COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/qui/01564

IN THE MATTER of **ALL THOSE** pieces parcels or lots of land situate at "*Signal Point*" also known as "*Sumner Point*" on the Island of Rum Cay one of the Islands of the Commonwealth of The Bahamas and designated Lots 2, 3, 5, 9 and 10.

AND IN THE MATTER of the Quieting Titles Act, 1959.

IN THE MATTER of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust).

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Timothy Eneas with him Ms. Knijah Knowles for the Petitioners
Ms. Travette Pyfrom for the Adverse Claimant, the Wahoo Resort Foundation

Hearing Date: 4 June 2020

Practice – Leave to appeal – Final Order – Interlocutory Order – Whether leave to appeal required by trial judge

Leave to appeal - Test to be applied – Reasonable prospect of success – Section 7(2) of the Quieting Titles Act – Whether case raises issue which requires clarification

By Summons dated 14 April 2020 and filed on 18 May 2020, the Foundation applied for leave to appeal certain paragraphs of a Judgment which was delivered on 27 March 2020 ("the Judgment"). The Petitioners object to leave being granted on the grounds that (i) the Judgment is a final order and therefore, no leave to appeal is required and (ii) in the event that leave is required, the appeal is hopeless and there is no reasonable prospect of success.

The Foundation says that even if the grounds of appeal are hopeless, the issues raised require clarification as the only authority on the point of *locus standi* is a Canadian authority.

HELD: dismissing the Summons for leave to appeal with costs to the Petitioners to be taxed if not agreed.

1. The Judgment of the Court disposes of all matters relating to the Foundation and therefore it is a final order. Leave to appeal is not required. **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** [2014] 2 BHS. J. No. 73 applied.

2. In order for a court to grant leave to appeal, an applicant has to demonstrate that he has some reasonable prospect of succeeding on the appeal: **Smith v Cosworth Casting Processes Limited** (1997) 4 All ER 840 and **N.E.P.M v J.L.M and others** [2018] 1 BHS J. No. 198 applied.

3. In certain "exceptional circumstances", the court may grant leave even where the case has no real prospect of success, but there is an issue which, in the public interest, should be examined by the Court of Appeal: **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2** at pages 10-11. The cases of **Keod Smith v Coalition To Protect Clifton Bay** (SCCivApp No. 20 of 2017) and **AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited** [2014] 2 BHS. J. No. 53 considered.

4. The court should also consider whether it is appropriate in all the circumstances of the case for the discretion to be exercised to grant leave. Discretion can only arise if there is some arguable basis of appeal.

5. The Foundation's grounds of appeal have no merit and there is no reasonable prospect of success on appeal. There are no issues of general public importance raised in the grounds of appeal by the Foundation. In addition, this case does not raise an issue where the law requires clarifying. Making a bald statement that the appeal raises issues which need clarification since the only authority comes from Canada will not suffice in law: section 7(2) of the Quieting Titles Act is sufficient. In any event, Canadian authorities, although not binding, are persuasive.

6. The general principle is that the successful party is entitled to costs. No reason was advanced before me as to why I should depart from this general principle. Costs are entirely discretionary: Section 28 of the Quieting Titles Act applied. Order 59 rr. 6. 3(2); 2(2); 3(4) of the Rules of the Supreme Court and section 30(1) of the Supreme Court Act relied upon.

RULING

Charles J:

Introduction

[1] On 27 March 2020, the Court delivered a judgment ("the Judgment") wherein it found that the Wahoo Resort Foundation ("the Foundation"), being a licensee of the Second Adverse Claimant ("the Crown"), has no locus standi in the present Quieting Petition. This determination was made after the Foundation had closed its case and the Court invited both Mr. Eneas, Counsel for the Petitioners and Ms. Pyfrom, Counsel for the Foundation, to provide written submissions on whether or

not the Foundation should participate any further in the proceedings. Upon considering the submissions, the Court concluded that the Foundation has no standing in the proceedings since it admitted that it does not claim possessory title or documentary title. The Court opined that the dispute is really between the Petitioners and the Crown.

[2] The Foundation is aggrieved by the decision and seeks leave to appeal certain parts of the Judgment.

[3] Both Counsel were invited to email written submissions to the Court with respect to the application seeking leave to appeal. They dutifully complied. On 4 June 2020, the Court heard both Counsel very briefly as they had already provided comprehensive written submissions. The Court gave an ex tempore ruling refusing leave to appeal the Judgment. Briefly, the Court concluded that the Judgment is a final order and therefore, no leave to appeal is required, and in the event that leave is required, the grounds of appeal are hopeless and raise no reasonable prospects of success on appeal. The Court also concluded that there are no legal issues which require clarifying in section 7(2) of the Quieting Titles Act, 1959 ("the QTA").

[4] I promised a written ruling. I do so now.

Jurisdiction

[5] Section 11(f) of the Court of Appeal Act, Ch. 52 provides that no appeal of an interlocutory Order of the Supreme Court shall lie without the leave of the Supreme Court. The Petitioners contended that since the Judgment is a final order, no leave is required. Learned Counsel Mr. Eneas relied on the Court of Appeal decision in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** [2014] 2 BHS.J. No. 73 which adopted Lord Esher's application test expounded in **Salaman v Warner and Others** [1891] 1 QB 734. At paragraph 24, the Court of Appeal determined that:

> **"…[I]f the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if**

given in the other, will allow the action to go on, then it is interlocutory."

[6] In my considered opinion, the Judgment finally disposes of **all** matters relating to the Foundation in this action and therefore leave to appeal is not required. The Summons for leave to appeal is therefore ineffectual and improperly placed before the Court. There is no jurisdiction for the Court to exercise at this stage. If the Foundation desires to appeal the Judgment, a Notice of Appeal reflecting the grounds stated within the Summons ought to be filed in the Registry of the Court of Appeal in accordance with the Court of Appeal Rules.

[7] In the event that I am wrong to come to the conclusion that the Judgment is final, I am of the firm view that the Foundation's appeal has no reasonable prospect of success and, as such, the application for leave to appeal ought to be dismissed for the reasons set out below.

Test to be applied on leave to appeal

[8] Both Counsel have correctly elucidated the test to be applied when an applicant seeks leave to appeal.

[9] I will start off with the guidance enunciated by Lord Wolff in **Smith v Cosworth Casting Processes Limited** (1997) 4 All ER 840 in relation to the granting of leave to appeal. This guidance is as follows:

> **"(1) <u>The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal</u>. This test is not meant to be any 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 prospect or an unrealistic argument is not sufficient.**
>
> **(2) <u>The court can grant the application even if it is not so satisfied</u>. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. <u>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.</u>"**[Emphasis added]

[10] In addition, in certain "exceptional circumstances" the Court may grant leave even though the case has no real prospect of success but there is an issue which, in the public interest, should be examined by the Court of Appeal: See: **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)** [1999] 1 WLR 2 at paras. 10 to 11 where the following is stated:

> **"The general test for leave**
>
> **10. …[T]he general rule applied by 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 on the appeal 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 added]

[11] Our courts have consistently followed the guidance given by Lord Wolff. In **Keod Smith v Coalition To Protect Clifton Bay** (SCCivApp No. 20 of 2017), Isaacs JA succinctly summarized the test to be applied by a court when determining whether to grant leave. At paragraph 23 of the Judgment, he stated:

> **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in Smith v Cosworth Casting Process Ltd [1997] 4 All ER 840."**

[12] Additionally, in **AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited** [2014] 2 BHSJ No. 53, the Court of Appeal held:

> **"The Court will refuse an application for an extension of time if satisfied that the applicant has no realistic prospect of succeeding on the appeal. Further, the court can grant the application even if it [sic] not so satisfied where the issue raised may be one which the court considers should in the public interest be examined by the court or where, the court takes the view that the case raises an issue of law which requires clarifying."**

[13] The afore-mentioned test was followed by this Court in **N.E.P.M v J.L.M and others** [2018] 1 BHS J. No. 198. At paragraph 43, I opined "*thus, it is settled law that the Court will only refuse leave to appeal if it is satisfied that the applicant has no realistic prospect of success on the appeal.*"

[14] To sum up, in order for a court to grant leave to appeal, an applicant has to demonstrate that he has some reasonable prospect of succeeding on the appeal. The fact that a court has reached a clear view is not decisive of whether a challenge to its reasoning is arguable. On the contrary, it is a matter of judgment on an all-encompassing approach which is exercised without thorough re-argument of the same points as led to the judgment. The proposed grounds of appeal need to be considered by the court in exercising this judgment. However, it goes without saying that if there is no ground of appeal raised which has a reasonable prospect of success, leave to appeal must be refused. The court should then consider whether it is appropriate in all the circumstances of the case for the discretion to be exercised to grant leave. Discretion can only arise if there is some arguable basis of appeal.

The grounds of appeal

Ground 1

[15] The Foundation alleged that the judge erred when she found that it [the Foundation] has no right to possession after having found that its pleadings and evidence establish that it is a licensee of the Crown.

[16] Learned Counsel for the Foundation submitted that the Court found that the Foundation is a licensee of the Crown which is a direct finding against the *locus standi* argument. According to Counsel, this finding validates the adverse claim brought by the Foundation.

[17] At paragraph 66 of the Judgment, the Court stated:

> **"I find much force in the submissions of learned Counsel Mr. Eneas that by reason of the authorities [supra], the Foundation has no possession of its own to assert in these proceedings. Any possession acquired by its alleged occupation of the 15 acres is the possession of the Crown".**

[18] I agree with learned Counsel for the Petitioners that this ground of appeal misrepresents the finding of the Court. After considering the authorities relating to the interest acquired by a bare licensee, this Court held at paragraph 66 (supra) that the Foundation, as a bare licensee, has no possession of its own to assert in these proceedings. Put another way, whatever possession resulted from the Foundation's alleged occupation could only be claimed by the Crown (an adverse claimant in these proceedings).

[19] The finding which I made that the Foundation was a licensee of the Crown was based upon its own admission. The real question for the determination of the Court concerned the Foundation's *locus standi* and whether its claim was one of title. As Mr. Eneas correctly argued, it is a well-established principle of law that (i) a bare licensee acquires no interest in the land over which he has been granted a licence and (ii) any possession of the land by the licensee is deemed to be the possession of the licensor. The Foundation expressly rejected in its evidence any claim to documentary and/or possessory title and repeatedly stated that its alleged entry onto the 15 acres was with the permission of the purported fee simple owner of the land, the Crown. On this assertion alone, the Foundation is not entitled as of right to any possessory interest in the property. This ground of appeal has no realistic prospect of success.

Ground 2

[20] In ground 2, the Foundation alleged that that the judge erred when she found that the Petitioners had adequately complied with the disclosure obligations under section 5 of the QTA. The Foundation further alleged that the judge failed to consider or properly consider the judgment of Madam Justice Rhonda Bain whereby Bain J found (3 years prior to the petition) that there were issues between the Petitioners and the Adverse Claimant vis-a-vis the land, the subject of the Petition, which required a full trial. The Foundation contended that the Petitioners failed to disclose the existence of the Bain J judgment in its section 5 affidavit.

[21] At paragraphs 68 to 69 of the Judgment, the Court stated:

> **"68. The Foundation alleged that there has been some deficiency in the Petitioners' compliance with their duty to disclose material facts in connection with the filing of the Petition.**
>
> **69. Given my findings [supra], I do not believe that this issue needs any further consideration."**

[22] It is plain that the Court made no determination with respect to disclosure. This ground is also hopeless and the Foundation has no reasonable prospect of success on this ground.

Ground 3

[23] Under ground 3, the Foundation asserted that the judge erred when she found (a) that the Foundation has no *locus standi* in the present proceedings as the Crown had also entered a claim and (b) that the Foundation participation in the proceedings has been and continues to be entirely unnecessary and is an abuse of the process of the Court with the effect of running up costs and delaying the fair trial of the action. In finding as she did the judge failed to give any or adequate consideration to the duty of the Court under section 8(1) of the QTA.

[24] Learned Counsel for the Foundation argued that section 8 speaks to the nature of the evidence which the court can act upon calling it "any evidence" which bears upon the question of title or "any other evidence".

[25] According to Counsel, the Foundation's evidence relates directly to its use and possession of the land, the subject of the petition; it is evidence relevant to the question of title. The evidence was not duplicated elsewhere in the trial and directly contradicts the section 5 affidavit and the assertion by the Petitioners *vis-à-vis* undisturbed possession of the land.

[26] Further, the QTA provides no other format for claims not recognized in the petition to be brought into the action; all claims are brought in for investigation by way of an adverse claim. The Foundation's evidence falls within the parameters of "*any other evidence*." The form adopted is in accord with the provision of the QTA. There is nothing in the Petitioners' argument to suggest otherwise.

[27] Learned Counsel also submitted that the Foundation's right to appear in this action is protected by the nature of the investigation which the Court is obligated under section 8 to carry out; any evidence received by the Court.

[28] She contended that the Petitioners' argument rested heavily on the adverse claim by the Crown who claims to be owner of the land. The Foundation never claimed to be the owner of the land. The Court found that it is a licensee of the Crown therefore it is alleged by Counsel for the Foundation that the case for the Foundation was made out.

[29] Counsel also contended that the Court permitted the Petitioners to adduce evidence of affidavits allegedly sworn in 1957 which have been submitted as evidence of the alleged possession by the Petitioners' predecessors in title. The Petitioners argued that the affidavit evidence ought to form part of the evidence before the Court because quieting proceedings are, in the nature of an investigation, which the Court accepted. According to her, this position applies across the board. Evidence of possession of the land is a relevant part of the investigation. The 1957 affidavits allegedly relate to past possession of the land. The Foundation's evidence relates to present possession of the land.

[30] In short, says Counsel, there is nothing in section 8 which prescribes how the evidence must be brought into the investigation. Further, there is nothing elsewhere in the body of the QTA to suggest that all claims filed must be claims to title. She submitted that this argument runs contrary to sections 3, 5, 7 and 8 which consistently refer to "*any person, any estate or any interest and any claim not recognized in the petition*."

[31] Section 8 (1) of the QTA provides as follows:

> **"The court in investigating the title <u>may</u> receive and act upon any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby."**

[32] Section 8(1) provides the Court with a complete discretion to receive and review any evidence which satisfies the Court of the truth of any facts alleged. In my considered opinion, the Court considered and weighed the evidence of the Foundation and the evidence of the Crown and fairly came to the conclusions about the Foundation's evidence and it participation in the proceedings. This can be found at paragraphs 51 to 66 of the Judgment. The Court considered the following:

(i) The Foundation's evidence and pleadings;
(ii) The Foundation's acknowledgement of the alleged title of the Crown and its entry of the land with the Crown's permission;
(iii) The Crown's acknowledgment of the Foundation as its licensee;
(iv) The Crown as an adverse claimant in the proceedings and;
(v) Any alleged possession on the part of the Foundation is deemed to be the possession of the Crown.

[33] At paragraph 67, the Court found that, in addition to the fact that the Foundation has no *locus standi* in the Quieting Petition, <u>it has failed to establish any entitlement or right to a Certificate of Title on its merits</u>.

[34] This is exactly the task which section 8(1) envisions. The Foundation has not provided any particulars on the nature of the alleged error on the part of the Court and, in the circumstances, this ground also has no realistic prospect of success.

Ground 4

[35] The Foundation alleged that the judge erred and misdirected herself in fact and in law in finding that "*there is nothing in the case on the evidence presented by the Foundation which is material to the investigation which could not be advanced by the Crown.*" Having found that the Foundation is a licensee and that its possession is deemed to be the possession of the Crown, the above finding is clearly unsupportable. The Foundation witnesses gave direct oral evidence of matters within the personal knowledge of the witnesses. None of the evidence given by the Foundation's witnesses were given by any other witness called on behalf of the Crown.

[36] I agree with learned Counsel Mr. Eneas that it was open to the Crown and well within its entitlement as an adverse claimant to assert as a part of its claim that the Foundation was its licensee. Likewise, it was within the Crown's remit to call the witnesses of the Foundation if it chose to. The simple point, says Mr. Eneas, is that the matters raised by the Foundation's witnesses were not within the claim or the case advanced by the Crown which is based upon a claim to a documentary title. I agree. Accordingly, this ground also has no reasonable prospect of success.

Ground 5

[37] The Foundation having pleaded that its claim is that of a licensee who was permitted by the Crown to enter into possession of the land, which the learned judge affirmed, the learned judge ought to have ordered the Petitioners to pay the Foundation's costs. Alternatively, as the Petitioners did not succeed in the application to dismiss outright the claim by the Foundation, the court ought to have reduced any costs order to reflect its order permitting the adverse claimant to participate in the proceedings. The judge erred in finding that the Foundation must pay the Petitioners' costs.

[38] The Foundation's contention that the Court ought to have ordered the Petitioners to pay its [the Foundation] costs in this matter starkly conflicts with the legal principles governing costs orders.

[39] As set out in the Judgment, the applications giving rise to the issue concerning the Foundation's standing are as follows:

(i) The Petitioners' Summons for an order that the Foundation's Adverse Claim was out of time and barred by section 7(2) filed on 12 October 2017 ("the Petitioners' Summons") (see paragraph 12 of the Judgment); and

(ii) The Foundation's Summons dated 29 January 2018 for an order extending the time period within which to file its adverse claim ("the Extension of Time Summons") (see paragraph 14 of the Judgment).

[40] The Petitioners contended that the late filing of the Foundation's Adverse Claim required the Foundation to obtain an extension of time for the purpose of participating in the proceedings. In other words, the Foundation required an extension of time before it could be recognized as a party to the proceedings. On this basis, learned Counsel for the Petitioners submitted that it was entitled to all of their costs thrown away resulting from the filing of the Petitioners' Summons (which it was entitled to do due to the late filing of the Foundation's adverse claim) and also all of their costs relative to the Foundation's Extension of Time Summons (see RSC Order 59 rule 3(4) set out below).

[41] The Petitioners rely upon the provisions of section 28 of the QTA which provides as follows:

> **"Subject to the provisions of this Act and of any of the rules made hereunder and except where otherwise provided, the practice and procedure under the Supreme Court Act and the rules made thereunder shall apply to proceedings under this Act."**

[42] In dealing with the issue of costs, a convenient starting point is O. 59 r. 3(2) of the Rules of the Supreme Court (the "RSC") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[43] Costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"[Emphasis added]

[44] O. 59 r. 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[45] Finally, O. 59 r. 3(4) provides that:

> "**The costs of and occasioned by any application to extend the time fixed by these Rules, or any direction or order thereunder, for serving or filing any document or doing any other act** (including the costs of any order made on the application) **shall be borne by the party making the application, unless the Court otherwise orders.**"

[46] The general principle is that the successful party is entitled to costs. No reason was advanced before me as to why I should depart from the general principle. Costs are entirely in the discretion of the Court. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation.

[47] Order 59 rule 3(2) dictates that costs shall ordinarily follow the event except in circumstances where some other order should be made. The Petitioners contend that they were entitled to recover the costs thrown away resulting from the filing of the Petitioners' Summons and also the costs associated with the Foundation's Extension of Time Summons. In this regard, the Petitioners rely upon the express provisions of Order 59 rule 3(4) which mandates that the Foundation shall be liable for the Petitioners' costs of and occasioned by the Foundation's Extension of Time Summons. At paragraph 76 of the Judgment, the Court made an Order that the Foundation will pay the Petitioners' costs to be taxed if not agreed.

[48] The allegation of the Foundation that some other order for costs ought to have been made is contrary to all legal principles dealing with costs. This ground of appeal is untenable and has no reasonable prospect of success.

Clarification of issue

[49] Learned Counsel Ms. Pyfrom further argued that if the Court is not minded to accept their arguments on the five grounds, it is the Foundation's case that the issues raised require clarification since the only authority on the point of *locus standi* is **Re Ferguson** (1996) Carswell PE1, a Canadian Quieting Titles Case from Prince Edward Island. Although Canadian authorities are not binding on this Court, they are highly persuasive.

[50] **Re Ferguson** establishes that in order to bring an adverse claim under section 7(2) of the QTA, the adverse claimant must be able to make a claim of title. In the present Quieting Petition, the Foundation does not assert any '*claim of title*' to the Subject Properties. The Foundation claims merely as licensee.

[51] In my opinion, the law is clear. Section 7(2) speaks for itself. No clarification is required. This ground suffers that same fate as the other grounds. It is doomed to fail. It has no reasonable prospect of success.

Conclusion

[52] For all of the above reasons, the Court made the following Order:

IT IS HEREBY ORDERED THAT:

1. The application of The Wahoo Resort Foundation by the Summons dated 14 April 2020 and filed herein on 18 May 2020 is dismissed on the ground that the order of the Court in the Judgment herein dated 27 March 2020 ("the Judgment") is a final order and accordingly leave to appeal the Judgment is not required.

2. Alternatively and in the event leave to appeal is required, the application by the Summons dated 14 April 2020 and filed herein on 18 May 2020 is dismissed on the ground that the appeal has no reasonable prospect of success.

3. The Petitioners' costs of the application for leave to appeal are to be paid by the Adverse Claimant, The Wahoo Resort Foundation, to be taxed if not agreed.

Dated this 15th day of June, A.D., 2020

Indra H. Charles
Justice