THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2023/0010

BETWEEN:

CARIBBEAN DEVELOPMENT (ANTIGUA) LIMITED

Applicant

and

[1] STUART LOCKHART
[2] GEERT DUIZENDSTRAAL
[3] GAYE HECHME

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal

Appearances:

Mr. Hugh Marshall Jr. for the Applicant
Mr. Andrew Young and Dr. David Dorsett for the First Respondent

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2023: November 20
2024: October 14.

Application for an extension of time to apply for leave to appeal – Whether the delay was inordinate – Whether there are good reasons for the delay – Whether the proposed appeal has a realistic prospect of success – Whether the grant of an extension of time would cause prejudice to the respondents – Application for leave to appeal – Application for a stay of proceedings pending the determination of the appeal – Whether the appeal would be rendered nugatory if a stay is not granted – The nature of compromise agreements – Whether a compromise agreement must be in writing – Whether an order founded on breach of a compromise agreement which is not in writing is a valid order

On 27th January 2023, the learned judge in the court below made an order granting judgment to the first respondent (the claimant in the court below) on the matter of the breach of the compromise agreement between the parties, and ordering that damages for such breach be determined by a Master in Chambers.

Being dissatisfied with this order, and the time within which to seek leave to appeal having elapsed, Caribbean Development (Antigua) Limited ("the applicant") filed an application on 21st March 2023 and an amended application on 22nd March 2023 seeking the following orders: (i) That time be extended to the applicant to file an application for leave to appeal the decision of a High Court Judge given on 27th January 2023; (ii) That the applicant be granted leave to appeal the decision of the learned judge; (iii) That a notice of appeal be filed within 21 days of the making of an order for leave to appeal; and (iv) That the proceedings in the court below be stayed pending the determination of the appeal.

Held: granting the application for an extension of time, granting the application for leave to appeal, ordering that the notice of appeal be filed within 21 days of the date of this order, granting the application for a stay of proceedings and making no order as to costs, that:

1. Applications for an extension of time to file court documents are usually determined by consideration of four factors: (i) the length of the delay in the filing of the document(s); (ii) the reasons for the delay; (iii) the chances of the appeal succeeding if the extension of time is granted; and (iv) the degree of prejudice to the respondent if the extension of time is granted and/or the degree of prejudice to the applicant if the extension is not granted. In the instant case, the applicant conceded that a delay of thirty-eight days was inordinate, and the Court adopted this concession. The applicant attributed this delay to the fact that that there were two persons within the applicant company (none of them lawyers) who had charge of the litigation and they had to wait thirty-three days before they could get a copy of the written judgment so as to review it and then take advice on its merits before applying for leave to appeal it. They then waited another nineteen days to actually file the application for leave to appeal, because both of the persons having charge of the litigation had unrelated family bereavements. Such a circumstance, wanting both in detail and credibility, is not a good enough reason to justify such a delay in seeking leave to appeal a judgment which the applicant so forcefully challenges on several legal grounds.

2. In terms of the prospect of success on the appeal, the learned judge's decision to make the orders that she did was based on the purported breach of a compromise agreement between the first respondent, on the one hand, and the applicant and the second and third respondents, on the other hand. A compromise agreement is a legally binding agreement between parties under which the parties agree to settle their potential claims in return for the payment of compensation to the party making the claim(s). Compromise agreements, or settlement agreements as they are alternatively referred to, were born in labour law, but have, over time, transitioned to other areas of contract law. There are various legal requirements for a compromise agreement to be legally binding, one of which is that the agreement must be in writing. The agreement allegedly breached in this case was not in writing. What was referred to in the court below as a compromise agreement is a handwritten memorandum apparently written and signed by the first respondent only. Additionally, the notice of admissions filed by the second respondent on 5th May 2021, and relied on by the learned judge to reach her conclusion that the applicant is bound by the compromise agreement negotiated on its behalf by the second respondent, clearly states that

'the agreement was an oral agreement'. A judgment founded on the breach of the agreement is, therefore, the product of an error of law by the judge. There must, in the circumstances, be (at least) a realistic prospect of success of an appeal against that judgment.

Bank of Credit and Commerce International SA v Munawar Ali and others [2001] UKHL 8 considered; **Beaumont Park Limited v Technology, Development & Investments Limited** SKBHCVAP2020/0018 (delivered 22nd July 2024, unreported) considered.

