

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL SIDE

2017/COM/com/0004

IN THE MATTER OF SUNSET EQUITIES LTD.

AND IN THE MATTER OF the International Business Companies Act, 2000

AND IN THE MATTER OF the International Business Companies Winding Up Act, 2011

AND IN THE MATTER OF the Companies (Winding Up Amendment) Act, 2011

BETWEEN

STERLING ASSET MANAGEMENT LTD.

Petitioner

AND

SUNSET EQUITIES LTD.

Respondent

Before Hon. Mr. Justice Ian R. Winder

Appearances: Ramonne Gardiner with Wilfred Ferguson Jr. for the Petitioner

Gail Lockhart Charles with Charles MacKay for the Respondent

5 November 2021

RULING

WINDER, J

1. This is my brief decision on the application of the Petitioner (Sterling) for leave to appeal the directions order given in this liquidation action on 10 September 2021. The directions were made pursuant to ***Order 3 Rules 11(1 & 2)*** of the ***Companies Liquidation Rules***.
2. On 6 April 2017 Sterling had petitioned the Court, as a shareholder, for the winding up of Sunset Equities Limited (the Company). Sterling had acquired its shareholding in the Company by virtue of providing a loan facility to the Company. The loan facility by Sterling to the Company has since been repaid in full. These proceedings were brought, subsequent to the repayment of the loan facility, on the basis, Sterling says, that the Company is insolvent.
3. After being improperly struck out, the Petition had been reinstated by the Court of Appeal with the directive that case management directions be given and the matter heard by the Supreme Court expeditiously . The terms of those directions now form the basis for the proposed appeal. The directions given were as follows:
 - a. The Company will be permitted to participate in the proceedings.
 - b. The proceeding will be treated as a proceedings against the company.
 - c. The petitioner shall advertise the Petition, filed on 6 April 2017, in the Tribune and Nassau Guardian newspapers in accordance with the Companies Liquidation Rules 2012 on or before 1 October 2021.
 - d. There shall be a further directions hearing on 25 October 2021 at 10:00am.
 - e. The parties shall give evidence by Affidavit to be filed on or before 12 November 2021 and each witness shall be made available for cross examination.
 - f. The trial of the petition shall take place on 15-17 December 2021 beginning at 10:00 am each day.

Despite Sterling's request, the Court did not make an order for discovery as part of the directions. The Court indicated, that in the exercise of its discretion, such a

direction was not warranted in the circumstances. Written reasons for the making of the directions order were provided on 22 October 2021.

4. Sterling has applied, by Summons dated 24 September 2021, seeking leave to appeal the directions order as it relates to the failure to give directions. Sterling also seeks a stay of the decision and for an adjournment of the trial. A draft notice of appeal was attached to the Summons, citing (6) grounds of appeal. The Summons was subsequently amended following the provisions of the written reasons for the directions order. The amended draft notice of appeal was enlarged to cite (14) grounds of appeal. Save for a ground that suggests that I had already decided to grant discovery (based on verbal exchanges between the bench and bar) and a claim of a failure to give reasons, the other grounds of appeal challenge the exercise of my discretion to grant directions. The test for granting leave to appeal was expressed in the case of *Rt. Hon Perry G. Christie and others v The Queen; The Coalition to Protect Clifton Bay and others*. According to *Isaacs JA*, giving the decision of the Court:

The Court has considered this issue of leave to appeal before. The principles involved ought not to be controversial. An applicant seeking leave to appeal must show that he has a “realistic prospect of succeeding on the appeal.... the use of the word ‘realistic’ makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.” (Per Lord Woolfe MR) in *Smith v. Cosworth Casting Processes Ltd.* [1997] 4 All ER 840.

5. I have read and heard the detailed submissions of both of the parties on the leave application. Whilst, not surprisingly, I do not agree with Sterling's submissions as to an error of law, I readily accept that the test for granting leave is not so high. The test, as expressed by *Isaacs JA*, provides that I should grant leave where Sterling persuades me that its proposed arguments in the appeal are not fanciful or unrealistic. Albeit the bar is not exceptionally high, and notwithstanding the numerous grounds of appeal indicated, I am not satisfied that Sterling has a realistic prospect of success in its proposed appeal.

