IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL-47/19

BETWEEN:

(1) ARNOLD SAMPATH

(2) MARION SAMPATH **PLAINTIFFS**

AND

THE ESTATE OF CLIFF ANDERSON SAMPATH (DECEASED) **DEFENDANT**

RULING

Before: **The Hon. Mr. Justice Anthony S. Gruchot**

Appearances: **Mr. Conrad Griffiths KC of Griffiths & Partners for the Plaintiffs**

Mr. George C. Missick of Geordins for the Defendant

Hearing Date: **13th September 2022**

Venue: **Court 5, Graceway Plaza, Providenciales**

To be Handed Down: **Tuesday 22nd November 2022 at 9:00 a.m.**

Introduction

1. There are 3 applications before the Court. The 1st is in respect of a summons filed by the Defendant on 13th May 2022 for leave to appeal the order of Simons J of 3rd May 2022 in which he gave summary judgment against the Defendant in the total sum of US$391,832.53 together with post judgment interest at the statutory rate of 6% and

awarded the Plaintiffs their costs of the action to be taxed if not agreed. He also dismissed the Defendant's application for security as to costs. What then follows is an application to stay the judgment pending the outcome of the appeal.

2. The 3rd application is the return date in respect of a charging order nisi granted by Hylton J on the papers on 29th July 2022 over parcel number 60900/213, which property is registered in the name of the deceased and consequently falls in to his estate.

Background

3. It is not necessary to give a full history of this matter as this is was rehearsed by Simons J in his written judgment. That said, it is perhaps useful for me to set out the salient facts behind these applications. The deceased, Mr. Cliff Sampath, passed away on 10th February 2019 not leaving a will. At the time of his death the deceased was living with his partner of some 15 years, Guillermina Rodriguez ('Ms. Rodriguez'), with whom he has 1 daughter, now aged 15, who is the sole beneficiary of the deceased's estate ('the Estate').

4. The Plaintiffs have brought a claim against the Estate for repayment of a large number of alleged loans to the deceased which span over a period of some 13 years.

5. The writ and statement of claim were filed on 11th April 2019. On 6th June 2019 Ramsay-Hale CJ made an order appointing Ms Rodriguez as representative of her daughter and of the Estate for this action. A defence was filed on 18th July 2019.

6. On 5th November 2021 the Plaintiffs filed a summons for summary judgment supported by the 1st affidavit of Marion Sampath, the 2nd Plaintiff, together with an affidavit of Jordon Bolton (Mr. Bolton), a chartered accountant simply clarifying the sums alleged to be owed. There is no evidence from the 1st Plaintiff, the major alleged creditor, the 2nd Plaintiff stating that she is authorised to speak on his behalf and as such, to tender his evidence.

7. Each individual payment/transfer made to the deceased upon which the claim is based is detailed in the 1st affidavit of the 2nd Plaintiff. The earliest item is dated 9th July 2006 and is verified by Mr. Bolton. The latest claims relate to funeral expenses in 2019. The Defendant wrongly suggests a period in question is some 19 years. The 2nd Plaintiff also wrongly states that the alleged loans were from 2003.

8. On 7th January 2022 an amended defence dated 30th December 2021 was filed without leave, pleadings having closed.

9. A summons seeking security for costs dated 6th January 2022 supported by the 1st affidavit of Ms Rodriguez[1] dated the same date was issued. I am unaware of the date of the filing of those documents as the copies in the hearing bundle provided to me are not

[1] This affidavit is also in response to the 1st affidavit of the 2nd Plaintiff as critically acknowledged by Simons J.

stamped as having been filed and the Registry has misplaced the Court file. On 18th January 2022 the 2nd Plaintiff filed her 2nd affidavit, in reply to that of Ms. Rodriguez.

10. On 19th January 2022 the application was heard with the decision being handed down on 3rd May 2022.

11. On 13th May 2022 the Defendant filed the application for leave to appeal and for a stay pending appeal.

12. On 15th July 2022 the Plaintiff applied by summons for a charging order based on the judgment. On 28th July 2022 an amended summons was subsequently filed correcting the parcel number of the subject property. As noted above, a charging order nisi was granted on the papers by Hylton J.

