Mr. Tynes QC contended that the affidavit did not satisfy the requirements of Ord. 14, r. 2(1), he did not elaborate during trial on why the affidavit was said to be insufficient, and the court was not referred to any authorities supporting that contention.

[12] In the defendants' written submissions in support of leave, they refer to the case of *May v Childley* [1894] 1 QB 451, and suggest that a standard form of compliance with the Rules would be in the following form, based on similar language used in that case:

> "The defendants are justly and truly indebted to the plaintiffs in the sum of $....and were indebted at the commencement of this Action…. The particulars of the said claim appear by the Statement of Claim in this Action."

As this was not the form used by the plaintiff, the defendants claim that there were no words of verification or confirmation of the facts on which the plaintiff's claim was based.

[13] I am of the view that the plaintiff's reliance on *May v Childley* is misplaced. In point of fact, that authority was cited by the Court in its Ruling as one of several cases referred to in a practice note in the Supreme Court Practice 1995 ("The White Book"), para. 14/2/5, for the principle that "*The [verifying] affidavit need not set out all the particulars, nor verify the facts except by reference to the statement of claim*" [para. 26-27 of the Ruling].

[14] In this regard, the "summary judgment affidavit" of Godfrey Bowe, filed 20 January 2021 in each of the actions, specifically referred to the writs of summons and statements of claim filed, and exhibited documentation which, of themselves, verified the facts upon which the claims were based. For example, this included the notices of charge in each matter along with demand letters sent to the defendants. Further, the affidavit was under oath and contained the traditional statement of truth (at para. 2) that "…*where the said contents consist of information relayed to me by other persons or derived from what is contained in documents not prepared by me, they are true to the best of my information and belief*." I am content to rely on and reiterate my finding at paragraph 23 of the Ruling that "*Ord. 14, r. 2 does not require any specific formulation of words for verifying or confirming the facts*."

[15] I therefore find that Ground 1 is without merit and does not disclose any real prospect of success for the purposes of an appeal. The defendants have not provided any principle or authority which throws doubt on the guidance given in the White Book for the requirements of a verifying affidavit, as illustrated by *May v Childley* and the other authorities referenced in that note.

<u>Ground 2</u>

[16] The second ground of appeal is that the notices of charge were signed by persons whom it is said are no longer "directors" of the body corporate, and therefore the notices are invalid. The

notices of charges were signed by Maurice Glinton QC, as President of the Condominium Association, and Michaela Virgill-Storr, Secretary of the Association. The contention of invalidity is founded on an alleged requisition made by more than 50% of the unit owners dated 14 September 2017 to remove the "Glinton Board", which was done pursuant to the provisions of article V(8)(iv) of the Association's Bye-laws ("the 2017 requisition"). The 2017 requisition was seemingly orchestrated by unit owners aligned with the "Glover Board" following the Court of Appeal's ruling on 4 September 2017 that the Glinton Board was the validly elected board.

[17] The issues relating to the conduct of the Association's elections and the legal challenges brought by the competing factions (the Glinton Board and the Glover Board) are set out in some detail at paragraphs 50-77 of the Ruling. As related there, the 2017 requisition ignited another round of legal proceedings between the two factions, which again travelled to the Court of Appeal. In its second ruling in this matter, handed down on 15 June 2019, which was an appeal from an application for an injunction by the Glinton Board—apparently refused by the first instance court on the basis that the requisition removed their ability to seek an injunction—the Court of appeal affirmed that the Glinton Board was "…*merely preserving their right as the lawful directors of the Association to manage the Association's affairs and to obtain the consequential relief prayed for in their Writ*." [para. 73].

[18] The main reasons for rejecting the defendants' contention that the issue of the 2017 requisition and its effect was a matter for adjudication in the summary judgment claims are set out at paragraph 73 of the Ruling. In essence, this Court concluded that it was "…*precluded from going behind the specific findings and effect of the Court of Appeal's decision and is bound to accept that the current lawful board of management of the Association is the Glinton Board*."

[19] I pause here to note that a notice of motion was filed on 25 June 2019 to appeal to the Privy Council on the ground that the Court of Appeal failed to advert to the applicant's (the Glover Board's) reliance on the 2017 requisition, the effect of which they say was to leave the Glinton Board without authority to have applied for the injunction in the first place, or to take any subsequent legal steps. As noted in the Ruling [para. 61], the application for leave to appeal to the Privy Council appeared to remain outstanding at the time of the Court's ruling, although neither side was able to confirm this. However, this has been subsequently confirmed by a current Court of Appeal Cause-List posted on its website, wherein it is noted that the leave application is set for 4 April 2022. It may be that the current litigation reanimated the application for leave, but the Court does not wish to speculate in this regard.

[20] However, as no stay was obtained of the Court of Appeal's ruling of 25 June 2019, it remains binding on the parties and this Court. For the reasons given, I conclude that this ground is likewise without merit.

