Wang Ruiyun

and

Gem Global Yield Fund Ltd

Ma CJ, Ribeiro PJ and Litton NPJ
Miscellaneous Proceedings No 42 of 2011 (Civil)
24 October, 8 November 2013

Civil procedure — Court of Final Appeal — discretionary leave to appeal — condition for grant of leave — jurisdiction to vary conditions exercised — order for payment of part of judgment sum into court as security — Hong Kong Court of Final Appeal Ordinance (Cap.484) s.25(4)

Interlocutory default judgment was granted against D, a company incorporated under the laws of the island of Nevis. The condition for setting aside that default judgment, namely a payment into court of $60 million, was not met. Instead, D appealed against the assessment of damages. The Court of Final Appeal granted D leave to appeal on the condition that D paid into court $400,000 as security for costs. P applied to vary the conditions for the grant of leave by adding a requirement that the judgment debt be paid into court, with leave to appeal rescinded if default.

Held, ordering D to pay into court $30 million by way of security for P's claim, that:

(1) Leave to appeal to the Court in cases like the present was not as of right, but in the discretion of the Court. Under s.25 of the Hong Kong Court of Final Appeal Ordinance (Cap.484), the court had power when granting leave to appeal to impose "such conditions as it considers necessary". As s.25(2) made clear, that power was a general power and not limited by the restrictions imposed regarding security for costs. The Appellate Committee, exercising the powers of the Court, clearly had jurisdiction under s.25(4) to vary the conditions initially imposed. (See paras.23, 27.)

(2) Here, the discretion to vary the conditions would be exercised. B was the person who had throughout been giving instructions to D's solicitors. He was purporting to prosecute an appeal before this Court on behalf of a company which he said had no assets; was not itself interested in prosecuting the appeal; and had not satisfied the judgment which had been issued against it; all the while giving contradictory accounts to the Court on oath regarding the nature of his relationship with that company. The proceedings were funded by a company

which did not have an interest in the actual dispute between the parties, but for the alleged collateral purpose of protecting its reputation from being sullied by a company with a name suggesting it was part of the same group. B and the company could not on the one hand act as the persons responsible for D, pursuing its appeal before the Court while ignoring D's duty to satisfy the judgment against it, there being no stay of execution. The amount of $30 million took into account the fact that leave was granted on the basis that it was reasonably arguable that the quantum of the damages ordered was excessive. The additional condition posed no risk of stifling the appeal (*Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2002] CP Rep 21 applied). (See paras.13, 17, 19–22, 24–28.)

民事訴訟程序 — 終審法院 — 酌情給予上訴許可 — 給予許可的條件 — 行使司法管轄權更改條件 — 下令把部份判定款項繳存法院以作保證 — 《香港終審法院條例》（第484章）第25(4)條

本案被告人是一家根據加勒比海尼維斯島法律成立的公司。原告人因被告人欠缺行動而成功取得針對被告人的非正審判決。撤銷該判決的條件是被告人須把6,000萬元繳存法院，但被告人未有履行該條件，反而針對損害賠償評估提出上訴。終審法院給予被告人上訴許可，條件是被告人須把400,000元繳存法院作為訟費保證。原告人申請更改給予許可的條件，即額外要求被告人把判定債項繳存法院，如被告人不如此行，則上訴許可將被撤銷。

裁決—下令被告人把3,000萬元繳存法院，作為原告人申索的保證：

(1) **在諸如本案般的個案中，上訴人並無當然權利獲給予上訴許可，而是由終審法院酌情給予上訴許可。根據《香港終審法院條例》（第484章）第25條，終審法院在給予上訴許可時有權施加「其能為有需要的條件」。正如第25(2)條表明，該權力屬概括性的權力，不受到訟費保證方面的條件限制。根據第25(4)條，行使終審法院的權力的上訴委員會顯然具有司法管轄權更改本已施加的條件。(見第23、27段)**

(2) **在本案中，本院將行使酌情權更改條件。被告人代表律師所接獲的指示，一直是由另一人（下稱B）發出。B宣稱代表一家他聲稱沒有資產的公司在本院席前進行上訴。該公司本身並無興趣進行上訴，亦未有履行針對它的判決；且一直在宣誓下就B與該公司的關係而向本院提供前後矛盾的陳述。為進行涉案法律程序而提供資金的公司，對與訟各方之間的實際爭拗並無利害關係；該公司指其提供資金的間接目的是保護其聲譽免受另一家公司損害，因為該另一家公司的名稱意味着它隸屬同一集團。B與該公司不能一方面充當被告人的負責人和代為在本院席前進行上訴，另一方面卻在針對被告人的判決未獲暫緩執行下無視被告人履行該判決的責任。本**

院定出3,000萬元的繳存法院金額時，已考慮到本院給予上訴許可的基礎是被告人可合理地辯證下級法庭所判給的損害賠償額過高。這項額外條件並無產生令上訴失去意義的風險（引用 *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2002] CP Rep 21）。(見第13、17、19至22、24至28段)

Mr Jose-Antonio Maurellet and Mr Justin Ho, instructed by Gall, for the appellant.

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

Legislation mentioned in the judgment

Hong Kong Court of Final Appeal Ordinance (Cap.484) ss.18(2), 22, 23, 25(1), 25(2), 25(4)

Rules of the High Court (Cap.4A, Sub.Leg.) O.48 r.1

Cases cited in the judgment

Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG [2002] EWCA Civ 1501, [2003] 1 All ER 344, [2003] CP Rep 18

Experience Hendrix LLC v PPX Enterprises Inc [2002] EWCA Civ 1960

Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, [2002] CP Rep 21

Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] EWCA Civ 40

Cases in the List of Authorities not cited in the judgment

Cathay Pacific Airways Ltd v Wong Sau Lai (2006) 9 HKCFAR 45, [2006] 1 HKLRD 396

Chan Chi Ming v Brilliant Rise Container Depot Ltd [2009] 4 HKC 458

Chu Hung Ching v Chan Kam Ming [2001] 1 HKC 396

Peaktone Ltd v Joddrell [2012] EWCA Civ 1035, [2013] 1 WLR 784, [2013] 1 All ER 13, [2012] CP Rep 42

Test Holdings (Clifton), Re [1970] Ch 285, [1969] 3 WLR 606, [1969] 3 All ER 517

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 $30 million 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 $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 $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 $400,000 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 O.48 r.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 $128,351,291.56 be paid into Court and that the outstanding costs in the sum of $286,510 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 10 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 s.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 s.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 to "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 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:

[1] Hong Kong Court of Final Appeal Ordinance (Cap.484) ss.22 and 23.
[2] Hong Kong Court of Final Appeal Ordinance.
[3] See s.18(2).
[4] [2002] CP Rep 21. See also *Bell Electric Ltd v Aweco Appliance Systems GmbH & 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.
[5] At [41].

> ... 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:

> [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.

Reported by Ken TC Lee

[6] At [42].