

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 229 OF 2001

TELESYSTEM INTERNATIONAL WIRELESS INC

(A company incorporated under the laws of Canada)

TIW DO BRASIL LTDA

(A limited liability co. organised under the laws of Brazil)

Plaintiffs

- and -

CVC/OPPORTUNITY EQUITY PARTNERS, L.P.

(A Cayman Islands Exempted Limited Partnership)

CVC/OPPORTUNITY EQUITY PARTNERS, LTD.

(A company incorporated under the laws of the Cayman Islands) (Sued in its capacity as the General Partner of CVC/Opportunity Equity Partners, LP)

VERONICA VALENTE DANTAS RODENBURG & DANIEL VALENTE DANTAS

Defendants

REASONS FOR JUDGMENT of THE HONOURABLE MR. JUSTICE SANDERSON
on the 5th day of October, George Town, Grand Cayman.

APPEARANCES:

For the PLAINTIFF:

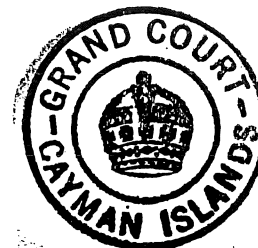
MR. M. BLACK Q.C.

MR. S. ANDREW

For the DEFENDANTS:

MR. A. TRACE Q.C.

MR. A. BOLTON



1 R E A S O N S F O R J U D G M E N T

2

3 SANDERSON, J.:

4 The plaintiff seeks leave to appeal the decision of Graham,
5 J. made on July 19, 2001, where he ordered that these
6 proceedings be stayed. He did so because he concluded there
7 was a *lis alibi pendens* in Brazil and that Brazil was the
8 convenient and proper forum for the parties to litigate the
9 issues.

10

11 The plaintiff had previously obtained an injunction in these
12 proceedings freezing the defendant's assets here, up to a
13 maximum amount of US \$390,000,000. I am told that the
14 injunction has actually frozen approximately \$60,000,000 in
15 the Cayman Islands. The plaintiff, therefore, also seeks an
16 order that if leave is granted, then that injunction should
17 be continued.

18

19 Alternatively if leave is not granted, the plaintiff
20 requests that the present injunction should not be
21 discharged until leave to appeal is sought from the Court of
22 Appeal. In the further alternative, the plaintiff requests
23 that a new injunction should issue.

24

25

(Sanderson, J. -- Reasons for Judgment)

1 The test for leave to appeal is, does the appeal have a real
2 prospect of success? Real means realistic and not fanciful
3 (see Bridge Trust Co. Ltd. and Robert N. Slatter v. The AG
4 of the Cayman Islands, Cause No. 296/94, Grand Court of the
5 Cayman Islands, July 13th, 2001 and Swain v. Hellman(1999)
6 The Times 4th November and Tanfern Ltd. v. Cameron-McDonald
7 (2000) 17th May.)

8
9 Mr. Black referred to the practice directions given by Lord
10 Woolf MR (as he then was) in his consolidated Practice
11 Direction ([1999]1 WLR 2, 3) in relation to the seeking of
12 leave under the English rules.

13

14 "The general test for leave

15 10. There is no limit on the number of
16 appeals the Court of Appeal is prepared to
17 hear. It is therefore not relevant to consider
18 whether the Court of Appeal might prefer to
19 select for itself which appeals it would like
20 to hear. **The general rule applied by the Court**
21 **of Appeal, and thus the relevant basis for**
22 **first instance courts deciding whether to grant**
23 **leave, is that leave will be given unless an**
24 **appeal would have no realistic prospect of**
25 **success.** Fanciful prospect is insufficient.

(Sanderson, J. -- Reasons for Judgment)

1 Leave may also be given in exceptional
2 circumstances even though the case has no real
3 prospect of success if there is such an issue
4 which, in the public interest, should be
5 examined by the Court of Appeal. Examples are
6 where a case raises questions of great public
7 interest or questions of general policy, or
8 where authority binding on the Court of Appeal
9 may call for reconsideration.

10 11. The approach will differ depending on
11 the category and subject matter of the decision
12 and the reason for seeking leave to appeal, as
13 will be indicated below. **However, if the issue**
14 **to be raised on the appeal is of general**
15 **importance that will be a factor in granting**
16 **leave.** On the other hand, if the issues are
17 not generally important and the costs of an
18 appeal will far exceed what is at stake, that
19 will be a factor which weighs against the grant
20 of leave to appeal.

21 A point of law

22 12. Leave should not be granted unless the
23 judge considers **that there is a real prospect**
24 **of the Court of Appeal coming to a different**
25 **conclusion on a point of law which will**

(Sanderson, J. -- Reasons for Judgment)

1 **materially affect the outcome of the case.** An
2 appeal on the grounds that there is no evidence
3 to support a finding is an appeal on a point of
4 law, but it is insufficient to show that there
5 was little evidence.

6 A question of fact

7 13. The Court of Appeal will rarely
8 interfere with a decision based on the judge's
9 evaluation of oral evidence as to the primary
10 facts or if an appeal would involve examining
11 the fine detail of the judge's factual
12 investigation.

13 14. **Leave is more likely to be appropriate**
14 **where what is being challenged is the inference**
15 **which the judge has drawn from the primary**
16 **facts, or where the judge has not received any**
17 **particular benefit from having actually seen**
18 **the witnesses, and it is properly arguable that**
19 **materially different inferences should be drawn**
20 **from the evidence. In such a case the judge,**
21 **if he grants leave, should expressly indicate**
22 **that is if basis on which leave is given.**

23 15. If a case is one which has involved
24 considering many witnesses and/or documents, it
25 will be especially important that the trial

(Sanderson, J. -- Reasons for Judgment)

1 court considers whether to grant leave and,
2 where it refuses leave, gives its reasons for
3 doing so. This is because in a case of this
4 sort the Court of Appeal is less able to assess
5 whether an appeal is appropriate.

6 Questions of discretion

7 16. The Court of Appeal does not interfere
8 with the exercise of discretion of a judge
9 unless the court is satisfied the judge was
10 wrong. The burden on an appellant is a heavy
11 one (many family cases do not qualify for leave
12 for this reason). **It will be rare, therefore,**
13 **for a trial judge to give leave on a pure**
14 **question of discretion. He may do so if the**
15 **case raises a point of general principle on**
16 **which the opinion of a higher court is**
17 **required.**

18 Appeals from interlocutory orders

19 17. An interlocutory order is an order
20 which does not entirely determine the
21 proceedings: see R.S.C., Ord. 59, r. 1A. Where
22 the application is for leave to appeal from an
23 interlocutory order, **additional considerations**
24 **arise: (a) the point may not be of sufficient**
25 **significance to justify the costs of an appeal;**

(Sanderson, J. -- Reasons for Judgment)

1 (b) the procedural consequences of an appeal
2 (e.g. loss of the trial date) may outweigh the
3 significance of the interlocutory issue; (c) it
4 may be more convenient to determine the point
5 at or after trial. In all such cases leave to
6 appeal should be refused."

7
8 In addition to the above paragraphs which were cited by
9 Mr. Black in his written argument, Lord Woolf also stated in
10 paragraph 8:

11 "From which court should leave to appeal
12 be sought?

13 8. The court which has just reached a
14 decision is often in the best position to judge
15 whether the case is or is not one where there
16 should be an appeal. It should not leave that
17 decision to the Court of Appeal. Courts of
18 first instance can help to minimise the delay
19 and expense which an appeal involves. Where
20 the parties are present for delivery of the
21 judgment, it should be routine for the judge
22 below to ask whether either party wants leave
23 to appeal and to deal with the matter then and
24 there. However, if the court of first instance
25 is in doubt of whether an appeal would have a

(Sanderson, J. -- Reasons for Judgment)

1 real prospect of success or involves a point of
2 general principle, the safe course is to refuse
3 leave to appeal. It is always open to the
4 Court of Appeal to grant leave."

5

6 These practice directions have been considered and followed
7 in this jurisdiction (see Ramon E. Beteta v. Columbraria
8 Ltd., Grand Court of the Cayman Islands, Cause 638 of 1999
9 judgment of Kellock, J. - June 7th, 2000.)

10

11 The salient facts of this case are set out in Graham, J.'s
12 reasons for judgment, and I will not repeat all of them. In
13 summary, the plaintiff commenced similar proceedings in
14 Brazil where the main issue was whether or not there was an
15 enforceable letter agreement which terms required the
16 defendant to cooperate with the plaintiff such that they
17 could exercise majority control in the Brazilian company in
18 which they had invested. After those proceedings were
19 commenced in Brazil, similar proceedings were brought here
20 where that issue, as well as other collateral and related
21 issues, were pleaded.

22

23 For the reasons mentioned by Mr. Justice Graham in his
24 reasons for judgment, he concluded that there was a *lis*
25 *alibi pendens* in Brazil and he stayed the proceedings here

(Sanderson, J. -- Reasons for Judgment)

1 on the basis of a foreign non-convenience argument. He
2 concluded that the proceedings would most suitably and
3 fairly be litigated in Brazil. Since that decision was
4 given, the proceedings have continued in Brazil where CVC
5 was successful in resisting the plaintiff's claim there.
6 The court in Brazil concluded that the letter agreement was
7 only a fallback arrangement and was never put into effect.
8 The plaintiff wishes in these proceedings, if allowed to
9 continue, to argue the validity of the letter agreement and
10 invites this court to ultimately reach a conclusion contrary
11 to the finding of the court in Brazil.

12

13 I am also advised by Mr. Black that the judgment in Brazil
14 is currently under appeal.

15

16 The plaintiffs filed a document which contains several
17 potential grounds of appeal and points out several alleged
18 errors in the reasons for judgment of Mr. Justice Graham.
19 For the reasons argued by the plaintiff, I do not think that
20 any of them have a real prospect of success. I acknowledge
21 that there is a possibility that they might succeed, but I
22 just do not think that it is a realistic one.

23

24 I am also not persuaded that there is a point of general
25 importance or public interest such as to warrant the

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1 granting of leave to appeal in a situation where I do not
2 think there is a reasonable prospect of success.

3

4 Further, CVC has already succeeded on this issue in Brazil
5 subsequent to the decision of Mr. Justice Graham. The
6 plaintiff now seeks to have that same issue litigated here.
7 It argues, in part, that it should be entitled to elect the
8 proceedings in the jurisdiction it wants to continue and
9 that there is a different claim being made here than there
10 was in Brazil. The essence of the claim being made here is
11 the validity and enforceability of the letter agreement and
12 that issue has been clearly resolved against the plaintiff
13 by the Brazilian courts. I do not think it is likely that
14 our Court of Appeal would allow what are essentially
15 duplicate proceedings to carry on here when that issue has
16 been resolved elsewhere.

17

18 Accordingly, having reached the conclusion that there is no
19 realistic prospect of success, the application for leave to
20 appeal is dismissed.

21

22 In the event that I refused leave to appeal, the plaintiff
23 sought a stay of my order and an order that the injunction
24 be continued until determination of this issue by the Court
25 of Appeal. I am prepared to grant this request on a very

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1 limited basis only.

2

3 Mr. Justice Panton and Mr. Justice Graham felt that an
4 injunction was appropriate in order to preserve the assets.

5 The strength of the plaintiff's case is now weaker than it
6 was when the injunction was granted by Panton, J. and

7 extended by Graham, J. because of the events that have

8 transpired in Brazil. There is, however, \$60,000,000 here
9 that is covered by the injunction and could potentially be

10 lost to the plaintiff should the Court of Appeal grant leave
11 to appeal and set aside the decision of Mr. Justice Graham.

12 Considering the interests of both the plaintiff and the
13 defendant, I think it is appropriate to continue the

14 injunction until November the 23rd, 2001. This will allow
15 the plaintiff time to apply to the Court of Appeal for

16 leave. I would suggest that this be done on notice rather
17 than *ex parte*. Unless the injunction is renewed by the

18 Court of Appeal, it will lapse on November 23rd, 2001.

19

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23



24

THE HON. MR. JUSTICE D.G. SANDERSON

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