

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Application No. 13 of 2018**

**BETWEEN:**

**GRENVILLE WINSLOW PHILLIPS  
(Receiver-Manager)**

**Intended Appellant**

**AND**

**RCTD HOLDINGS LIMITED  
SILVER POINT VILLA HOTEL INC.**

**Intended First Respondent  
Intended Second Respondent**

**Before: The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge, Justices of Appeal and The Hon. William J. Chandler, Justice of Appeal (Acting)**

**2018: September 20**

**2019: January 30**

**Sir Henry Forde QC, Ms. Wendy Straker and Mr. Graeme Brathwaite of Dentons Delany for the Intended Appellant**

**Mr. Amilcar Branche and Ms. Sherise King for the Intended Respondents**

**DECISION**

**GOODRIDGE JA:**

**INTRODUCTION**

[1] This is an application under *CPR 62.2* in which the intended appellant, Mr. Grenville Phillips (Mr. Phillips) seeks leave to appeal a decision given

by **Alleyne J** on 31 July 2018, denying Mr. Phillips' application for permission to file a supplemental witness statement in the High Court action.

- [2] The substantive action involves a dispute in relation to the validity of Mr. Phillips' appointment as the receiver-manager over Silver Point Villa Hotel (Silver Point), the property owned by the first intended respondent, RCTD Holdings Limited and the second intended respondent, Silver Point Villa Hotel Inc. (the intended respondents).

## **BACKGROUND**

- [3] The intended respondents, at the material time, were companies incorporated under the provisions of the **Companies Act, Cap. 308** with their registered offices situated at Suite 9 Beaumont House, Hastings, Christ Church.
- [4] By a debenture dated 18 November 2005, the intended respondents borrowed a sum of money from Republic Finance & Trust (Barbados) Corporation (Republic Finance and Trust), formerly BNB Finance & Trust Corporation. Under the debenture, provision was made for the appointment of a receiver-manager. The collateral for the debenture was the intended respondents' assets and property including Silver Point. The certificate of registration of a charge in respect of the debenture was dated 7 July 2006.

- [5] By participation agreement dated 2 September 2013, Republic Bank (Barbados) Limited (Republic Bank), purchased a participatory interest in the loan and debenture from the seller, Republic Finance and Trust.
- [6] Subsequently, the intended respondents defaulted in their repayment of the loan.
- [7] In 2016, Republic Finance and Trust and Republic Bank (the creditors) and WM Capital Partners 57, LLC (WM Capital), a company resident in the United States of America, entered into negotiations for the creditors to sell the debt of the intended respondents to WM Capital.
- [8] Following successful negotiations, the creditors and WM Capital entered into a loan sale and assignment agreement where WM Capital agreed to provide financing to the intended respondents and the debenture would be transferred to WM Capital. As a consequence of this agreement, the permission of the Exchange Control Authority (the Authority) of the Central Bank of Barbados was required for the transfer of any security registered in Barbados in compliance with the provisions of the **Exchange Control Act, Cap. 71**.
- [9] WM Capital's case is that, beginning on 31 August 2016, it sought the relevant permission from the Authority, submitted certain documents to the Authority and was granted the required permission.

- [10] Mr. Dustin Delany of Messrs. Delany Law, attorneys-at-law for WM Capital, wrote to the Authority on 31 August 2016, informing it that WM Capital made an offer of finance to the intended respondents which would be used for certain purposes. Mr. Delany concluded that “We therefore seek your approval to use the said property as collateral for this facility, being structured over a three (3) year term...”
- [11] Further communication took place between the attorneys-at-law for WM Capital and the Authority. The Authority requested further documentation from WM Capital’s attorneys-at-law and on 3 October 2016 the attorneys-at-law sent the documents to the Authority.
- [12] By letter dated 7 October 2016, the Authority wrote to Mr. Delany and stated *inter alia*: “We refer to your previous correspondence ending with your letter dated October 3, 2016, subsequent conversation and email between (Holdipp/Howell) by which permission is sought on behalf of your client WM Capital Partners LLC which has made an offer of financing...to RCTD Holdings Ltd and Silver Point Villa Hotel...We acknowledge receipt of your letter and supporting documentation outlining the terms and conditions of the above loan facility. We advise that permission is granted for the above loan transaction.”

