

**IN THE SUPREME COURT OF BELIZE A.D. 2020**

**CLAIM NO. 42 of 2020**

**BETWEEN (DORIAN GRYFFYN  
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(FBS MARKETS INC.**

**CLAIMANT**

**DEFENDANT**

**BEFORE THE HONORABLE JUSTICE LISA M SHOMAN**

**Application by Defendant/Applicant for Leave to Appeal and Stay of Proceedings pending Approval.**

Appearances: Ms. Ashanti Martin and Ms. Erin Quiros for the Claimant  
Ms. Iliana Swift for the Defendant

**JUDGEMENT**

**BACKGROUND**

1. I thank both Counsel for the Applicant and the Respondent for the extensive written submissions provided to the Court, as well as for the supplemental cases provided to the Court, as well as the oral arguments made to the Court on November 8, 2021.
2. Both parties agree on the Applicable Test for Security for Costs; and the point of departure is how that test is to be applied and in particular, how it is applied to this case in which Applicant is asking for the Claimant/Respondent, an individual, to pay security for its costs in these courts prior to any further proceedings.

3. On June 7, 2021, this Court exercised its discretion and dismissed the Defendant's application for security for costs and a stay of proceedings. By notice of Application dated June 28, 2021, the Defendant/Applicant has applied for:
  - 1) An order that the Defendant be granted leave to Appeal;
  - 2) An Order that proceedings be stayed pending the determination of the Appeal; and
  - 3) An order that Costs of Application be in the cause.
  
4. The grounds are set out in the application and in essence are as follows:
  - i. There is a prima facie case that error has been made in the judgment and therefore leave to Appeal should be granted;
  - ii. The Judge's decision was informed by a wrong principle;
  - iii. The learned Judge took into account irrelevant matters, so that the ultimate decision is so aberrant that no reasonable Judge could have reached it;
  - iv. Should leave be granted to appeal and these proceedings are not stayed, the appeal will be rendered nugatory.
  
3. There is no dispute on the law relating to the grant of leave to appeal. The case of *Kevin Millien v. BT Trading Ltd.* Claim 325 of 2014 is ultimately guided by the principles set out by the Belizean Court of Appeal President Sosa in *Wang v. Atlantic Industries*, from which the "Wang Test" (as it is sometimes referred to in Belize) is derived sets out the circumstances in which a Court will grant leave to appeal to an Applicant, and consequently, sets out three categories of case, one of which the Applicant must establish.
  
4. I accept the further guidance of the Court of Appeal in *Belize Telemedia Ltd. V. Attorney General of Belize, et al* – Civil Appeal No. 23 of 2008 in respect of interlocutory orders such as this one.
  
5. The Applicant has to satisfy this Court that in exercising its discretion, the Court made a

mistake of law; disregarded principle; misapprehended facts; took into account irrelevant material; ignored relevant material or failed to exercise its discretion.

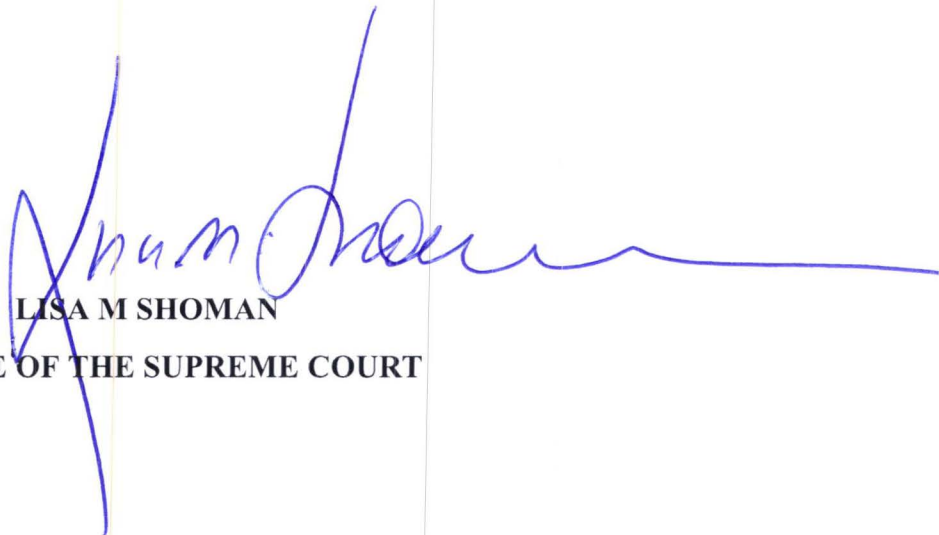
6. The Applicant, in its intended Notice of Appeal identified the following as errors:
  - a. The learned Trial Judge erred in law and/or misdirected herself in finding that an Order for Security for Costs would stifle the claim;
  - b. The learned Trial Judge erred and or misdirected herself in failing to consider whether the Claimant's claim was genuine or had any "prospect of success";
  - c. The learned Judge's decision was informed by a wrong principle in law;
  - d. The learned Trial Judge erred in law and/ or misdirected herself in failing to consider the cause of the Claimant's impecuniosity;
  - e. The learned Trial Judge erred in failing to properly balance the rights of the Claimant against that of the Defendant in light of the residence of the Claimant and his lack of assets in Belize.
  - f. The learned Judge took into account irrelevant matters so that the ultimate decision is so aberrant that no reasonable judge could have reached it;
  - g. The decision is against the weight of the evidence.
  
