IN THE COURT OF APPEAL OF BELIZE A.D. 2025
CIVIL APPLICATION NO 1 OF 2024

BETWEEN:

FYFFES GROUP LIMITED

Applicant

and

MERIDIAN ENTERPRISES LIMITED

Respondent

and

BANANA GROWERS ASSOCIATION

Interested Party

Before:

The Hon. Mde Justice Hafiz Bertram — President
The Hon. Mde Justice Woodstock Riley — Justice of Appeal
The Hon. Mde Justice Minott-Phillips — Justice of Appeal

Appearances:

Nigel Ebanks for the Applicant
Eamon Courtenay, SC and Priscilla Banner for the Respondent

2024: June 26
2025: January 17

REASONS FOR DECISION

Minott-Phillips, JA

[1] **Minott-Phillips, J.A.:** On 26th June 2024 we heard the parties on the Motion of the applicant, Fyffes Group Limited ***("Fyffes")*** for leave to appeal the decision of Alexander, J. made on 7th February 2024 refusing its application to set aside service on it and strike out a claim brought by the Respondent, Meridian Enterprise Limited ***("Meridian")***. Fyffes' motion also asked us to stay the proceedings in the

court below (Claim No 614 of 2018) pending the outcome of the appeal, and order costs of its application in the appeal.

[2] At the conclusion of the hearing, we granted Fyffes' application and indicated short written reasons would follow. These are our reasons.

[3] The draft Notice of Appeal annexed to an affidavit in support of the Motion puts forward the following (summarized by me) as the proposed main grounds of appeal of the decision of Alexander, J. They are that she erred:

a. in finding Meridian's non-disclosure of material facts did not merit setting aside the court's order for permission to serve Fyffes out of the jurisdiction with the claim;
b. in finding that a costs order was an adequate remedy to address Fyffes' complaint instead of setting aside the permission to serve order;
c. in assuming jurisdiction over Fyffes on the above bases and in ordering Meridian's claim to proceed;
d. because her decision is unreasonable and against the weight of the evidence.

[4] A prior claim brought by Meridian against Fyffes (Claim 98 of 2017) was struck out by the court as it was not satisfied that Meridian was a party to the contract on which it had sued the Defendants, Fyffes and Banana Growers Association. An appeal of that order by Meridian (that was a nullity for having been filed without leave) was withdrawn upon Fyffes indicating it was taking a preliminary objection to the appeal filed proceeding without leave.

[5] Meridian's application to serve Claim No 614 of 2018 on Fyffes was made *ex parte* under Part 7 of the Civil Procedure Rules and its evidence in support of it failed to disclose the court order striking out the prior claim against Fyffes and the non-pursuit of an appeal of that order. In its submissions before us Meridian indicated that it was ordered to pay the costs of its successful resistance before Alexander, J of Fyffes' application to set aside the permission to serve *ex juris,* etc., because it conceded its non-disclosure of the prior events in obtaining the order *ex-parte*. Courtenay, SC (counsel for Meridian) said *"Alexander, J. must have considered it* [the non-disclosure] *material to have granted costs against us".*

[6] In opposing the Motion for leave to appeal Meridian submitted that this application fell short of meeting the threshold test for the grant of leave to appeal, as no appealable error was particularized in Fyffes' draft Notice of Appeal. Meridian went on to submit that the judgment of Alexander, J. was a *"model judgment – clear, coherent, addresses the issues raised – that demonstrates no error even on a prima facie basis."* In so submitting, it was seeking to answer Fyffes' submission that the way the Judge below exercised her discretion was wrong for failing to take sufficient account of the seriousness of Meridian's material non-disclosure in an *ex-parte* application. Fyffes further submitted that the punishment in costs meted out to Meridian for its admitted non-disclosure was insufficient in that it *"allowed the offending party to retain the benefit of its non-disclosure".* Furthermore, Meridian submitted, the court had already determined in the prior action that Fyffes was not a party to the contract and, consequently, there would be a real risk of injustice to Fyffes if leave to appeal is not granted as the current *status quo* resulting from the *ex-parte* order coupled with that of Alexander, J. alters that position to the prejudice of Fyffes.

[7] The above encapsulates the arguments advanced before us by Fyffes and Meridian on this application as I understood them.

[8] This application is procedurally sound. As is required by section 201 of the Senior Courts Act, this application, as filed, was made to a single Judge of the Court of Appeal (and then at our discretion set for hearing before the Court).

[9] It is generally accepted that the test to be met for the grant of leave to appeal is that the intended appeal has a real and not a fanciful prospect of success. Additionally, this court has repeatedly affirmed Belize's adoption of the circumstances in which the Court of Appeal in England would grant such leave[1], which are:

a. Where the court sees a *prima facie* case that an error has been made; or

[1] ***Belize Telemedia Ltd v Belize Telecom Ltd*** – unreported Civil Appeal No 23 of 2008. Judgment delivered 27th March 2009, Per Carey, JA at paragraph no 6; ***Belize Offshore Centre Limited et al v Worldwide Property Management Limited*** – unreported Civil Appeal No 28. Judgment delivered on 16 May 2011, Per Mottley, P. at numbered paragraph 14; and ***Karina Enterprises Ltd v China Tobacco Zhejiang Industrial Co Ltd*** Unreported Judgment delivered 7 November 2014, Per Hafiz Bertram, JA (as she was then) at numbered paragraphs 7-11.

b. Where the question is one of general principle, decided for the first time; or

c. Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.

Those three circumstances are disjunctive. We take this opportunity to highlight the fact that the universally accepted source document for the above dicta, namely, Vol 1 of the UK ***Supreme Court Practice 1991*** at paragraph 59/14/7, uses the conjunction ***'or'*** at the end of clauses *a* and *b* above in setting out the circumstances in which leave will be granted. A perusal of the various decisions in this jurisdiction (including the often referenced ***James Wang v Atlantic Insurance Co. Ltd.***[2]) shows that, sometimes, *'and'* is used at the end of clauses *a* or *b* above instead of the word *'or'* that actually appears in the source document (although the context indicates those three factors are, in fact, regarded disjunctively here in Belize)[3].

[10] Additionally, also, since this is an interlocutory matter, the applicant would have to satisfy us that the application is not disqualified by any of the following additional considerations expressed by Lord Woolf MR in his ***Practice Note (Court of Appeal: procedure)*** [1999] 1 All ER 186, at paragraph 17[4]:

> *" (a) the point may not be of sufficient significance to justify the costs of an appeal;*
>
> *(b) the procedural consequences of an appeal (e.g. loss of the trial date) may outweigh the significance of the interlocutory issue;*
>
> *(c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused."*

[11] It is also noteworthy that rule 1(4) of Order II of the Court of Appeal Rules states,

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[2] Unreported. Action No. 114. Decision of the Hon Mr Justice Sosa, S.C. pronounced on 21st July 1998.

[3] See, for example, paragraphs 14 (where the disjunctive 'or' is, in fact, used) and 15, 16 & 20 of ***Belize Offshore Centre Limited*** (*supra*), paragraphs 7 & 11 in ***Karina Enterprises Ltd*** (*supra*) and paragraphs 10 & 14 in ***Fresh Water Creek Farms Ltd v Silk Grass Farms Ltd*** – unreported. Civil Appeal No 3 of 2022. Judgment delivered on 14th April 2023. Per Hafiz Bertram P.

[4] Also recited by Carey, JA ***in Belize Telemedia*** (*supra*) at numbered paragraph 6, and Hafiz Bertram, P. in ***Fresh Water Creek Farms Ltd*** (*supra*) at para 14, as informing the approach taken by this court in considering applications for leave to appeal from interlocutory orders.

"No ground which is vague or general in terms …. shall be permitted, ***save the general ground that the judgment is against the weight of the evidence****…."*

[12] In this application one of the proposed grounds of appeal is that the judgment is against the weight of the evidence. The questions arise (which there is no need to decide here) whether that proposed ground can be a stand-alone ground and, if so, whether it is to be considered statutorily unimpugnable. There is no need to decide that here because:

a. I am of the view that each ground of appeal (as summarized by this court in paragraph 3 above) comes within at least one of the three categories itemized in paragraph 9 above, and
b. the proposed appeal is not barred by any of the additional considerations (recited in paragraph 10 above) that apply when the order being appealed is (as is the case here) interlocutory; and
c. I am unable to say that the proposed appeal has no prospect of success.

I do not wish to say more for fear of seeming to tilt the balance in favour of one side or the other in the upcoming appeal. I express no view on its likely outcome.

[13] It is for those reasons that, having heard this application on the 26th of June 2024, we decided to:

a. grant leave to appeal the decision of the Hon Madam Justice Alexander made on 7th February 2024;
b. stay the proceedings in Claim No 614 of 2018 pending the outcome of the appeal; and
c. award costs of this application in the appeal.

Minott-Phillips
Justice of Appeal

[14] **Hafiz Bertram, P**.: I agree with the reasons of my learned sister Minott-Phillips, JA for granting the application and the order made.

Hafiz Bertram
President

[15] **Woodstock-Riley, J.A.:** I concurred with the decision we gave to grant the Applicant Fyffes Group Limited leave to appeal the decision of Alexander J refusing its application to set aside service on it and strike out a claim brought by the Respondent Meridian Enterprise Limited.

[16] The indication was given that short written reasons would follow and Minott-Phillips JA has done so. In as much as the opportunity was taken to address the test for the grant of leave to appeal, I consider it useful to make some observations.

[17] Various prior decisions have referred to the 1998 case **James Wang v Atlantic Insurance Co Ltd,** Sosa J therein made the statement that the circumstances in which leave will be granted "*I venture to apprehend are the same ones in which the Court of Appeal of England will grant leave*." He went on to reference the **Supreme Court Practice 1991 Volume 1**, page 964, at paragraph 59/14/7, "*leave will be granted by the English Court of Appeal in three categories of case, viz.:*

1. *Where they see a prima facie case that an error has been made;*
2. *Where the question is one of general principle, decided for the first time, and*
3. *Where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.*"

[18] As noted by Minott-Phillips JA, while Sosa J used the word "and" the actual 1991 Practice uses the word "or". Subsequent decisions in Belize have alternatively used "and" or "or".

[19] More importantly, I think it is relevant to look at updated Rules and jurisprudence not only from the United Kingdom, but the Court of Appeals of the Caribbean and our apex court the Caribbean Court

of Justice. What is essential to note is the difference in consideration of the categories, which are not to be regarded as on equal footing.

[20] Even within the English Court of Appeal and The Practice Note by Lord Woolf MR – [1999] 1 AII ER 186 it indicates

> *"1. This practice direction …… has been the subject of consultation with the members of the Court of Appeal, and sets out the collective views of the court.*
> *2. The provisions of the practice direction dated 26th July 1995 ([1995] 3 AII ER 850, [1995] 1 WLR 1191) (the 1995 practice direction) must be read subject to this practice direction."*
>
> "*The general test for leave*
>
> *10. The general rule applied by the Court of Appeal, and thus 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 reconsideration*."

[21] It is in "exceptional circumstances" that leave would be given outside of a case with a realistic prospect of success.

[22] The United Kingdom Civil Procedure (Amendment) Rules 2000 s 52.3(6) provide,

> "*permission to appeal will only be given where – (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard*."

[23] The Caribbean Civil Court Practice 2024, of which the Honourable Mr. Justice Adrian Saunders, President of the Caribbean Court of Justice was Editor in Chief, indicates

> *"Leave to appeal will only be granted when an applicant establishes that the intended appeal has a realistic prospect of success.*" (Note 31.4)

[24] Reference is made to two Eastern Caribbean Court of Appeal decisions both authored by Barrow J, presently a Caribbean Court of Justice Judge. **Othneil Sylvester v Faelleseje, A Danish Foundation**, St. Vincent and the Grenadines Civil Appeal No 5 of 2005 (delivered 20th February 2006) where he notes "*The appellant needs to show that the intended appeal has a real prospect of success, which is a heavier burden than showing only that he has an arguable appeal*."

[25] *Leave to appeal will only be granted when an applicant shows that the intended appeal has a realistic prospect of success. As a starting point, the court needs to know if there is an argument capable of being advanced*." **First Caribbean International Bank (Cayman) Ltd v Henry Starkey, BVI Civil Appeal No 23 of 2005** (delivered 11th January 2006), Barrow JA, British Virgin Islands.

[26] In **Christopher Salt, Aberconia Limited and Bloombay Holdings Inc v Kaupthing Singer & Friedlander Limited, Caribbean Court of Justice Application No. 1 of 2016,** Mr. Justice Saunders made the comment in reference to a special leave application but nonetheless instructive,

> "*It must be stressed, however, that irrespective of how much public or general importance such an appeal may have, to be successful the Special Leave application would have to demonstrate an arguable case. Special leave will not be given where an appeal is wholly devoid of merit*."

[27] The Court of Appeal of Barbados refers to the test for granting leave as a two-step process. The first step is whether the intended appeal has a realistic prospect of success. If unable to satisfy the first step, the second step is to determine whether there are compelling reasons why the appeal

should nevertheless be heard. Burgess J, also now a Judge of the Caribbean Court of Justice, in **Financial Services Commission and BIPA Inc. v British American Insurance Company (Barbados) Limited**, **Civil Appeal No 1 of 2022** noted,

> "*the basic criteria which must guide me in determining whether or not to grant leave to appeal a decision of a lower court are not spelt out in our **CPR**. This notwithstanding, it seems to be accepted practice in this Court to appeal the decision of **Beckles J (ag)** is that BIPA's intended appeal has a realistic prospect of success: As to this, see the authoritative Caribbean Civil Court Practice 2011 at pg 389 and Barrow JA in the Vincential Court of Appeal case of Sylvester v Faelleseje, A Danish Foundation, St. Vincent and the Grenadines Civil Appeal No. 5 of 2005 at para [1]*."

[28] It recognized as noted in the Woolf Practice Direction that in "exceptional circumstances" other considerations could be made. Burgess J in **Financial Services Commission and BIPA Inc. v British American Insurance Company (Barbados) Limited**, **Civil Appeal No 1 of 2022** also noted,

> "*The court can in certain circumstances grant leave even if it is not satisfied that the appeal has a realistic prospect of success. One such example is where the court considers that the issue should, in the public interest, be examined by the Court of Appeal. Another is where the Court takes the view that the case raises an issue where the law requires clarification: **Smith v Cosworth Casting Process Ltd, Practice Note [1997[I WLR 1538 per Lord Woolf MR**. Stated differently, if there are compelling reasons why the issues raised in a case should be heard by the Court of Appeal, leave may be granted notwithstanding that the intended appeal has no realistic prospect of success*."

[29] It is important to maintain the consideration of the more recent categories and the focus of showing a realistic prospect of success and awareness that only in exceptional circumstances would leave be granted with no prospect of success.

Woodstock-Riley
Justice of Appeal