- [13] By deed of transfer and assignment of debenture dated 19 October 2016, the creditors transferred the debenture and assigned all of their rights and obligations under the debenture to WM Capital pursuant to a loan sale and assignment agreement dated 26 September 2016, made between the creditors and WM Capital.
- [14] WM Capital's attorneys-at-law issued demand letters and notice of intention to enforce a security, dated 26 October 2016, to the intended respondents.
- [15] By deed of appointment of receiver-manager dated 14 November 2016, certified by the Supervisor of Insolvency on 18 November 2016, Mr. Phillips was appointed by WM Capital as the receiver-manager over the assets and property of the intended respondents. Upon his appointment as receiver-manager, Mr. Phillips wrote to the board of directors of the intended respondents giving notice of that appointment. Mr. Phillips is the principal consultant of Grenville Phillips & Associates Inc. situated at No. 16 Thomas Daniel Building, Hincks Street, Bridgetown.
- [16] In furtherance of the exercise of his powers under this appointment, Mr. Phillips attempted to gain entry into Silver Point on 16 November 2016 and was prohibited from doing so until, as he was told, he obtained an order of the court.

[17] By electronic mail dated 13 December 2016, the attorneys-at-law for WM Capital sought clarification and confirmation from the Authority based on their letter dated 7 October 2016 in which the Authority advised that permission was granted for the loan transaction. The attorneys-at-law asked for confirmation of whether the approval for the loan transaction consisted of approval of all the supporting documents submitted which included the debenture agreement and the loan sale and assignment agreement. To this, the Authority confirmed by electronic mail dated 14 December 2016 that the approval for the loan consisted of approval of all the supporting documentation included.

[18] Mr. Phillips, as a result of being denied entry into Silver Point, commenced a claim in the High Court.

### **THE PROCEEDINGS IN THE HIGH COURT**

[19] By a claim form filed 23 December 2016, Mr. Phillips sought orders against the intended respondents including a declaration that he is the duly appointed receiver-manager over the property and assets of the intended respondents, and a prohibition against the directors and agents of the intended respondents from obstructing him or his agents from exercising his duties as receiver-manager.

[20] The intended respondents, in their defence, denied that Mr. Phillips' appointment and the deed of transfer and assignment of debenture were valid. They also counterclaimed against the intended appellant and sought orders *inter alia* for a declaration that the intended appellant was not entitled to take possession of Silver Point and for damages in trespass to Silver Point which they claimed disrupted their business and resulted in loss and damage. The basis of the intended respondents' defence and counterclaim is that the intended appellant was not validly appointed as receiver-manager as a result of WM Capital's failure to obtain the requisite exchange control permission for the transfer of the debenture.

[21] By notice of application filed 19 January 2018, Mr. Phillips applied to the court for an order that "Pursuant to **Rule 29.5 (3) of the Supreme Court (Civil Procedure) Rules 2008** the Witness Jeff Young file a witness statement supplemental to his Witness Statement filed herein on the 12<sup>th</sup> day of December 2017 on or before the 15<sup>th</sup> day of February 2018." An affidavit in support of the application was also filed.

[22] Mr. Phillips laid out the grounds of his application as follows:

"1. Prior to the filing of the Witness Statement of Mr. Young, the Claimant had applied to the Central Bank of Barbados seeking clarification as to whether or not the Loan Sale and Assignment Agreement between Republic Bank Barbados

Limited and Republic Finance and Trust (Barbados) Limited and WM Capital Partners 57, LLC (the LSAA) had been approved by the Exchange Control Authority pursuant to Section 12 (1) of the Exchange Control Act Cap 71 of the Laws of Barbados.

2. The Central Bank issued a Certificate of Validation with respect to the LSAA, which is dated the 6<sup>th</sup> day of December 2017 and which was received by the Claimant's Attorney-at-Law, Sir Henry de B. Forde, Q.C. on January 5<sup>th</sup>, 2018, subsequent to the filing of Mr. Young's Witness Statement.

3. The Claimant has been advised by his Attorneys-at-Law and verily believes that the evidence with relation to the Certificate of Validation is relevant to the issues arising in the Claim."

[23] The application was heard by **Alleyne J**, who later refused to grant Mr. Phillips' application for permission to file a supplemental witness statement. **Alleyne J** set out the reasons for his decision delivered 31 July 2018.

### **THE APPLICATION FOR LEAVE TO APPEAL**

[24] Displeased with this decision, Mr. Phillips filed a notice of application on 21 August 2018, seeking leave of this Court to appeal **Alleyne J's** decision on the ground that "The Intended Appellant has an arguable appeal based on the grounds of appeal contained in the draft Notice of Appeal appended hereto." An affidavit in support of the application was also filed.

