



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 79 OF 2022 (DDJ)

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF POSITION MOBILE LTD SEZC**

Before: The Hon. Justice David Doyle

Heard: On the papers

**Draft Judgment
circulated:** 8 December 2023

Judgment delivered: 12 December 2023

HEADNOTE

Determination of application for leave to appeal

JUDGMENT

Introduction

1. By a summons dated 14 November 2023 (the “Application”) Technology Investment Consortium LLC (the “Petitioner”) seeks leave to appeal “the judgment ... 31 October 2023 to the Court of Appeal”. The Petitioner also, somewhat unusually, seeks that the costs of the Application be costs in the cause of the summons dated 3 August 2023 (the “Second JPL

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Summons”) of the Petitioner for the appointment of joint provisional liquidators to Position Mobile Ltd SEZC (the “Company”). By order made on 31 October 2023 (the “Order”) I dismissed the Second JPL Summons. Paragraph 2 of the Order expressly limited concise written submissions in support of any ancillary applications to 5 pages and at paragraph 4 it was stated that they would be dealt with on the papers without a further hearing. Concise written summons were required before 3pm on 27 November 2023 and any concise submissions in response before 3pm on 6 December 2023.

2. I have considered:
 - (1) the Petitioner’s bundle of documents and authorities for application for leave to appeal;
 - (2) although not included in the Petitioner’s bundle, the Order;
 - (3) the Petitioner’s 9 page written submissions for permission to appeal dated 27 November 2023 from Michael Wingrave and Jack Stringer of Dentons;
 - (4) the 5 page written submissions of Genimous Investment (Hong Kong) Co., Ltd and Genimous Holding (HK) Limited (the “Respondents”) from Stephen Moverley Smith KC and Peter Kendall dated 6 December 2023.

The relevant tests

3. In *Wang v Credit Suisse AG* (unreported FSD judgment delivered on 10 May 2022) I referred to *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners LP* 2001 CILR N-21 (Grand Court: Sanderson J) and the general test:

“Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? ... In exceptional circumstances, leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration ... if the Court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter.”

4. Morrison J.A. in his reasons delivered on 21 September 2017 in *Select Vantage Inc. v Cayman Islands Monetary Authority* (Civil Appeal No 22 of 2017) reiterated the general rule as follows at paragraph 26:

“The general rule is that leave to appeal will be given only in the case of an appeal with a realistic (as distinct from a fanciful) prospect of success. In exceptional circumstances, leave may also be given if there is an issue which, in the public interest, should be examined by the Court of Appeal. Leave will generally not be given in the case of an appeal from a judge’s exercise of a discretion (unless it can be shown to have been palpably wrong); nor will leave usually be given in the respect of a proposed appeal from a decision based on a judge’s evaluation of oral evidence as to the primary facts.²¹”

Footnote 21 reads:

“See generally Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2.”

5. Where interlocutory appeals are concerned the court should also note the judgment of Sanderson J in *CVC/Opportunity Equity Partners Limited v Demarco Almeida* 2001 CILR Note 20. The concise note in the law reports in respect of that judgment reads as follows:

“Leave to appeal from an interlocutory order will be refused, even when the appellant has a realistic prospect of success, if (a) the point raised by the appeal is not sufficiently significant to justify the resulting costs; (b) if the significance of the point is outweighed by the procedural consequences, e.g. the loss of an existing trial date; or (c) it will be more convenient to determine the point at or after the trial (*Practice Direction (Court of Appeal: Leave to Appeal & Skeleton Arguments)*), [1999] 1 W.L.R. 2, applied.”