3. The applicant's realistic prospect of success can further be grounded on its submission that that the learned judge failed to give consideration to or to pay any, or any sufficient, regard to the applicant's application of 3rd June 2022 to strike out the first respondent's claim and to give summary judgment against him. There is nothing in the learned judge's oral or written order which indicates that the learned judge did give consideration to or pay any, or any sufficient, regard to the applicant's application. The obvious failure by the learned judge to deal with the applicant's application, properly or at all, also gives the applicant a realistic prospect of success on an appeal against the order of the learned judge. Accordingly, despite the admitted inordinate delay in bringing the application and the unsatisfactory reasons for the delay, the applicant's clearly good prospect of success on the appeal overrides the other factors on the basis of which a court will grant, or not grant, an extension of time to seek leave to appeal. Furthermore, as the applicant demonstrated a good prospect of success on the appeal, this was sufficient to grant leave to the applicant to appeal the decision of the learned judge.

4. On applications for a stay of proceedings, the deciding factor is whether there is clearly a good prospect of success on the appeal because, if there is, proceedings in the court below should not be continued, otherwise proceedings in the High Court and Court of Appeal in relation to a particular dispute can be going on virtually at the same time and possibly reaching different conclusions. So, if there is clearly a good prospect of success on an appeal, an application for a stay of proceedings in the court below should be granted. If the applicant clearly does not have a good prospect of success on an appeal, then a stay of proceedings should not be granted, because a party should not be allowed to hinder the progress of proceedings in the High Court simply by filing an appeal, especially if it is one of doubtful merit. If an applicant's prospects of success on an appeal are neither clearly strong nor clearly weak, then other factors may be brought into play in the determination of an application for a stay of proceedings. The possibility that an appeal can be rendered nugatory if a stay is not granted and proceedings in the High Court are continued whilst the appeal is pending before the Court of Appeal may be a significant factor in the consideration of the court. The appeal court may also consider the degree of prejudice likely to be caused to either side in the appeal if a stay of proceedings is granted or not granted. But there is not an exhaustive list of factors which the court must consider in deciding whether to grant a stay of proceedings where the prospects of success on an appeal are neither clearly weak nor clearly strong; in the final analysis, the Court should follow where justice leads it. Since the applicant has been granted an extension of time and leave to appeal on the basis of its good

prospect of success on the appeal, the proceedings in the court below are stayed pending the hearing and determination of the appeal.

C-Mobile Services Limited v Huawei Technologies Co. Ltd BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) distinguished.

JUDGMENT

Introduction

[1] **MICHEL JA:** This is an application filed by the applicant, Caribbean Development (Antigua) Limited (which was the first defendant in the court below), on 21st March 2023 and amended on 22nd March 2023, for the following orders:

(1) That time be extended to the applicant to file an application for leave to appeal the decision of a High Court Judge given on 27th January 2023.

(2) That the applicant be granted leave to appeal the decision of the learned judge.

(3) That a notice of appeal be filed within 21 days of the making of an order for leave to appeal.

(4) That the proceedings in the court below be stayed pending the determination of the appeal.

[2] The four orders sought by the applicant are linked to each other, such that the second order cannot be granted unless the first one is; the third order cannot be granted unless the second one is; and the fourth order cannot be granted unless the third one is. Separate consideration must, however, be given to each of the orders sought, excepting the third order which, in substance, follows from the second, because if leave to appeal is granted then time must be given to the applicant to file its notice of appeal, and if leave to appeal is refused then no notice of appeal can be filed by the applicant. I will, therefore, briefly address and rule on the first, second and fourth orders sought by the applicant.

Extension of time

[3] In relation to the first of the orders sought by the applicant, applications for extension of time to file court documents are usually determined by consideration of four factors:

(1) the length of the delay in the filing of the document(s);

(2) the reasons for the delay;

(3) the chances of the appeal succeeding if the extension of time is granted; and

(4) the degree of prejudice to the respondent if the extension of time is granted and/or to the applicant if the extension of time is not granted.

[4] In terms of the first of the four factors to be considered, I would myself have been inclined to find that the length of the delay in filing the application for leave to appeal, being thirty eight days, was not – in the circumstances of this case – inordinate; but this finding would directly contradict the position taken by the applicant in the affidavit filed in support of its application, where the deponent swore that the applicant accepts that there has been a delay in making the application for leave to appeal and that the delay was inordinate. This statement was substantially repeated in the applicant's submissions in support of its application where it is stated that: 'It is readily accepted that there was a delay in filing the application for leave to appeal and that delay was inordinate.'