Discussion

13. There is a secondary dispute concerning the administration of the Estate. An application for the grant of letters of administration was filed on 21st May 2019 which I am told has been amended on at least 2 occasions. Mr. Griffiths contends that on each amendment the Estate is diminishing. As a result, the Plaintiffs have had a caveat entered to prevent the grant and Mr. Missick submits the Estate is now stymied. This Mr. Missick submits, is preventing Ms. Rodriguez (appointed as representative of her daughter and of the Estate for this action by Order of Ramsay-Hale CJ made on 6th June 2019) from obtaining information which would put the defence on a proper footing with information that the Estate could obtain from the deceased's bank etc.

14. It is not disputed that leave for appeal is required, summary judgment being interlocutory in nature.

15. It is not exactly clear why the application for leave has not come before the Court sooner. Mr. Griffiths criticises the Defendant submitting that the matter has not been prosecuted with due diligence. He advises that a Notice of Appeal was filed and then had to be withdrawn as it was filed without leave. Even so, I do not see how that could have impacted on the time it has taken to have this matter listed as the leave application was filed 10 days after the handing down of the summary judgment decision; however, it does not appear that the reason for the delay was down to either of the parties, and I take it no further.

16. In giving his ruling Simons J was critical of the Defence to the extent he expressed:

> "*The Defendant has chosen not to condescended to answer these specific, documented and, on their face verifiable assertions by the Plaintiffs.*
>
> *In her Affidavit (and Amended Defence) and with full notice of what case the Plaintiffs make, the Defendant chose not to address with any specificity the allegations and averments made by the Plaintiffs. Rather, the Defendant's principal response to the Plaintiffs' Summons – an Application for Security for Costs seems to be more of an afterthought, calculated to head off the inevitable.*

The Court should never be in a mood to play footsie with stratagems that undermine the rules of Court that are intended to deliver justice as quickly and cheaply as possible.

Two examples will suffice to justify the harshness of this assessment, one from Ms. Rodriguez's 1st Affidavit and one from the Original Defence and Amended Defence (filed without leave). First, the Affidavit is concerned primarily with supporting the Security for Costs Application and the closest it comes to disputing the material offered by the Second Plaintiff's Affidavit in Support of the Summary Judgment Application is at Paragraphs 26 and 27. At Paragraph 26 Ms. Rodriguez she says that she has been advised by her Attorneys that the Plaintiffs' claim requires "further disclosure" and, at Paragraph 27, she says that she along with a "Mr. Shepherd…and other witnesses" will provide evidence that the deceased sent the Plaintiffs "tens of thousands of dollars if not hundreds of thousands of dollars over the years".

The Defence as originally filed, merely puts the Plaintiffs to proof of their claims. The Amended Defence differs only in that it asserts at Paragraph 8 that any money given to the deceased as a loan was paid back during his lifetime, and at the new Paragraph 10, which asserts any advance of funds by the Plaintiffs to the deceased were gifts and, in relation to the First Plaintiff, reliance is had to the presumption of advancement. The internal inconsistency of the pleading is inescapable.

I therefore hold with Mr. Griffiths QC that based on the authorities, the Defendant must show a bona fide Defence to the claim that has a reasonable probability of success, and not merely a fanciful, implausible, or incredible case to refute a valid claim. On the papers before the Court, the Defendant has at best, promised a case upon further disclosure by the Plaintiffs and upon appointment by the Probate Court of Ms. Rodriguez and Pastor Velasquez as personal representatives of the deceased. That unfortunately, does not quite meet the mark to turn back a properly documented Order 14 Summons for Summary Judgment."

17. The above are the reasons given for granting summary judgment.

18. Mr. Missick submits that there are 2 reasons why leave should be granted:

    a) That the intended grounds of appeal have a realistic prospect of success; and

    b) The Defendant should not be deprived of its right to appeal.

19. Dealing first with the second of those grounds, in response to my request for authority of such right of appeal Mr. Missick refered me to *Smith -v- Cosworth Casting Processes Ltd*. [1997] 1 WLR 1538 albeit he did not cite any passage from that judgment. Having perused the full case report I do not find that there is any reference to a 'right of appeal'. It is the position that the Defendant cannot bring an appeal as of right, hence the requirement for leave.

20. The Court is therefore left with considering the correct test, i.e., whether the appeal has any realistic prospect of success.

21. With respect to the consideration of what is a 'realistic prospect of success' Mr. Missick again refers to *Smith -v- Cosworth Casting Processes Ltd*. in which the judgment was given by Thomas LJ, to which Lord Woolf MR and Gibson LJ agreed. Lord Woolf MR went on to issue guidance on applications for leave to appeal and applications to set aside leave. With respect to the grant of leave that guidance is:

> "*1. The court will **only** refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. 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. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. 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.*" (Emphasis added)

22. The White Book 1999 at Note 59/14/18 states that the general test is that leave will normally be granted unless the grounds of appeal have no realistic prospects of success but also the court may grant leave if the question is one of general principle, decided for the first time or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage. Thereby setting out a 2-limb test which reflect the above 2 quoted paragraphs from Lord Woolf's MR guidance.

23. The starting point then, is that the leave should be granted unless there is no realistic prospect of success.

24. In *CR -v- SR (Financial Remedies: Permission to Appeal)* [2014] 1 FLR 186 Moylan J, in determining what was a 'real prospect of success', considered the differing approaches taken in *NLW -v- ARC* [2012] EWCH 55 (Fam) and *AV -v- RM (Appeal)* [2012] 2 FLR 709. In these matters the application for leave to appeal was brought under the Family Procedure Rules 2010. Rule 30.3(7) provides:

> *"(7) Permission to appeal should 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."*

25. Starting at paragraph 3 of his judgment:

> *"The meaning of the phrase 'real prospect of success' in r 30 has been considered in two first instance decisions.*

[4] The first is a decision of Mostyn J, namely NLW v ARC [2012] EWHC 55 (Fam), [2012] 2 FLR 129. He says, in para [8]:

'In his skeleton argument Mr Chamberlayne has suggested that the object of the test is only to weed out the hopeless appeal. I would not go that far. I would suggest that the concept of a real prospect of success must mean, generally speaking, that it is incumbent on an appellant to demonstrate that it is more likely than not that the appeal will be allowed at the substantive hearing. Anything less than a 50/50 threshold would of course, by linguistic definition, mean that it is improbable that the appeal will be allowed and in such circumstances it would be hard to say that any appeal had a real prospect of success; rather, it could only be said as a matter of logic that it had a real prospect of failure.'

In the course of his judgment, Mostyn J makes it clear, in particular in para [3], that:

'The new procedure set out in Part 30 of the Family Procedure Rules is intended to align the procedure for appeals from district judge to judge with the procedure that has obtained since the year 2000 under CPR 52 in relation to appeals from judges to the Court of Appeal.'

[5] In a later decision, AV v RM (Appeal) [2012] EWHC 1173, [2012] 2 FLR 709, Moor J reaches a different conclusion to that of Mostyn J as to the meaning of the phrase 'a reasonable prospect of success'. He says at paras [9] and [10] of his judgment:

'[9] It has been on said on many occasions that judges should not place a judicial gloss on the words of either the statute or the rules. With the greatest of respect to Mostyn J, it may well have been that this aspect was not argued fully before him and that his attention was not, in particular, drawn to a decision of the Court of Appeal, of Tanfern Limited v Cameron MacDonald and Another [2000] 1 WLR 1311, in which Brooke LJ said the following (at para [21]):

"[21] Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard. Lord Woolf MR has explained that the use of the word 'real' means that the prospect of success must be realistic rather than fanciful [see Swain v Hillman, The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No. 1732 of 1999].

