Abuse of process and the Court of Appeal's approach to appeals from without notice decisions in the BVI

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This article outlines the findings of the Eastern Caribbean Supreme Court's (the "**Court**") Court of Appeal in ***Greater Sail Limited v Nam Tai Property Inc, Nam Tai Group Ltd & Nam Tai Investment (Shenzhen) Co Ltd*** [1] where the Court considered the proper approach to an appeal against the grant of interim mandatory and prohibitory orders, before the *inter partes* (or on notice) hearing of the application.

The Collas Crill perspective

This case suggests that respondents who wish to challenge injunctions that have been obtained without notice in the BVI should do so by seeking to discharge these, rather than pursuing an appeal before the return date hearing, when the Court will have an opportunity to consider the respondent's evidence and submissions.

In the majority of cases any intervening prejudice to the respondent can be avoided by an early application to the Court, or through the cross-undertaking or payment into Court that an applicant normally has to provide to compensate a respondent in the event that the without notice interim injunction should not have been granted.

The case

The pertinent facts of the case are these.

In October 2021, the Court ordered that a special meeting of the shareholders of the First Respondent, Nam Tai Property Inc (a BVI company) (**"Nam Tai"**) should be held on 30 November 2021. The meeting was duly held and resolutions were passed removing four of the incumbent directors from office and appointing a slate of new directors.

Following the court-ordered shareholders' meeting (the **"Meeting"**), the new board attempted to take control of the assets and affairs of the Nam Tai group of companies, including the Third Respondent, Nam Tai Investment (Shenzhen) Co Ltd (a company incorporated in the People's Republic of China) and other subsidiaries in China.

However, on 1 December 2021, immediately following the Meeting, the Appellant, Greater Sail Limited (a BVI company) (**"Greater Sail**) sent letters to the Shenzhen Administration for Market Regulation Bao'an and Guangming Branches, requesting them not to approve any changes regarding Nam Tai's management and legal representative.

As a result, Nam Tai's new officers and managers were unable to take control of its assets and affairs, as well as those of many of its group of companies, including office premises, bank accounts and corporate seals.

On 26 January 2022, the Respondents to the Appeal (who were the claimants in the High Court) (the "**Respondents**") sought urgent interim orders requiring Greater Sail to allow the new board to take control of the group and its assets. On 31 January 2022, the learned judge in the High Court granted the Respondents a number of *ex parte* (or without notice) interim mandatory and prohibitory orders against Greater Sail (the **"*Ex parte* Order"**). While Greater Sail belatedly complied with the *Ex parte* Order, it appealed contending that the learned judge was plainly wrong in exercising his discretion to grant the *Ex parte* Order, erred by failing to afford procedural fairness to it and failed to provide a reasoned judgment.

The Respondents countered that the appeal was an abuse of process as it was against an *ex parte* order in respect of which there was no application to discharge the same and, that in any event, the appeal had no merit.

The judgment

The Court noted in its judgment that central to the resolution of the issue on appeal is that Greater Sail never applied to the High Court judge to discharge the injunctions and, moreover, the *inter partes* hearing of the application was not listed to be heard until 20 September 2022. Hence, Greater Sail was asking the Court to hear and determine an appeal against the grant of interim mandatory and prohibitory orders before the *inter partes* application had been heard.

In dismissing Greater Sail's appeal, the Court applied the English Court of Appeal decision in ***WEA Records Ltd. v Visions Channel 4 Ltd and Others***[2] where Sir John Donaldson MR said that:

"In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court upon an ex parte application. This jurisdiction is conferred by section 16 (1) of the Supreme Court Act 1981. Equally, there is no doubt that the High Court has power to review and to discharge or vary any order, which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in R.S.C., Ord. 32, r. 6.

As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see R.S.C., Ord. 35, r. 2 (1), and Vint v. Hudspith (1885) 29 Ch.D. 322…"

The Court also applied another English Court of Appeal decision in ***Hunter & Partners Limited v Wellings & Partners***[3] where it was said that, in general, it was most unsatisfactory for an appellate court to be asked to adjudicate on an appeal when only one side's evidence had been filed. Rather, the proper procedure would be for the claimant's application to be stood over to the subsequent *inter partes* hearing, when the first instance court would have the opportunity to consider both sides' evidence. After the court has reached its decision on that evidence, it would be for the party aggrieved, either by the grant or refusal of the injunction, to appeal without leave to the Court of Appeal.

The Court determined that it should adopt the approach set out in the English cases referred to above and said that:

"...to do otherwise could seriously undermine the structure for dealing with interim applications and open the floodgates for leapfrogging over inter partes hearings directly to the Court of Appeal."

In the final analysis, the Court held that it would be improper to allow Greater Sail to appeal to it against an *ex parte* order, without first giving the learned judge an opportunity of reviewing it in light of full evidence and submissions advanced at an *inter partes* hearing.

Please do not hesitate to contact a member of our Dispute Resolution team if you have any questions or if you require any assistance.

[1] BVIHCMAP2022/0009, 21 June 2022.

[2] [1983] 1 WLR 721.

[3] [1987] FSR 83.

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