7. The test that this Claimant/Respondent relied on was that which set out in the Belizean Court of Appeal case of *Fort Street Tourism Village v. Suzanne Kilic* Civil Appeal No. 26 of 2016 in respect of the exercise of the discretion of the Court in its decision of the Security for Costs Application made by the Defendant/Applicant

8. The Applicant concedes (the parties having agreed that the Claimant was ordinarily resident outside Belize and had no assets in Belize) that the Judge's Decision turned on whether it was just to make the Order.
9. At the heart of the Defendant/Applicant's contention, is that there is insufficient evidence before the Court to support that finding that an Order for Security for Costs would stifle the claim.
10. In support of this the Court is asked to apply the principles as set out in *Keary Developments Ltd. v Tarmac Construction Ltd. and Another* [1995] 3 All E.R. 534. The Keary Developments Ltd. case was an appeal case against an order of a tribunal dismissing an application by a defendant company for an order that the plaintiff company give security for costs of the claim. In considering whether it was just to order payment of security for the costs of the claim, Peter Gibson LJ in his judgment included among, "the relevant principles" (i. e. considerations), a balancing exercise. He stated that the court must carry out a balancing exercise; and that it must weigh the injustice to the plaintiff against the injustice to the defendant, of making or not making an order of security for costs.
11. In this current case, the Applicant has zeroed in on the evidence of the Claimant as to his financial difficulties, specifically his unemployment, and why he would personally be unable to pay security for costs or unable to secure a loan to do so.
12. The Applicant submits that based on the *Keary* decision, the Claimant had an evidentiary burden which he did not discharge, to prove to the Court additionally that he would also be unable to obtain the costs from third parties. The Applicant says that given that there was no evidence before the Court regarding whether the Claimant was in fact unable to obtain the funds from third parties; that there was consequently, insufficient evidence for the Court to find that an order for security for costs would stifle the Claimant's claim.

13. The Applicant says that the Court erred in finding that an order would stifle the claim since the Court was obliged to consider the cause of the Claimant's impecuniosity and failed to attribute sufficient weight to this evidence when conducting the necessary balancing exercise.
14. The Applicant' Counsel provided two further authorities for Court to consider :
  1. *Julienne Haynes Seymour v. Elliot Mottley*, Civil Suit No. CV0563 of 2018, and
  2. *Ackerman v. Ackerman & Ors* [2011] EWHC 2183.
15. As Counsel for the Claimant/Respondent rightly points out, these authorities are persuasive, not binding authorities on this Court, and indeed both cases are distinguishable from this case on the facts.
16. The Keary case is an authority which is more properly applicable to companies, and I accept that the citation referred to by Counsel for the Applicant in the *Haynes v. Seymour* case at Paragraph 70, is likewise based on two other cases which deal with companies - and not with an individual. The Court faced with a similar situation with regards to the impecuniosity of a company is indeed obliged to consider whether such a company may raise the necessary funds elsewhere; but does that cross-apply to an individual?
17. The exercise of the discretion of the Court must be a careful balancing act. This is also acknowledged in the *Ackerman* case. In this current case, the Court has concluded the necessary careful balancing exercise. I do not find that the Claimant/Respondent was required to demonstrate to the Court (especially given his particular circumstances) if he was able to raise funds elsewhere. The authorities cited by Counsel for the Applicant, after careful examination, do not persuade me that the principles which are applicable to companies can or should cross-apply to an individual.

18. I therefore decline to grant the Application for Leave to Appeal since in my considered view, the Applicant has not established that it met the criteria necessary for this Court to grant leave to appeal the order which was made on June 7<sup>th</sup>, 2021. This being the case, I would also decline to allow a stay of proceedings in this matter. As Counsel have both submitted orally, the grant (or not) of a Stay follows the event of the grant for security for costs.
19. I do not find that refusal of the stay would in any event render the appeal nugatory or that the Appellant would suffer loss, which could not be compensated and damages. There is no evidence as to this effect and the Applicant's Application is silent on the matter. This Court intends to employ its Case Management powers in such a way as to ensure that this does not occur and that any Appeal in this regard would conclude prior to trial.
20. No order as to costs.

**DATED November 30, 2021**



**LISA M SHOMAN**

**JUSTICE OF THE SUPREME COURT**