[10] The test for permission to appeal is, of course, exactly the same in the Court of Appeal. It, therefore, follows that this court is bound by Tanfern Limited v Cameron-MacDonald and I consider that there should be no gloss placed on the words of the rules other than to say that "real" means that the prospect of success must be realistic rather than fanciful.'

[6] It is clear to me – given, as Mostyn J rightly points out, that the intention or purpose of the new rules is to align the procedure for appeals from district judge to judge to that which applies in relation to appeals to the Court of Appeal – that the test to be applied should be the same in both circumstances. I, therefore, as

did Moor J, consider that I should apply and am indeed bound by the interpretation given to the phrase 'real prospect of success' by the Court of Appeal in the decisions referred to above.

[7] I also propose to quote from the White Book 2012, Vol 1, para 52.3.7:

'The first ground ("real prospect of success") presents no conceptual problems. It is precisely the same test as that which the courts apply when considering summary judgment: see rule 24.2. The rationale is the same. If a claim or defence has no real prospect of success, the court will prevent the litigant from pursuing it. Likewise, if an appeal has no real prospect of success, the court will prevent the litigant from pursuing it. The main practical difference is that, for obvious reasons, more appeals are weeded out by this process, than first instance claims or defences.'

The White Book then refers to Swain v Hillman and Another [2001] 1 All ER 91 and to Tanfern Ltd v Cameron-MacDonald and Another [2000] 1 WLR 1311.

[8] In my view, as I have already indicated, I should apply the test set out in Tanfern Ltd v Cameron-MacDonald and Another, namely that the husband in this case must show a realistic, rather than fanciful, prospect of success.

26. In H v G (Adoption appeal) [2013] EWHC 2136 (Fam.) Jackson J stated:

[31] Secondly, although it has no bearing on my decision or even on the issue with which I have had to deal, I have noted the judgment of Mostyn J in granting permission to appeal. During the course of that judgment he refers to previous formulations of his own and of Moor J (AV v RM (Appeal) [2012] 2 FLR 709) in relation to the appropriate test to be applied. The test, which appears at r 30.3(7) of the Family Procedure Rules 2010 is that an Applicant must show "a real prospect of success". I would simply record that so far as I am concerned no further elaboration of those words is necessary or helpful. I would not, with respect to Mostyn J, follow him in regarding it as a term of art or in focusing on the word "fanciful" derived from a previous Court of Appeal authority as an antonym to the word "real" in the rule; or of finding synonyms to that antonym, particularly the synonyms "capricious, whimsical or absurd".

[32] I respectfully suggest that to allow permission to appeal in any case where the application is not capricious, whimsical or absurd is to set the threshold too low. It does not, in my view, give effect to the rule that simply requires a real prospect of success to be shown.

27. In *De* Cruz *-v- Rubino* [2015] EWHC 1691 Holman J in granting what he clearly considered a weak application for leave to appeal, at paragraph 13 gave the following decision:

"*I cannot see any "compelling reason" why this proposed appeal should be heard. On the question of "real prospect of success", I have concluded at the end of the argument today that the proposed appeal does have what is characterised as "a real prospect of success" in that there may be some substance in the point that*

the father and his advocate were taken unfairly by surprise when the district judge decided to embark on a full final hearing that day in the circumstances as I have described them.

…

I am unable to say that the proposed appeal does not have a real prospect of success in the limited areas that I have indicated, and that being the stated position of the father, I propose to grant him permission to appeal. I do not limit the areas which may be explored on that appeal, but I give due warning to the father, in his presence, that I am far from saying that his proposed appeal will succeed on any of the proposed grounds. I am merely unable to say that it does not have "a real prospect of success", which is a relatively low threshold test, somewhere below a 50/50 prospect of success."

28. Whilst the above authorities were advanced under the Family Procedure Rules in *Re R (a child)* [2019] EWCA Civ 895 Jackson LJ (Baker LJ agreeing) also commented on the divergent approach taken by Mostyn J and Moor J. At paragraph 29 of the judgment :

"29. I finally refer to a procedural issue. In this case, the application for permission to appeal correctly set out the relevant test under CPR r.52.6(1), namely that permission to appeal may be given only where –

a. the court considers the appeal would have a real prospect of success; or

b. there is some other compelling reason why the appeal should be heard.

30. The same criteria govern appeals within the Family Court and commentary on the equivalent provision (FPR 30.3(7)) appears in the Family Court Practice 2018 at p.1909. When seeking permission to appeal, Mr Lord cited that commentary, which is in these terms:

"Real prospect of success – There are two conflicting authorities on the meaning of a 'real prospect of success'. In NLW v ARC [2012] 2 FLR 129, FD, Mostyn J held that the 'real prospect of success' meant it was more likely than not that the appeal would be allowed at the substantive hearing: "anything less than a 50/50 threshold could only mean there was a real prospect of failure". Moor J, however, has held that a 'real prospect of success' is one that is realistic rather than fanciful, and does not mean a greater than 50/50 chance of success. … The weight of current first instance authority follows the approach of Moor J. "

31. Several years on, this divergence of approach continues to be referred to in applications ***for permission to appeal to this court and to the High Court. This appeal represents an opportunity to resolve any remaining doubt. The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of the relevant sub-rule*** *is that the appeal would have a real prospect of success. As stated in Tanfern v Cameron-MacDonald (Practice Note) [2001] 1 WLR 1311 CA at [21], which itself follows Swain v Hillman [2001] 1 AER 91 CA, there must be a*

realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not. (Emphasis added)

29. Mr. Griffiths submits that as there is no test for granting leave set out in the Court of Appeal Ordinance then the Court should follow the current English rules found under Rule 52 of the CPR. He cites as authority for this section 23 (cited as section 22 in his skeleton argument) of the Court of Appeal Ordinance which provides:

English rules to apply where no other provision made

"*23. Where in any case no special provision is contained in this Ordinance or any other law, or in Rules of Court, with reference thereto any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal.*"

30. Accordingly, he submits that the correct test is not to be taken from the White Book but from the Civil Procedure Rules ('CPR') in England and Wales as they presently are.

31. CPR 52.6 provides:

(1) Except where rule 52.7 applies, permission to appeal may be given only where—

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard.

(2) An order giving permission under this rule or under rule 52.7 may—

(a) limit the issues to be heard; and

(b) be made subject to conditions.

32. Mr. Griffiths submits that leave should only be granted if there is a real prospect of success of the appeal. He refers to the note to CPR Rule 52, at 52.6.2 which states that it is precisely the same test as that would apply when considering the summary judgment application. He goes to quote the end of the 4th paragraph of that note which says "*…meeting the "real prospect of success" test for permission to appeal will be a difficult test to satisfy."*

33. Mr. Griffiths submits that in applying that test, Simons J had formed the view that there was no prospect of success of the Defence and further advocates that the Court should be consistent. I have some difficulty with that concept. Whilst I of course accept that the Court should be consistent in its application of the law, rules and tests, it cannot be right to suggest that because Simons J was of the view that the Defence had no prospect of success, I must form the same view or, moreover, that it follows that the grounds of appeal have no realistic prospect of success. If that were the case, there would be no purpose to a leave application. I must look at what was before the Court when the judgment was given and then go on to apply that test to the proposed grounds of appeal.

34. In his judgment Simons J states:

> "*Paraphrasing, Order 14, rule 3 requires a Defendant facing a Summary Judgment Application to satisfy the Court that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial of the claim. Otherwise, the Court may give such judgment for the Plaintiff as may be just.* ***So, the bar is a high one****.*" (Emphasis added)
>
> He goes on -
>
> "*Mr. Griffiths QC reminds me of this Court's recent acquaintance with the Order 14 test, having applied it in the case of Ira Riklis v. Pearls Villa Management, Ltd. [CL-13/2021] in a Ruling delivered on 16 April 2021. There the Court emphasized (sic) the need for a Defendant, resisting an Order 14 Application to show "that there is a* ***fair or reasonable probability*** *of his having* ***a credible Defence*** *and not merely that there is* ***a faint possibility*** *that he has a Defence…".*" (Emphasis added)

35. Mr. Griffiths submits that Mr. Missick's reliance on <u>*Smith -v- Cosworth Casting Processes Ltd.*</u> is flawed as that this is only authority for the 2nd limb of allowing an appeal i.e. that there is some other compelling reason for the appeal to be heard, which he further submits cannot be invoked in this matter. As I have commented at paragraph 19 above, Mr. Missick did not direct me to any particular passage in that judgment, but I cannot agree with Mr. Griffiths that the authority is limited only to the 2nd limb. I have set out Lord Woolf's guidance given in that case, at paragraph 21 above in which his Lordship clearly deals with both limbs.

36. As noted at paragraph 32 above, Mr. Griffiths submits that meeting the 'real prospect of success' test for permission to appeal, will be a 'difficult test to satisfy'. I consider that, on a proper reading of the note, this reference has been taken out of context as it relates to applications for leave where there is challenge to the trial judge's finding of fact, not to applications for leave generally, and reflects the approach that an appellant court will be slow to interfere with a lower court's finding of fact.

37. I am not of the view that the correct test is in any way particularly different under the CPR than it was prior to their application. I have set out above the relevant authorities. In <u>*Smith -v- Cosworth Casting Processes Ltd.*</u> pre-CPR, Lord Woolf states "*… the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not* sufficient." In <u>*Swain -v- Hillman*</u> a post-CPR decision, he uses almost identical terms, "*The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…"*. See also Brooke LJ in <u>*Tanfern Ltd -v- Cameron-MacDonald and Another*</u> at paragraph 25 above.

38. I do not therefore put the test as high as Mr. Griffiths would urge (paragraph 32 above) and Simons J held (paragraph 33 above).

39. The proposed 12 grounds of appeal have been set out in full in the summons seeking leave and are repeated in Mr. Missick's skeleton argument. As I noted at the hearing, the

Defendant appears to take issue with everything Simons J decided in respect to the application. It is not necessary for me to rehearse all of the 12 grounds here. It is not for me to consider the substance of the appeal (*Nathan -v- Smilovitch and another* [2002] All ER (D) 573 (May)) but to consider whether any of the proposed 12 grounds have a realistic prospect of success and, I would suggest, anything stated in this judgment which may give rise to an amendment or addition to those grounds.

40. Again, from *Smith -v- Cosworth Casting Processes Ltd.*

> *"Where leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave.*
>
> *When leave is granted, the applicant does not need to know more than that he has the leave which he needs and therefore that he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application which is usually made ex parte"*

41. It is of course the case that this application has not been made *ex parte* and I have the benefit of hearing argument from both sides as to the proposed grounds of appeal.

42. It is beyond peradventure that a number of the grounds have no prospect of success, for example, the suggestion that the learned judge failed to considered the amended defence. It is plainly apparent that the amended defence was considered as at paragraph 10 of his ruling Simons J states:

> *"Two examples will suffice to justify the harshness of this assessment, one from Ms. Rodriguez's 1st Affidavit and one from the Original Defence and* ***Amended Defence*** *(filed without leave)."* (Emphasis added)

The amended defence is referenced in paragraphs 9 to 11 of the ruling.

43. Also, in my view the suggestion that the application for security for costs should have been dealt with before considering the summary judgment does not even reach a fanciful prospect of success.

44. The above examples are not to be considered exhaustive as per Lord Woolfe in *Smith -v- Cosworth Casting Processes Ltd*:

> *"It is a misconception to assume that because only one aspect of the proposed appeal was mentioned in any reasons which were given, that leave was granted under a misapprehension that there were not other issues to be determined on any appeal unless the reasons make this clear.*"

The same applies to grounds that do not have a realistic prospect.

