FAMV No. 42 of 2011

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NO. 42 OF 2011 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM CACV NO. 147 OF 2010)

Between:

WANG RUIYUN	Plaintiff (Respondent)
and	
GEM GLOBAL YIELD FUND LIMITED	Defendant (Appellant)

Appeal Committee:	Chief Justice Ma, Mr Justice Ribeiro PJ and Mr Justice Litton NPJ
Hearing and Decision:	24 October 2013
Handing Down of Reasons:	8 November 2013

D E T E R M I N A T I O N

Mr Justice Ribeiro PJ :

1. At the hearing, we made the following orders, with reasons to be given later, namely:

(a) That the conditions upon which leave to appeal have been granted be varied by the addition of the condition that the appellant pay into

Court by way of security for the respondent's claim the sum of HK$30,000,000.00 in a manner acceptable to the Registrar, within 21 days from the date of this order.

(b) That in default of compliance with the aforesaid order, leave to appeal be rescinded without further order.

(c) That the costs of the application be in the appeal.

We now provide our reasons.

A. The procedural history

2. The appellant is a company incorporated under the laws of the island of Nevis (forming part of Saint Kitts and Nevis in the Caribbean).

3. There is no dispute that the appellant is liable to the respondent in damages for breach of contract in connection with the parties' dealings with 926 million shares in a Hong Kong listed company called Bestway International Holdings Ltd. On 6 March 2007, Stone J granted summary judgment for part of the respondent's claim in the sums of $40,503,237.28 and HK$930,412.15. Those amounts have been paid.

4. On 6 August 2009, the respondent obtained interlocutory judgment for damages to be assessed against the appellant in default of defence. The assessment was then conducted by Master de Souza who, on 9 June 2010, assessed the damages in the sum of HK$128,351,291.56.

5. In July and August 2010, the appellant applied to set aside the interlocutory default judgment and also lodged a notice of appeal against the Master's assessment of damages. At the hearing of the first application, Stone J was very unimpressed by the appellant's conduct in the litigation and was prepared to set aside the interlocutory default judgment only on terms that the

appellant paid $60 million into court. That condition was not met, so that the judgment stands. There is no stay of execution. Instead, the appellant pursued its appeal in the Court of Appeal, arguing that the Master's assessment of damages was wrong in law. The Court of Appeal dismissed the appeal on 20 June 2011.

6. On 29 March 2012, the Appeal Committee granted conditional leave to appeal on the basis that the assessment of damages raised an arguable question concerning the existence of an available market for the shares eventually sold by the respondent. The conditions were that the appellant pay HK$400,000.00 into Court as security for costs and also that the appellant pay forthwith the costs then outstanding. Those conditions have been complied with.

7. In the meantime, the respondent set about trying to enforce his judgment. The person who had throughout been giving instructions to the solicitors on the record for the appellant (the firm now known as "Gall") was Mr Christopher Brown ("Mr Brown"). On 26 November 2012, he was orally examined by video link with New York pursuant to Order 48 rule 1, as the representative of the defendant, the judgment debtor ("the examination"). As a result of some of the answers given by Mr Brown during the examination, the respondent issued a summons seeking a variation in the conditions for the grant of leave to appeal by adding a requirement that the judgment debt of HK$128,351,291.56 be paid into Court and that the outstanding costs in the sum of $286,510.00 due to the respondent in consequence of the examination, be paid to the respondent, with leave to appeal rescinded if default.

8. By letter dated 12 April 2013, Messrs Gall wrote in response to the respondent's attempt to obtain a charging order over a parcel of 58,125,000 shares in a company called Chinese Energy Holdings Ltd asserting that Mr Brown:

> "... has repeatedly stated that, to the best of his knowledge, [the appellant] no longer exists and has no assets. He has made those statements under oath in a video testimony and has made it clear that his only involvement in these proceedings is to try to protect the GEM name from further calumny."

9. On 10th July 2013, the Court directed that the Appeal Committee be re-convened to deal with the respondent's summons and wrote to the parties expressing concern as to:

> "... whether in the light of the answers given by [Mr Brown] in the course of [the examination], the appellant company is still in existence and if so, whether it has duly authorised the prosecution of the appeal".

10. On 25 September 2013, Messrs Gall informed the Court that the appellant company had been struck off the Nevis register of companies on 4 February 2013 for non-payment of its annual registration fees. With a view to meeting the Court's concerns, a fresh affidavit of Mr Brown dated 11 October 2013 was filed, stating that he had caused the appellant company to be restored to the register; exhibiting a Nevis legal opinion confirming that such restoration had been achieved with retroactive effect; and exhibiting a certificate of a resolution of the defendant's board of directors dated 11 June 2010 authorising Mr Brown "individually on behalf of [the defendant] and in its name to give instructions to Gall & Lane at Hong Kong in the matter of the Wang Ruiyun Litigation" ("the resolution").

B. The unsatisfactory position of Mr Brown

11. We accept the evidence that the appellant has now been restored to the register and that its capacity to prosecute legal proceedings has been retroactively restored. However, we are far from satisfied with Mr Brown's evidence, given on oath, concerning his relationship with the appellant company and with the litigation.

12. Mr Brown testified that the individuals controlling the appellant company were James and Pierce Loughran, father and son. Pierce had died in 2007 and James in October 2010. According to Mr Brown, the resolution was certified by James Loughran who signed the exhibited document dated 20 June 2010.

13. It is striking that throughout the examination which took place in November 2012, Mr Brown never once mentioned the resolution. This is so even though on several occasions, he was directly asked about the basis of his authority to act in the litigation on the appellant's behalf. Instead of referring to the resolution, he was at pains to deny that there was any arrangement with James Loughran for himself to act as the appellant's representative in the litigation.

(a) When he was asked by Mr Abraham Chan ("Mr Chan"), counsel then appearing for the respondent, whether there was "an agreement, written or otherwise, which regulates your functions as far as this litigation is concerned", Mr Brown answered that there was none.

(b) He was asked: "After both James and Pierce had died, what was, to your understanding, the basis of your authority to continue to represent the defendant in legal proceedings?" His answer was not coherent, ending with him saying: "At that point, I understood that I was responsible to go on after and represent that this name and this case gets dismissed".

(c) When Mr Chan suggested to Mr Brown that there had been "effectively an agreement by the Loughrans that you, for the benefit of the GEM Group's name, would take the reins of the litigation", this was specifically denied:

> "When you say 'agreement' I don't think it was an agreement, I think it was a conversation where I effectively said that there is a judgment out there and you need to deal with this, and the conversation was well, you go deal with it. Arrangement? I wouldn't call that an arrangement."

(d) Mr Brown added:

> "Just to correct the record, they didn't say, 'You go do it', it wasn't quite like that, it was, 'You do what you want to do, we are not doing anything', and I said 'Fair enough'."

14. Those answers are obviously inconsistent with the existence of the resolution. Moreover, if the appellant's board had appointed Mr Brown "in its name to give instructions to Gall & Lane at Hong Kong in the matter of the Wang Ruiyun Litigation", one would have expected him to rely on the resolution as authorisation to obtain the appellant's documents or records required to give the solicitors such instructions. However, during the examination, he portrayed himself as powerless to obtain any of the appellant's documents, never mentioning the resolution.

15. He spoke about an attempt he made in May 2011 to obtain documents from persons described as "the administrators of Loughran & Co" which, according to him, was met with a blank refusal:

> "… The answer was, 'Who are you to be asking for this? We are not even involved in this'. It was basically a brush-off."

16. Mr Brown did not rule out the possibility that the administrators did have relevant documents stating:

> "... I hadn't even got to the point where I was asking for massive numbers of documents. I was starting, and they were brushing me off. I can't tell you that they don't have those documents."

He added:

> "... I explained to them that I was ordered by the Hong Kong court to provide the documents, and they denied my request. I had actually mentioned a number of the documents that I was looking for, financial information and bank accounts, etc, and they said, 'that's not something that you have the rights to come and stay in touch'. ... That was a kind way of saying don't call again."

17. However, after the Court expressed its concerns about Mr Brown's authority to prosecute the appeal, he changed his tune. The Court was told about the resolution for the first time (even though it appears that it had been passed in June 2010 and a copy sent to Messrs Gall at that stage). We now see Mr Brown taking it upon himself to instruct Messrs Gall, through Nevis agents, to restore the company to the registry and to obtain the legal opinion filed, without any suggestion that this had to be done by anyone else or with anyone else's consent. His position now is that he was expressly authorised by "the board" (as certified by Mr Loughran) to conduct the proceedings on the appellant's behalf, contradicting his sworn testimony that Mr Loughran had merely said to him: "You do what you want to do, we are not doing anything" in relation to the litigation.

18. At the hearing, Mr Jose Maurellet, acting for the appellant, drew attention to an affidavit dated 30 May 2011, filed in proceedings brought by the respondent in the Eastern Carribean Supreme Court in an application to set aside a judgment entered in default of acknowledgment of service. In it, Mr Brown asserts that "... Mr Loughran authorised me to act on behalf of GEM Nevis in relation to the Hong Kong proceedings..." (without mentioning the board resolution) and informed the Court that "if the present management of GEM Nevis is allowed to continue with the prosecution of the appeal, funding for the same will be provided by GEM, as has been the case all along". Since he was the only individual giving instructions in the prosecution of the appeal, he must have been referring to himself as "the present management of GEM Nevis".

19. There are two features which cause the Court concern. The first is Mr Brown's apparent willingness, while on oath, to change his evidence as and when it suits him. When examined by the respondent with a view to locating possible assets of the appellant for the purposes of executing the judgment, it

evidently suited Mr Brown to distance himself from the company, saying that he had nothing to do with its management and that he lacked any power to obtain its records. But when it became necessary to answer the Court's query as to his authority to prosecute the appeal on the defendant's behalf, Mr Brown painted a very different picture and assumed control for the purposes of reviving the appellant company. In the Nevis proceedings, he referred to the pursuit of the Hong Kong appeal – obviously in his hands – as in the hands of "the present management" of the appellant company.

20. The second cause for concern is that the GEM Group, through Mr Brown, has been funding the proceedings, not as persons with an interest in the actual dispute between the parties, but for the alleged collateral purpose of protecting the GEM Group's reputation from being sullied by a company with the same "GEM" name. Mr Brown asserts that the defendant company has no assets and no legal connection with either himself or the GEM Group and, indeed, has no commercial existence.

21. Mr Brown is therefore purporting to prosecute an appeal before this Court on behalf of a company which he says has no assets; is not itself interested in prosecuting the appeal; and has not satisfied the judgment which has been issued against it; all the while giving contradictory accounts to the Court on oath regarding the nature of his relationship with that company.

22. For those reasons, the Appeal Committee took the view that it ought to make the Orders set out at the beginning of this ruling. Mr Brown and the GEM Group which is financing the costs of the appeal, cannot have it both ways. They cannot on the one hand act as the persons responsible for the appellant company, pursuing its appeal before this Court while ignoring that company's duty to satisfy the judgment against it, there being no stay of execution. We fixed the amount to be paid into court taking into account the

fact that leave to appeal was granted on the basis that it is reasonably arguable that the quantum of the damages ordered is excessive.

C. The relevant legal provisions

23. Leave to appeal to the Court in cases like the present is not as of right but in the discretion of the Court.[1] And by section 25(1) of the Court's statute,[2] the Court has power when granting leave to appeal to impose "such conditions as it considers necessary". As section 25(2) makes clear, that power is a general power and not limited by the restrictions imposed regarding security for costs. Section 25(4) provides that the Court has power "vary any conditions it has imposed under this section in such manner as it considers fit". The Appeal Committee, exercising the powers of the Court,[3] therefore clearly has jurisdiction to vary the conditions initially imposed in the light of its discovery of the aforesaid matters causing concern.