Ground 3

[21] I must confess that the formulation of this ground is somewhat puzzling, and it is out of joint with the Court's findings and events that transpired during the hearing. As pointed out by the

plaintiff in their brief submissions opposing the leave application, this ground appears to be a roundabout attack on the discretion exercised by the Court to allow the amendment of the name of one of the defendants during the hearing of the action. However, for reasons that can be taken in a short compass, in my judgment this ground does not provide the defendants in actions Nos. 01354 and 01355 with any legs for an appeal.

[22] As originally constituted, the defendants in 01354 were named as follows: "H. Godfrey Waugh, Waugh Construction (Bahamas) Ltd., Douglas Prudden (or Other Owner or Owners of Unit No. 1105)". In 01355, the named defendants were: "Gregg Waugh, Waugh Construction (Bahamas) Ltd., Douglas Prudden (or Other Owner or Owners of Unit No. 1103). In the affidavits of Godfrey Waugh, filed 18 May 2021 in both actions, he deposed that he was the Vice-President and a Director of "Waugh Contracting Company Limited", whom he indicated was the owner of the units 1105 and 1103, respectively the subject of the actions in 01345 and 01355.

[23] During the course of the hearing, and seemingly out of an abundance of caution having regard to the averment in the Waugh affidavit, the plaintiff made an oral motion for leave to amend to correct the mistake in the name of one of the defendants in the two actions—the defendant described as "*Waugh Construction (Bahamas) Ltd*." Having heard both parties on the issue, and the Court being satisfied that no injustice would result from the amendment, I granted leave to amend subject to an undertaking from the plaintiff to file and serve the necessary documents for that purpose and on the usual terms as to the defendants' having their costs. The documents were filed and the amendment duly made to substitute the name of "*Waugh Contracting Company Limited*" for "*Waugh Construction (Bahamas) Ltd.*" in the two actions.

[24] The Court's reasons for granting leave to amend are set out extensively in the Ruling [para. 33-38]. As the Court held (para. 36):

> "In all of the circumstances of the case, I am satisfied that there are no features of injustice that would result from granting leave for the amendment. The persons who are either the owners of the Units or who have purported to be the owners of the units were served with the proceedings and acknowledged them, and therefore ought not to be allowed to set up a technical defence to the claims on any error in the name of the defendants."

[25] Thus, the assertion in the ground of appeal that the defendants named in the action were not the unit owners must ring hollow in light of the amendments made, and the other evidence that was before the court. So too, must the contention, in the defendants' submissions for leave, that summary judgment was entered against the defendants named in the "*un-amended Application for Order 14 relief*". Indeed, such a contention would make a nonsense of the application for leave to amend, and the purpose and effect of those amendments.

[26] To the extent that the defendants' real complaint is directed towards the exercise of the Court's discretion to grant leave to amend, the asserted ground does not in any way impugn the exercise of the court's discretion to grant leave, so as to give rise to an arguable ground of appeal in this regard. Furthermore, and although the issue has been addressed by the amendment, the defendant's claim that there was "unrefuted evidence" that the defendants named in actions

Nos. 01354 and 01355 were not owners of units in the condominium complex is not accurate. As set out in the Ruling [para.35], the defendants' own evidence created some confusion as to the ownership of the units, as they exhibited documents in which Gregg Waugh represented himself as being the owner of unit 1103, and Godfrey Waugh acknowledged and responded to the claims made against unit 1105.

Whether any public interest issue or other matter requiring clarification

[27] Quite apart from lacking any real prospects of success, in my opinion the grounds of appeal also do not raise any issues that would otherwise qualify for leave under the public interest gateway and, as mentioned, leave in such cases is only to be granted in exceptional circumstances. It is to be noted that the defendants have not even attempted to argue that there is any public interest issue involved in any of the proposed grounds.

[28] In this regard, it is instructive to point out that in dismissing the application for leave to appeal its 2017 decision to the Privy Council, the Court of Appeal remarked:

> "The court is satisfied that it ought not to exercise its discretion to allow the intended appellants to appeal to the Privy Council inasmuch as it is not a matter involving a point of law of general importance. It is a matter which simply involves issues between unit owners of a particular condominium."

[29] Although that was said in the context of the 2017 Ruling, it remains apposite, as the issues in dispute are still peculiar to the owners of a particular condominium unit, and emerge out of a specific factual matrix.

CONCLUSION AND DISPOSITION

[30] The application of the defendants in the above actions for leave to appeal, by summons filed 9 March 2022, is dismissed on the basis that the defendants have not asserted grounds which in the opinion of the Court have any realistic prospects of success, and neither do they raise any public interest issue such as to merit consideration by the Court of Appeal.

[31] The plaintiff will have its costs of the application for leave, to be paid by the defendants, and to be taxed if not agreed.

Klein, J.

29 March 2022