[25] In the draft notice of appeal, the intended appellant's grounds of the proposed appeal, broadly stated, are: (1) the dispositive issue at trial of whether or not exchange control approval was obtained by WM Capital is an issue of fact for determination by the trial court and therefore, the proposed evidence relating to this issue is relevant to the just disposal of the case, and (2) the trial judge erred in the exercise of his discretion when he refused to permit the intended appellant to file additional evidence in these circumstances which will effectively deprive the intended appellant, of a fair trial and where such permission would not result in prejudice to the intended respondents.

### **THE ISSUE**

[26] The issue which arises for this Court's determination is whether leave should be granted to the intended appellant to appeal the decision of **Alleyne J.** In determining this issue, we have had regard to this Court's decision in **Financial Services Commission and BIPA Inc. v. British American Insurance Company (Barbados) Limited Claim No. 4 of 2012 (BIPA).**

### **THE BIPA PRINCIPLES**

[27] In **BIPA**, this Court recognised that there were no basic criteria set out in **CPR** to guide this Court in determining whether or not to grant leave to appeal a decision of a lower court. Nevertheless, this Court held that the basic

threshold which must be met in order to obtain leave of this Court to appeal a decision is that the intended appeal has a realistic prospect of success. The Court emphasised that “permission will be granted if [the intended appellant] can show that there is more than a fanciful prospect of [him] persuading the Court of Appeal to depart from that Court’s entrenched principle of non-interference with the judicial exercise of a trial court’s discretion unless such exercise is “clearly or blatantly” or “plainly” wrong.

[28] Even if this Court is not satisfied that the appeal has a realistic prospect of success, if there are compelling reasons why the issues raised in a case should be heard by this Court, leave may be granted. Such reasons may be where there is an issue which should be examined by this Court in the public interest, or where the case raises an issue where the law requires clarification.

[29] Accordingly, in applying the **BIPA** principles to this case, this Court must now determine two issues, namely: (i) whether Mr. Phillips’ intended appeal has a realistic prospect of succeeding in showing that **Alleyne J** was clearly, blatantly or plainly wrong in the exercise of his discretion, and (ii) if the answer is no, whether there are compelling reasons why the appeal should nevertheless be heard.

[30] We will deal with these issues in turn.

## COURT'S ANALYSIS AND CONCLUSIONS

### *Issue No. 1 - Whether Mr. Phillips' intended appeal has a realistic prospect of success*

[31] The answer to the question of whether Mr. Phillips' intended appeal has a realistic prospect of success, entirely turns on whether or not Mr. Phillips has shown that **Alleyne J's** exercise of his discretion was "clearly or blatantly" or "plainly" wrong. In answering that question, we also must keep firmly in mind the grounds on which the intended appellant's proposed appeal is based and the factual circumstances that gave rise to the application and the submissions of the parties to this Court.

[32] The factual circumstances of this case indicate that the intended appellant purported to exercise his powers as receiver-manager over Silver Point on the basis that he had been validly appointed pursuant to the debenture which had been transferred to WM Capital after the required permission was given to WM Capital by the Authority.

[33] Ms. Wendy Straker, counsel for the intended appellant, in her oral submissions before this Court, stated that the crux of the matter is whether permission was granted by the Authority for the loan and sale agreement prior to the deed of transfer and assignment of debenture and the deed of

appointment of the intended appellant as receiver-manager. In her arguments, counsel submitted that the Certificate of Validation had retrospective effect and consequently, permission would have been granted to WM Capital prior to the execution of the deed of transfer and deed of appointment.

[34] Counsel also contended that the intended respondents would be afforded sufficient time to respond to issues arising from the supplemental witness statement relating to the Certificate of Validation since at the date of the hearing of the application they had not filed their witness statements. Therefore, according to Ms. Straker, any prejudice caused would only be to the intended appellant, since the refusal of his evidence relating to the Certificate of Validation would prevent him from fully ventilating his case before the trial court and would be unfair to the intended appellant.

[35] In response, Mr. Amilcar Branche, counsel for the intended respondents, submitted that the intended appellant had not satisfied the requirements for the grant of leave. Counsel stressed that in his claim, the intended appellant had stated that exchange control permission was granted for the transaction, and the intended respondents have fought the case for two years on the basis that no such permission was granted.

[36] Mr. Branche submitted that it was only after the intended appellant received the Certificate of Validation, that the intended appellant sought to file a supplemental witness statement in respect of the certificate. Counsel argued that a supplemental witness statement is not to be used to advance any new case, since it would cause prejudice to a defendant. He also submitted that all that was required was for the intended appellant to amend the pleadings which would have cured the defects and saved them the time expended in filing and arguing the application for leave. In any event, argued Mr. Branche, if the intended appellant always had exchange control permission, there would be no need to file a supplemental witness statement.

[37] Mr. Branche further submitted that, in the context of the case as pleaded, the judge was constrained in the exercise of his discretion, given the nature of the evidence before him. Counsel contended that the intended appellant had not discharged the burden of showing that the judge was clearly wrong in the exercise of his discretion.

[38] In relation to Mr. Phillips' application to file a supplemental witness statement, **Alleyne J** stated that "This issue of relevance is key to the determination of this application." He stated that the general purpose of a witness statement is captured in *CPR 29.4* and emphasised that the witness statement, or statement of the evidence, under that rule is in relation to any

issues of fact to be decided at the trial. The judge also referenced **section 44** of the **Evidence Act Cap. 121** which explained that relevant evidence affected the assessment of the probability of the existence of a fact in issue in the proceedings.

[39] **Alleyne J** explained that the issue was not simply whether permission was granted by the Authority for the transfer of the debenture, but whether permission was granted by the Authority at the date of the intended appellant filing his statement of claim. The judge stated that the intended appellant asserted that at the date of filing, exchange control permission had, as a matter of fact, been granted. In the judge's determination "The Claimant now seeks to set up a different case in respect of any requisite Exchange Control Permission." This case was in respect of the Certificate of Validation and "...the effect of that document was to retrospectively validate the transfer."

[40] The judge was of the view that although the Certificate of Validation "related to the Exchange Control Permission question, this is a new argument and one which the Defendants have not been afforded an opportunity to consider or reply to."

[41] He concluded that the issue of the Certificate of Validation was not relevant in the specific context of the case as pleaded by the intended appellant. To

allow such evidence to be adduced in relation to facts not pleaded by the intended appellant would, in the judge's determination, be in violation of *CPR* 8.5 which requires a claimant to include in the claim form or in the statement of claim "a short statement of all the facts on which he relies" and would be prejudicial to the intended respondents. **Alleyne J** also considered that the intended appellant did not make clear the nature or ambit of the evidence he sought to adduce by filing a draft witness statement or indicating the intention or purpose of the evidence.

[42] In assessing the prospect of the intended appellant succeeding in his intended appeal before this Court, we find that **Alleyne J** took into account only relevant considerations and there was no argument advanced that he took into account irrelevant considerations in the exercise of his discretion. Moreover, we can find no reason to interfere with the judge's exercise of his discretion on the basis that the exercise was "clearly or blatantly" or "plainly" wrong.

[43] We agree with **Alleyne J** that the issue of permission having been granted by the Authority prior to the transfer of the debenture as disclosed by Mr. Phillips' pleadings is entirely different from an assertion that a Certificate of Validation was granted subsequent to the transfer of the debenture but has retrospective effect. Accordingly, the intended appellant has not shown that there is a realistic prospect of success of his intended appeal before this Court

and as a result, has failed to surmount the first hurdle in a successful application for leave to appeal.

[44] Consequently, if the intended appellant is to succeed in his application for leave to appeal the decision of **Alleyne J**, he must surmount the second hurdle of establishing that there are compelling reasons why the issues raised in this case should be heard by this Court.

*Issue No. 2 - Whether Mr. Phillips has established that there are compelling reasons why his appeal should be heard by this Court*

[45] We have not been greatly assisted by counsel for the intended appellant in respect of whether there are compelling reasons that this Court should hear the intended appeal except for the statement in counsel's written submissions that "...this Court should give consideration to the nature of this case and the stage of the proceedings to date as well as the importance of this case for determining how supplemental witness statements should be dealt with by the courts in Barbados."

[46] As was stated by **Alleyne J**, there is no guidance in *CPR* as to how a judge should exercise his discretion in regard to allowing a supplemental witness statement. However, in considering and applying the **BIPA** principles, we are not persuaded that this is an issue of great public interest and importance or

one which requires this Court to clarify the law in this matter. We are therefore of the opinion that there are no compelling reasons why we should hear the intended appellant's intended appeal.

[47] Moreover, there were options available to the intended appellant in the High Court which had not been exhausted prior to the filing of the application in this Court, and given the totality of these circumstances, we deny the application for leave to appeal the decision of **Alleyne J.**

## **DISPOSAL**

[48] For all of the foregoing reasons, the intended appellant's application for leave to appeal is dismissed with costs to the intended respondents, to be assessed, if not agreed.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Ag.)