24. We took the view that the discretion to vary the conditions ought in the present case to be exercised. Similar issues have arisen in the English Court of Appeal in the line of cases beginning with *Hammond Suddard Solicitors v Agrichem International Holdings Ltd*.[4] In that case, Clarke LJ (as Lord Clarke of Stone-cum-Ebony then was) held that a condition requiring the defendant/appellant to pay the judgment amount into court as security for the claim was justified where (among other factors) (i) the appellant was a British Virgin Island company against whom it would be difficult to exercise the normal mechanisms of enforcement so that there was a very real risk that if the

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1 Hong Kong Court of Final Appeal Ordinance Cap 484, sections 22 and 23.

2 Hong Kong Court of Final Appeal Ordinance Cap 484.

3 See section 18(2).

4 [2001] EWCA Civ 2065. See also *Bell Electric Ltd v Aweco Appliance Systems GmhH & Co KG* [2003] 1 All ER 344; *Experience Hendrix LLC v PPX Enterprises Inc* [2002] EWCA Civ 1960; and *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWCA Civ 40.

appeal failed, the respondents would be unable to recover the judgment debts and costs, it being "fanciful to think that the appellant will co-operate in the enforcement process"; (ii) the appellant had access to resources which enabled it both to instruct solicitors and leading and junior counsel to prosecute its appeal and ... to provide a substantial sum by way of security for cost; (iii) there was "no convincing evidence that the appellant did not either have the resources or have access to resources which would enable it to pay the judgment debt and costs as ordered".[5]

25. Clarke LJ considered that in such circumstances:

> "...there is a real risk that, unless the orders sought are made, the respondents, if the appeal is dismissed, will be deprived of the fruits of the judgment, and will only be able to recover whatever sum is secured by way of costs. In our judgment, on the facts of this case, it is not just to allow the appellant to proceed with an appeal which is designed not only to reverse the judge's decision that it is liable to the respondent but also to obtain judgment on its counterclaim for a very substantial amount, especially in circumstances in which it appears that it is willing and able to use resources from others, including perhaps its owners, while being unwilling to seek and obtain resources to discharge the judgment debt."[6]

26. There are genuine parallels in the present appeal. The attitude of Mr Brown in the judgment debtor examination makes it plain that attempts to execute the judgment will face serious difficulties. While the appellant is not seeking to assert a counterclaim in the present case, there are serious unanswered questions regarding the true relationship between Mr Brown, who is running the litigation, and the defendant company.

27. An Order of the type made should not be made where there is convincing evidence that it would have the consequence of stifling an appeal. The evidence here is to the contrary. In Mr Brown's aforesaid affidavit filed in the Nevis proceedings, he stated:

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5 At §41.

6 At §42.

> "[The appellant] did not ignore the judgment dated 27 Oct 2010. Given the fact that [the appellant] had no assets, the GEM Group did not want to pay HK$60m (a significant amount of money) into Court, especially when it maintains that Wang has suffered little or no damage (and a matter which is now the subject of the appeal). A commercial and legal decision was therefore taken not to make payment of the HK$60m into Court to set aside the judgment, but rather simply proceed with the appeal in the hope of significantly reducing the assessment of damages."

28. This shows that the GEM Group who are funding the costs are well able to provide funding for twice the amount of security we have ordered, and that having considered whether to provide it when it was ordered by Stone J, they took "a commercial and legal decision" not to do so. The additional condition imposed accordingly poses no risk of stifling the appeal. Indeed, there has been no suggestion that any such risk arises.

(Geoffrey Ma)	(R.A.V. Ribeiro)	(Henry Litton)
Chief Justice	Permanent Judge	Non-Permanent Judge

Mr Jose Maurellet and Mr Justin Ho, instructed by Gall for the Appellant

Mr Paul HM Leung , instructed by Alvan Liu & Partners for the Respondent