6. There is clearly no merit in the ground alleging that I had already decided to grant discovery based on verbal exchanges between the bench and bar. A clear reading of the transcript reflects this erroneous suggestion. Statements made by a judge whilst probing counsel, in the course of a hearing, which he ultimately reserves a decision could never form the basis of a decision. Such a suggestion is inimical to the advocacy process.
7. In respect of the claim as to a failure to give reasons, this too has no realistic prospect of success. Firstly, this was a case management directions hearing and at no time was there a request by Sterling for written reasons prior to its decision to appeal. The leave application was filed on the 14th day after the directions were given and the directions order has yet to be perfected. Secondly, the reason for the refusal may have been laconic but it nonetheless expressed the Court's view that discovery was not warranted in the circumstances of the case. In any event more detailed reasons for the directions order were subsequently provided to the parties.
8. Sterling argues that my provision of more detailed reasons, subsequent to the directions, was inappropriate and could not be relied upon in the appeal. Sterling relies on the decision in ***Responsible Development For Abaco (RDA) Ltd et al And The Right Honourable Perry G. Christie SCCivApp No. 248 of 2017***. In that case the Court of Appeal, by majority, acceded to an appellant's request not to give consideration to a supplemental ruling by the judge. The case concerned a application for security for costs in a judicial review proceedings. The sum total of the Court's pronouncement on the issue is to be found at paragraph 27 of the Judgment, per ***Barnett P.***, as follows:

At the hearing the Court by a majority decision acceded to the appellant's request not to give consideration to the second ruling. I dissented from that decision and would have rejected the applicant's request to refuse to consider the judge's supplemental ruling setting out in full her reasons.

9. The basis for the court's decision in *RDA*, to not consider the judges' further reasons, is not ventilated in the judgment. This is unsurprising, as this dicta in *RDA* was clearly not meant to create a precedent excluding the provision of reasons by a court following its decision, as Sterling suggests. This view, that *RDA* was not meant to create a precedent excluding the subsequent provision of reasons by a court, is reflected in the fact that the headnote (approved by the Court) make no mention of this issue.

10. Any cursory look at the facts in *RDA* readily demonstrates that these two cases are not similar and are easily distinguishable. In *RDA* the judge delivered a written ruling on 22 November 2017. It was not until 18 February 2019, almost a year and a half later, and a day before the appeal was to be heard, the judge published a further ruling of her decision requiring the applicant to provide security for costs. Clearly the decision of the Court of Appeal was based on the obvious unfairness in the provision of fuller ruling, at the eve of the hearing, when preparation for the appeal had been completed. These facts in no way mirror the circumstances of this case where the appeal has yet to be formally launched and the reasons were provided to the parties relatively shortly after the direction was given. There could be no prohibition on a judge giving reasons, shortly after the decision, so long as the decision made by the judge is not altered in any way by the reasons. In the circumstances I find that this ground does not have a realistic prospect of success.

11. The other grounds of appeal cite an error of law in the exercise of the courts discretion to grant directions. Order 3 Rules 11(1 & 2) of the *Companies Liquidation Rules* provides:

- (1) Upon the presentation of a petition by a contributory seeking a winding up order or an order for alternative relief under section 191 (3) of the Act on the ground contained in section 186(e), the petitioner must at the same time issue a summons for directions in respect of the matters contained in this rule.
- (2) Upon hearing the summons for directions, the court shall give such directions as it thinks appropriate in respect of the following matters-

- (a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject matter of the proceeding;
- (b) whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;
- (c) service of the petition;
- (d) whether, and if so by what means, the petition is to be advertised;
- (e) whether the petitioner should serve any further particulars of his claim;
- (f) service of a defence by the company or the respondents (as may be appropriate in the light of the directions given under paragraphs (a) and (b) of this rule);
- (g) the manner in which evidence is to be given;
- (h) if evidence is directed to be given by affidavit, directions relating to cross-examination of the deponents;
- (i) discovery and inspection of documents;
- (j) oral discovery; and
- (k) such other procedural matters as the court thinks fit.

12. As indicated in the written reasons, whilst Order 3 Rule 11(2)(i) provides for discovery and inspection of documents, discovery and inspection, like the other items listed under the Rule, will only be included in a directions order where the Court thinks it appropriate in the given circumstance. The Rule empowers the Court to exercise a discretion where it deems it appropriate to do so. In ***Downie v Blue Planet Limited SCCivApp & CAIS No. 1188 of 2019***, per ***Barnett P.***, the Court of Appeal recited the well-known principle concerning the Court of Appeal's approach to the exercise of a judge's discretion:

22. I bear in mind that this is the appeal from the exercise of a judge's discretion. A court of appeal will not interfere with the exercise of that discretion unless it can be shown that the judge took into account a matter or matters that he ought not to have taken into account or that the decision is plainly wrong.

13. In ***Downie***, the appeal related to the exercise of the Courts discretion as to costs. Whilst the discretion in this case relates to a directions order, the exercise of the discretion is nonetheless wide. I am not satisfied, notwithstanding the many grounds listed, that there is the demonstration by Sterling showing that the

Court took into account a matter or matters that it ought not to have taken into account or that the directions order is plainly wrong.

14. In the circumstances therefore leave to Appeal is refused. A stay of the directions order is also refused.

15. Sterling is well aware of the opportunity to seek leave directly from the Court of Appeal.

Dated the 25th day of November 2021

A handwritten signature in black ink, appearing to be 'I. Winder', written in a cursive style.

Ian Winder

Justice