Determination

6. The Petitioner refers to 5 grounds of appeal:
- (1) a misdirection as to the standard for the assessment of necessity and the assessment of evidence supporting necessity;
 - (2) a failure to treat assertion of fact as proven and a failure to import a concession of a *prima facie* case into considerations concerning necessity;
 - (3) a wrong approach to the expert evidence;

- (4) an error in the assessment of the Amended Agreements;
 - (5) errors in respect of proportionality and wrongful criticism of the Petitioner's failure to expeditiously progress its winding up petition and its contempt application.
7. In my judgment leave to appeal should not be granted in this case as the appeal does not have a real prospect of success and there is nothing otherwise in the public interest which warrants the time and attention of the Court of Appeal. Accordingly, I refuse leave to appeal and can, in the circumstances, keep my reasoning concise.
8. The majority of the grounds of appeal go to matters of evidence, inferences and the exercise of a judicial discretion. In respect of Ground 1 and Ground 2 it is clear from the statutory language that the lower *prima facie* hurdle only applies to section 104(2)(a) and not to the necessity hurdle. In respect of Ground 3 the Petitioner says, as regards the expert evidence, that "The Learned Judge would have been driven to prefer the evidence of Dr Malek on the key issues which his evidence was produced to prove." The Petitioner suggests that there are "good prospects that the Court of Appeal will reach a different view to the Learned Judge on whether or not and, if so, how to resolve the expert evidence." The Petitioner concedes that "Ground 4 concerns the Learned Judge's treatment of factual evidence" and suggests that "the Learned Judge drew wrong inferences or should have drawn materially different inferences from the Amended Agreements and the surrounding facts." The Petitioner suggests that "there are good grounds for considering that the Court of Appeal will draw materially different inferences from the Amended Agreements ...". The Petitioner also concedes that "Ground 5 properly arises in connection with the comments of the Learned Judge upon the exercise of his discretion." The Petitioner suggests that the judge was wrong to criticise the Petitioner for failing to promptly progress its winding up petition and its application for contempt. It is difficult to conceive of an appellate court taking issue with a trial judge wishing petitioners to act expeditiously.
9. The Petitioner in respect of Ground 1 raises a novel point and submits that allegations going to necessity should be resolved as a matter of evidence on the same basis as allegations going to *prima facie* case. I agree with the Respondents that the fact that the Petitioner advances an argument that has never been advanced before (for obvious reasons, namely it being unarguable) is not sufficient to justify leave to appeal: mere novelty is not enough. It is

necessary to show that there is a real prospect of the appellate court coming to a different conclusion.

10. Casting any undue *amour propre* aside and injecting as much objectivity as is humanly possible, it is difficult through my eyes, on the basis of the material and arguments presented to date, to see how the Petitioner has a real prospect of persuading the Court of Appeal that the appeal should succeed.
11. Put simply, as should be clear from an objective reading of the judgment delivered on 31 October 2023, although the lower court had some concerns, the Petitioner presented insufficient evidence and legal arguments to persuade the lower court to press the nuclear JPL button.
12. The appeal does not have a real prospect of success and there is no issue which should be examined by the Court of Appeal in the public interest. Leave to appeal is therefore refused.
13. The Petitioner should pay the Respondent's costs of its failed application for leave to appeal, such costs to be assessed on the standard basis in default of agreement.
14. I should add that the Respondents, in addition to their submissions that there was no real prospect of success on appeal, raised the additional ground of opposition that the proposed appeal is from an interlocutory order (Rule 12(3) Court of Appeal Rules (2014 Revision)) and the caselaw makes it clear that leave to appeal from such, even where an appellant has a realistic prospect of success, should still be refused in certain circumstances including consideration of "procedural consequences". The Respondents add that the procedural consequences of granting leave to appeal in this case will be either yet further delay in prosecuting the winding up petition pending the determination of the appeal (the current delay having already been deprecated) or, if it is prosecuted diligently notwithstanding the appeal, the strong possibility that the appeal will be rendered entirely academic because the petition will have been heard and determined meanwhile. The Respondents submit that given these procedural consequences, even if the court were to conclude that any ground for leave had a reasonable prospect of success (although the Respondents stress that none does) leave should be refused because it would not materially affect the outcome of the case. As I have concluded that the appeal has no realistic prospect of success I do not need to determine this additional *prima facie* powerful ground of opposition raised by the Respondents.

15. I do however reiterate what I said at paragraph 226 of the judgment delivered on 31 October 2023 namely, the Petitioner “would be well advised to focus its efforts and resources on progressing towards the hearing of the winding up petition ...”.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT