

CONYERS LEADS SUCCESSFUL BVI COURT OF APPEAL CASE CONCERNING INJUNCTION PROCEDURE

Mark Forté & Richard Evans – October 2009

On 28 September 2009, the Court of Appeal in the BVI handed down a judgment of general importance in the context of appellate practice.

The ruling arose in the context of the long running Danone litigation (*Danone Asia Pte v. Golden Dynasty Enterprise Ltd et al*) and concerns the longstanding confusion in the ECSC (the umbrella judicial system of which BVI is a part) as to when leave to appeal is required in relation to injunction/receivership orders. The applicable statutory provisions (contained in the Eastern Caribbean Supreme Court (Virgin Islands) Act) provide that leave to appeal a first instance decision is required in respect of all interlocutory orders, save those specified. Amongst the exempted list of orders is an order “*where an injunction or the appointment of a receiver is granted or refused*”. Such orders are relatively common in BVI commercial practice.

The exception to the requirement for leave therefore plainly would apply if the court made, or refused, such an order at an *ex parte* stage. As a matter of BVI commercial practice, it is frequently the case that injunctions and interim receiverships are sought on an *ex parte* basis (either on the grounds of urgency, or secrecy, or both). Under the Civil Procedure Rules such an order may only be made, in the first instance, for a period not more than 28 days. In practice, a respondent served with an *ex parte* order who is intent on challenging it frequently requires more time than 28 days to so do. Accordingly, it is not uncommon for the first *inter partes* return date to be used for the purpose of making directions for the further conduct of an actual, or anticipated, discharge application. At the hearing of that application, in the ordinary course, the Court will either continue the *ex parte* order (either as made, or varied) or discharge it entirely.

The question that has vexed BVI practitioners for a number of years is whether a challenge to such a return date order, whether it the continuation or the discharge of an injunction, falls into or outside the statutory definition of those not requiring leave. It is a practical question of some significance, since the obtaining of leave is, by its nature, a hurdle to be overcome and many an appeal fails at that “filter” stage. Moreover, a leave application requires time, and can cause a fair degree of delay in the entire process. Against this background of genuine uncertainty, prudence often dictated that a putative appellant would be best advised to file both a notice of appeal, and a contingent application for leave at the same time as the notice of appeal, in an attempt to cover all bases. In this context, the BVI has followed English authority to the effect that a notice of appeal that has been filed without permission, in circumstances where permission is required, is a nullity, and will be struck out.

Given the importance of the issue, and the frequency with which it has arisen in practice, it was frankly startling that there has been no reported case on the topic. Both counsel before the Court of Appeal agreed that despite their researches nothing had been found on point. During the course of argument, the Court expressed not only surprise at this stage of affairs, but also a desire to consider whether any unreported decisions of the court could shed light on the area. At the end of oral submissions, they directed that they would conduct a review, and report their results to the parties. In the event, the Court agreed with the parties: this was indeed an area wholly without authority.

When delivered, the judgment of the Court was a majority decision: the Chief Justice concurred with the judgment of George-Creque JA whilst Edwards J.A. supplied a forceful dissenting judgment. This is itself notable. Dissenting judgments are not very frequent in the Court of Appeal.

A preliminary issue arose. A single judge of the Court of Appeal had ordered that the Appellants' contingent application for leave be dismissed on the grounds that it was unnecessary since no leave was required. The Respondents applied to set this order aside. The Appellants argued that the inter-relationship of the Eastern Caribbean CPR, and the English CPR and Eastern Caribbean authority was such that there could be no challenge to the order of a single Judge, in respect of a ruling relating to leave. The Court disagreed – as a matter of its inherent jurisdiction, it determined, the full Court enjoyed a residual discretion to police its own procedure, and accordingly had jurisdiction to entertain a review of the single judge's order, even if this course did not appear permitted under the CPR. In itself this preliminary ruling is an interesting focus away from the strict rules-based approach of the Court that many had regarded it as frequently adopting.

In dealing with the substantive application, George-Creque JA accepted the invitation of the Appellants that the Court ought to adopt a purposive construction to its interpretation of the provisions of the Supreme Court Act. As a matter of substance, and in practice, there was no justifiable distinction between the grant of an injunction or receivership order on the one hand and its continuation by order on the other. They amounted to the same thing. Similarly, no real distinction exists between the refusal to grant such an order and its discharge. The Judge accepted that Appellants' argument that if one considers the mischief at which the statutory provisions are aimed, to draw a distinction between grant/refusal on the one hand and continuation and discharge the other would be artificial:

“To my mind the words ‘re-grant’, ‘continue’, ‘refusal to discharge’ or ‘dismissal’ of an application to discharge, would all be encompassed in the word ‘grant’ since the effect is that an injunction is in place. Similarly, the words ‘discharge’ or ‘dismissal’ of an application for an injunction would be encompassed in the word ‘refusal’ as the effect is that no injunction is in place. I agree with the appellants that to read into the language such distinctions, merely by the use of words, call for an exercise of linguistics gymnastics which only succeeds in defeating the purpose and intention of the provisions.

The appellants, quite rightly in my view, made reference to the mischief which the provision seeks to address. I can do no better than state it in the manner the appellants have stated it in paragraph 12(iv) of their skeleton arguments which I take the liberty of adopting and making my own:

“...Each of the exceptions to the general rule that leave is required in respect of interlocutory orders can be recognized as exception on the grounds of public policy. In the case of injunctions, appointments of a receiver and liberty of the subject custody of an infant..., there are good public policy reasons for saying that the freedom of parties (necessarily impacted by each of these orders) overrides the administrative benefits of a leave stage such that leave ought not to be required. Where therefore is of concern is the fundamental nature of the order under challenge. An injunction and receivership order by its nature restricts the freedom of a respondent. It is this qualitative nature that renders it an exception to the requirement to obtain leave. Against this background, a pedantic consideration of whether in any particular case the order is a grant or re-grant, or a continuation (and to those I add ‘or a discharge’) has no place..”

Accordingly, an appeal from an order continuing or discharging an injunction or receivership order at an inter partes hearing is to be treated no differently from an appeal against an ex parte order granting or refusing such relief. Leave to appeal either is not required.

In the **Danone** judgment, the Court of Appeal has taken what is a welcome opportunity to clarify a remarkable uncertainty in practice of many years standing. It has brought clarity and certainty to an important and very practical issue. In practice, it is unlikely to encourage a significantly greater number of appeals, but doubtless will reduce the costs and delay in prosecuting appeal in the area, which is surely welcome.

Richard Evans, with Mark Forté, both of the BVI Office of Conyers Dill & Pearman appeared as Counsel for the successful Appellants. Mark Forté is head of Litigation at Conyers Dill & Pearman in the British Virgin Islands and is responsible for all aspects of litigation, insolvency and restructuring. Richard Evans is an associate in the Litigation Department of Conyers Dill & Pearman's British Virgin Islands office.

Stephen Moverley-Smith Q.C. of XXIV Old Buildings, London appeared for the Respondents.

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