45. Notwithstanding that both the Defence and amended defence have a paucity of pleading and are replete with non-admissions, it is clear that there is dispute as to the monies claimed and payments alleged to have been made. The application before Simons J was not an Ord. 18 r. 13 or r.19 strike out application. If it were, in my view the proper course would be to allow the Defendant to [further] amend the Defence, and I would adopt the reasoning and approach of Hylton J in *Frank Gedeus -v- Gilbert Fitzroy Selver* (CL-51 of 2016) [2022] TCASC 28[2].

46. There are matters arising from the judgment and the proposed grounds which lead me to conclude that there are good reasons why leave should be granted, particularly, in light of my view that the test of 'a realistic prospect of success' has been set too high by Simons J.

47. Further there appears to have a been a misunderstanding or a misinterpretation of a pleading. At paragraph 8 of the amended defence the Defendant pleads:

> *"Except that it is denied that the Estate owes any money to the Plaintiffs, Paragraph 14 of the Statement of Claim is admitted. Any money that was given to Cliff Sampath as a loan he paid back to the Plaintiffs during his lifetime."*

The reference to paragraph 14 is obviously an error.

48. At paragraph 10 of the amended defence the Defendant pleads:

> *"Further, the Defendant says that any advance of funds by the Plaintiffs to the Defendant was a gift from the Plaintiffs and to Cliff Sampath …" (sic)*

Again, there are obvious errors in the drafting of this pleading but putting those to one side, Simons J contrasted these 2 averments as follows:

> *"The Amended Defence differs only in that it asserts at Paragraph 8 that any money given to the deceased as a loan was paid back during his lifetime, and at the new Paragraph 10, which asserts any advance of funds by the Plaintiffs to the deceased were gifts and, in relation to the First Plaintiff, reliance is had to the presumption of advancement.* ***The internal inconsistency of the pleading is inescapable****."* (Emphasis added)

49. It is apparent that Simons J took the 2 averments as being contradictory. I can see an alternative in that there were different characteristics to the sums advanced. Some of them being loans (which it is averred were repaid) and other sums which were gifts. If the monies advanced were looked at in that way, then the incontinency is rather less apparent.

50. This to a degree is supported by the 2nd affidavit of the 2nd Plaintiff, filed in response to that of Ms. Rodriguez. At paragraph 27 of her affidavit Ms. Rodriguez states:

[2] At paragraphs 19 to 23

"In particular, what the Plaintiffs have failed to disclose which I believe is in intentional is that the deceased has sent both the Plaintiffs tens of thousands if not hundreds of thousands of dollars over the years. ***I refer to copies of some of the deceased bank's statements that I found at pages 11 to 13****. (sic)"* (Emphasis copied)

It is perhaps noteworthy that these payments appear to have been made in 2018. Ms. Rodriguez goes on at paragraph 28:

"I personally gave the 1st Plaintiff $30,000 in cash for and at the direction of the deceased when the 1st Plaintiff visited his son in Providenciales the December before the deceased died."

51. In response, the 2nd Plaintiff seeks to explain this at paragraph 7 of her 2nd affidavit:

"I refer to pages 11 to 13 of the exhibit GR 1. It appears Ms. Rodriguez has had access to the Deceased (sic) bank account and his banking records. Those payments to me related to the earlier loans (pre-2003) to the Deceased and did not relate to the subject matter of my claim in this Action."

In contrast at paragraph 6 of the same affidavit the 2nd Plaintiff states:

"The loans the subject of this Action were advanced to the Deceased from 2003 onwards when the Deceased left Trinidad and moved to the Turks and Caicos Islands. Prior to 2003, the Deceased lived in Trinidad and the First Plaintiff and I had also advanced monies as earlier loans to the Deceased which had not been repaid by the Deceased…"

And at paragraph 9:

"The First Plaintiff has told me that he did not receive US$30,000.00 in cash and this is the first he had heard of this allegation…"

52. Mr. Missick referred the Court to the guidelines propounded by May LJ in *S -v- Gloucestershire County Council*; *L -v- Tower Hamlets London Borough Council and another* - [2001] 2 WLR 909 submitting that the learned judge has erred in law for failing to take into account those guidelines. Those guidelines are that the court must be satisfied:

53. All [substantial] relevant facts reasonably capable of being brought before the court are before it.

a) [That the facts are undisputed or] that there is no real prospect of disputing such facts.

b) There is no real prospect of oral evidence affecting the court's assessment of the facts.

c) There is no real prospect of gaps in the evidence being filled.

d) There is no real prospect of the claim or issue succeeding or of the defence or issue being successfully defended.

e) There is no other reason why the case should be disposed of at trial.

54. It appears to me that there were certainly matters in the papers that were before Simons J which provided the Defendant with a defence that satisfied the test of having a reasonable prospect of success, based on the above authorities, and as such there are grounds of appeal that too satisfy the test. Furthermore, it does not appear to me that all the relevant facts that were reasonably capable of being brought before the Court were, in fact before the Court. I therefore grant leave to the Defendant to appeal the summary judgment.

55. That then leaves the 2 remaining applications. The 1st is that request for a stay of the judgment pending appeal.

56. Mr. Griffiths did not address me at any length regarding the stay application other than to say that it falls away if leave is not granted. Mr. Missick advised that the only asset of the Estate is the property registered as parcel 60900/213 and whilst this is disputed, it is clearly a significant asset of the Estate. He submits that it is clear that unless a stay is ordered then the Plaintiffs will proceed to dispose of the property and that as both Plaintiffs are non-resident in the Turks and Caicos Islands the funds will be dissipated overseas and the administration of the Estate will be otiose and hence the appeal rendered nugatory. There is force in that argument in light of the 3rd application that is before me.

57. It is of course established principle that an appeal does not act as a stay of the judgment and that the Court will not grant a stay unless there are good reasons for doing so. The common situations whereby the Court might be minded to grant a stay (see note 59/13/2) are particularly relevant to the case at bar. I am of the view that this is a matter in which a stay would be appropriate. The asset in question cannot be disposed of by the Defendant unless and until the caveat with respect to the grant of letters of administration is warned off or lifted, in my view an unlikely occurrence absent further litigation. If a stay is not ordered and the charging order is made absolute the Plaintiffs will no doubt proceed to sell the property outside of the Estate and the proceeds dissipated to 2 other jurisdictions, to recipients who have no assets in the Turks and Caicos Islands, leaving the Estate potentially insolvent to the detriment of any other creditors. Accordingly, I order that the judgment of 3rd May 2022 is stayed pending appeal.

58. This does appear to be a modest Estate and in light of my comments at paragraphs 39, 42 & 43 above, I would urge the Defendant to hone down the grounds of appeal in order that the same may be disposed of with the minimum of costs.

59. With respect to the application for the charging order nisi, to be made absolute, in light of my decisions above that of course cannot happen. Certain criticism is made by Mr. Missick with respect to the charging order application such that the charging order should not be made absolute, but such criticism would only be relevant in the event of the Defendant having not being successful on the leave and stay applications and accordingly I do not need to deal with them.

60. Also, Mr. Griffiths takes issue as to the approach the Court should take in respect of the aforementioned criticism, submitting that the judicial consideration set out in the White Book with respect to such applications do not apply due to the omission of Order 50 from the Civil Rules 2000. In the circumstances I do not need to deal with those arguments either. I do however adopt the guidance from Note 50/9A/42 which provides that when the Court further considers the matter after an order nisi has been made "*the Court must either make absolute the order nisi, with or without modification or discharge it. A charging order nisi ought to not be left in a state of uncertainty or ambiguity; it must either be made absolute or discharged*." Even if these rules do not apply, I am of the view that this is the correct approach and I therefore order the charging order nisi made on 29th July 2022 is discharged.

61. I shall hear counsel on the issue of costs.

22 November 2022

The Hon. Justice Anthony S. Gruchot
Judge