[5] In terms of the reasons for the delay, in the affidavit in support of its application, the applicant avers that it has provided a justifiable excuse for the delay, and in its submissions in support of the application, the applicant submits that the delay was excusable.

[6] The reason provided by the applicant for the delay was twofold, firstly, that it waited thirty three days to get a copy of the learned judge's written judgment so as to be able to review it, seek advice on it, and consider the merits of filing an appeal, whereupon the applicant determined that it would be in its best interest to appeal the decision; and secondly, that it waited an additional nineteen days

after receiving the written judgment before making the application for leave to appeal, because both of the officers of the applicant who were charged with the conduct of the litigation were travelling outside of the jurisdiction due to bereavements in their respective families. The applicant submitted that the combination of these two factors resulted in a thirty-eight-day delay in making the application for leave to appeal, because what should have taken fourteen days instead took fifty-two days.

[7] In terms of the chances of the appeal succeeding if the extension of time is granted, the applicant submitted, in its written submissions in support of its application, that it had advanced arguments as to the strength of its intended appeal sufficient to allow this Court to decide on the prospects of its success. In his oral submissions in support of the applicant's application, counsel for the applicant, Mr. Hugh Marshall Jr., went much further though and submitted that the applicant has very good prospects of success on appeal.

[8] The applicant stated that there were two applications before the court at the hearing on 6th October 2023. The first was the first respondent's application filed on 17th March 2022 to strike out the joint defence filed on behalf of the applicant and the second and third respondents, based on admissions subsequently made by the second and third respondents (though not by the applicant). The second was the applicant's application filed on 3rd June 2022 to strike out the first respondent's claim in the court below (contained in his re-amended claim form and statement of claim) because the first respondent did not set out in his pleadings a basis on which the court could make the order which he was seeking and for summary judgment against the first respondent on the basis that, given the pleadings and the evidence, the first respondent did not have a real prospect of success on his claim.

[9] The applicant submitted that in reviewing the written order of the learned judge, it was apparent that the learned judge did not consider the applicant's application and/or pay any, or sufficient, regard to it and she simply ordered a trial of the issues raised by the first respondent and awarded damages against the applicant to be assessed by a Master.

[10] The applicant also submitted that, moreover, the agreement the first respondent is relying on and on which the learned judge largely based her order, is not a concluded agreement and was never agreed upon by the applicant's board of directors.

[11] In these circumstances, the applicant contends that it has a realistic prospect of success on appeal if leave is granted to it to appeal the order of the learned judge.

[12] On the issue of prejudice, the applicant did not advance any argument on the degree of prejudice to the respondent if the applicant is granted an extension of time to apply for leave to appeal. The applicant did however advance arguments on the degree of prejudice to it if the extension of time is not granted. The applicant stated that it has a judgment against it for damages to be assessed and if no extension of time is granted to it to appeal, and consequently no leave to appeal or stay is granted, the applicant will be compelled to pay damages on a claim not properly pleaded and with no evidence to support it.

First respondent's response

[13] In terms of a response on the issue of the length of the delay and the reasons for the delay in applying for leave to appeal, the first respondent merely stated in his submissions in opposition that he does not accept either the justification for the length of the delay or the reasons for the delay advanced by the applicant in the affidavit and submissions in support of its application.

[14] As to the prospect of success in the appeal (if leave is granted) the first respondent submits that the appeal has no reasonable prospects of success given the findings of fact made by the trial judge. The first respondent submits too that the learned judge granted summary judgment in his favour on the basis that there was a breach of a compromise agreement between the applicant and the first respondent, and that the applicant had no real prospect of successfully defending the claim for breach of the compromise agreement.

[15] As to the degree of prejudice to him if the extension of time is granted, the first respondent did not make any submission in this regard, nor did he make any submission on prejudice to the applicant if the extension was not granted.

Discussion and analysis

[16] As I indicated earlier, I would myself have been inclined to find that the delay of thirty-eight days in the filing of the application for leave to appeal was not inordinate, especially having regard to the thirty-three-day wait for a written judgment, but the applicant having taken a contrary position, I do not propose to rule against him in his favour.

[17] In terms of the reasons for the delay, I am totally unimpressed with the excuse of the applicant for the delay in the filing of an application for leave to appeal. The applicant claims that there were two persons within the applicant company (none of them lawyers) who had charge of the litigation and that they waited for thirty-three days to get a copy of the written judgment of the learned judge so as to review it and then take advice on its merits before applying for leave to appeal it. They then waited another nineteen days to actually file the application for leave to appeal, because both of the persons having charge of the litigation had unrelated family bereavements. Such a circumstance, wanting both in detail and credibility, is not in my view a good enough reason to justify such a delay in seeking leave to appeal a judgment which the applicant so forcefully challenges on several legal grounds.

[18] I will momentarily skip over the third factor of the prospect of success on the appeal to comment briefly on the fourth factor - the degree of prejudice to one party or the other if the extension is granted or not granted; only to say that neither of the parties appears to have attached much significance to it, probably because it does not emerge in this appeal as being very favourable to one party or the other. In the scheme of things, I do not regard it as being significant in the context of the application under consideration, and I will so treat it.

[19] In terms of the prospect of success on the appeal, it is apparent that the learned judge's decision to make the orders that she did was based on the purported

breach of a compromise agreement between the first respondent on the one hand and the applicant and the second and third respondents on the other hand. Three of the four findings by the learned judge on which she grounded her order relate to supposed breach of the compromise agreement. The first paragraph of the ensuing order of the learned judge dated 27th January 2023 states that:

> "a. Judgment be granted to the Claimant on the matter of the breach of the compromise agreement and that damages for such breach are to be determined by a Master in Chambers."

[20] A compromise agreement is a legally binding agreement between parties under which the parties agree to settle their potential claim(s) in return for the payment of compensation to the party making the claim(s). Compromise agreements, or settlement agreements as they are alternatively referred to, were born in labour law, but have over time transitioned to other areas of contract law.

[21] There are various legal requirements for a compromise agreement to be legally binding, one of which is that the agreement must be in writing. This much has been clearly stated and implied in a number of cases from the Commonwealth, including **Bank of Credit and Commerce International SA v Munawar Ali and others**[1] from the UK; and **Beaumont Park Limited v Technology, Development & Investments Limited**[2] from this Court sitting in Saint Christopher and Nevis.

[22] So, although the applicant did not take this point, a judgment based on breach of a compromise agreement, when the purported agreement is not in writing, is the product of error of law by the judge, because the purported agreement not being in writing is fatal to its validity. The 'compromise agreement' allegedly breached in this case was not in writing. What was referred to in the court below as a compromise agreement is a handwritten memorandum apparently written and signed by the first respondent only. The memorandum is exhibited at page 21 of the application bundle filed by the applicant on 10th November 2023 and marked "W.B.1". But, if it was necessary to erase any remaining doubt, the

[1] [2001] UKHL 8.
[2] SKBHCVAP2020/0018 (delivered 22nd July 2024, unreported); This judgment was delivered after the hearing of this appeal.

notice of admissions filed by the second respondent on 5th May 2021, and relied on by the learned judge to reach her conclusion (at paragraph [5] of her order) that the applicant is bound by the compromise agreement negotiated on its behalf by the second respondent, clearly states (at paragraph [2] d.) that 'the agreement was an oral agreement'. A judgment founded on the breach of the agreement is, therefore, the product of an error of law by the judge. There must, in the circumstances, be (at least) a realistic prospect of success of an appeal against that judgment.

[23] The applicant's realistic prospect of success on appeal can also be grounded on the submission by the applicant that the learned judge failed to give consideration to or to pay any, or any sufficient, regard to the applicant's application of 3rd June 2022 to strike out the first respondent's claim and to give summary judgment against him. There does not appear to be anything in the learned judge's oral or written order which indicates that the learned judge did give consideration to or pay any, or any sufficient, regard to the applicant's application. Where, in paragraph [6] of the written order, the learned judge spoke to the applicant's application of 3rd June 2022, it was only to note that the second and third defendants (now the second and third respondents) 'have admitted the compromised agreement in the terms stated by the Claimant'. Note though that the parties who admitted the compromise agreement do not include the applicant, who was the first defendant in the court below. The other mention of the applicant's application is at paragraph [7] c. of the order: 'The application filed on 3rd June 2022 by the First Defendant is dismissed.' This failure by the learned judge to deal with the applicant's application, properly or at all, also gives the applicant a realistic prospect of success on an appeal against the order of the learned judge.

[24] In the circumstances, although the applicant asserts that its delay in filing an application for leave to appeal was inordinate, and although I stated earlier that I am totally unimpressed with the excuse offered by the applicant for its delay in filing an application for leave to appeal, in my view the applicant's clearly good prospect of success on the appeal overrides the other factors on the basis of which a court will grant, or not grant, an extension of time to seek leave to

appeal. I will accordingly grant the applicant an extension of time to file its application for leave to appeal the order of the learned judge dated 27th January 2023.

Leave to appeal and notice of appeal

[25] The basis upon which the extension of time is granted to the applicant to seek leave to appeal, that is, its clearly good prospect of success on the appeal, is sufficient to grant leave to the applicant to appeal the decision of the learned judge. I will accordingly grant leave to the applicant to appeal the judgment of the learned judge.

[26] As I expressed earlier in this judgment, if leave is granted to the applicant to appeal the judgment, it follows that leave will be granted to it to file its notice of appeal.

Application for a stay

[27] In terms of the order sought by the applicant for a stay of proceedings in the court below pending the determination of the appeal, it appears that applications for stays before this Court have in recent years been determined largely in accordance with, or by reference to, the dicta of Blenman JA (as she then was) in the case of **C-Mobile Services Limited v Huawei Technologies Co. Ltd.**,[3] where she adopted and applied the five principles identified by Mostyn J in the English case of **NB v London Borough of Haringey**[4] as essential to applications for stays pending appeal. The five principles are: (i) the court must take into account all the circumstances of the case; (ii) a stay is the exception rather than the general rule; (iii) a party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted; (iv) in exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered; and (v) the court should take into account the prospects of the appeal succeeding, but only where strong grounds of appeal or a strong

[3] BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).
[4] [2011] EWHC 3544 (Fam).

likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

[28] I take the view that these five principles are determinative of applications for a stay of execution of a judgment, but not to applications for a stay of proceedings in the court below. On applications for a stay of proceedings, the deciding factor is whether there is clearly a good prospect of success on the appeal because, if there is, proceedings in the court below should not be continued, otherwise proceedings in the High Court and Court of Appeal in relation to a particular dispute can be going on virtually at the same time and possibly reaching different conclusions. So, if there is clearly a good prospect of success on an appeal, an application for a stay of proceedings in the court below should be granted. If the applicant clearly does not have a good prospect of success on an appeal, then a stay of proceedings should not be granted, because a party should not be allowed to hinder the progress of proceedings in the High Court simply by filing an appeal, especially if it is one of doubtful merit.

[29] If an applicant's prospects of success on an appeal are neither clearly strong nor clearly weak, then other factors may be brought into play in the determination of an application for a stay of proceedings. The possibility that an appeal can be rendered nugatory if a stay is not granted and proceedings in the High Court are continued whilst the appeal is pending before the Court of Appeal may be a significant factor in the consideration of the court. The appeal court may also consider the degree of prejudice likely to be caused to either side in the appeal if a stay of proceedings is granted or not granted. But there is not an exhaustive list of factors which the court must consider in deciding whether to grant a stay of proceedings where the prospects of success on an appeal are neither clearly weak nor clearly strong; in the final analysis, the Court should follow where justice leads it.

[30] Having determined that the applicant will be granted an extension of time to seek leave to appeal the judgment, and will also be granted leave to appeal, on the basis that the applicant clearly has a good prospect of success on the appeal, and having regard to my analysis and conclusion in paragraphs 27 to

29 hereof, it stands to reason that the applicant should accordingly be granted a stay of the proceedings in the court below. I will accordingly order that the proceedings in the court below be stayed pending the hearing and determination of the appeal.

[31] In view of the applicant's admitted inordinate delay in applying for leave to appeal the decision of the learned judge and the entirely unsatisfactory reasons for the delay; in view of the fact that applications for leave to appeal are ex parte applications; in view of the fact that the application for a stay was not specifically resisted by the first respondent; and in view of the fact that the applicant did not ask for costs in its notice of application, affidavit in support or submissions in support; notwithstanding the fact that the applicant prevailed in its application, I propose to make no order as to costs.

Disposition

[32] I make the following orders:

(1) An extension of time is granted to the applicant, Caribbean Development (Antigua) Limited, to apply for leave to appeal the decision of the learned judge dated 27th January 2023.

(2) Leave is granted to the applicant to appeal the decision of the learned judge.

(3) The applicant shall file and serve a notice of appeal within 21 days of the date of this order.

(4) The proceedings in the court below are stayed pending the hearing and determination of the appeal.

(5) There shall be no order as to costs.

[33] Apologies are extended to the parties and to counsel for the considerable delay in the delivery of this judgment. This delay was caused by several factors, none of which was the fault of the parties or their counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar