In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 9

BETWEEN:

FATHER

Applicant

-and-

MOTHER

Respondent

DECISION ON LEAVE TO APPEAL
(Determination on the papers)

Before:	**Hon. Alexandra Wheatley, Acting Justice**
Application made by:	**The Applicant, In Person**
Date Application Filed:	**28 May 2025**
Date of Ruling:	**4 June 2025**

Leave to Appeal; Interlocutory Application; Children Cases; Exercise of Judge's Discretion; Stay Application

WHEATLEY, ACTING JUSTICE

1. This is the Father's application filed on 28 May 2025 seeking leave to appeal (**Leave to Appeal Application**) the Ruling of 16 May 2025 (**the Ruling**). An affidavit sworn on 27

May 2025 was filed in support. The Father is also seeking that the Ruling be stayed until such time as the appeal is determined.

2. The legal test for determining an application for leave to appeal when the decision is based on the Court's discretion is addressed in Justice Subair Williams' decision of *Apex Fund Services Ltd and Hughes v Clingerman and Silk Road Funds Ltd (Leave to Appeal)* [2020] Bda LR 12. The relevant paragraphs are 25 through 29 of Subair William J's Ruling in *Apex Fund*, which state as follows:

> "*25. To a great extent, Counsel's opposing arguments on the applicable test perch on the same branch. Where a decision made by a judge was done in the exercise of the Court's discretion, the grounds will not likely be reasonably arguable or have any real prospect of success unless one can sensibly contend that the judge erred by:*
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> i. *exercising his/her discretion under a mistake of law or misapprehension of the facts;*
> ii. *taking irrelevant matters into consideration or (as I would add) failing to take relevant matters into consideration; or by*
> iii. *reaching any illogical conclusion on any reasonable view.*
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> *26. Where a judge's exercise of discretion is flawed on any of the above grounds, it is arguable that the judge 'plainly got it wrong'.*
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> *27. The test for leave to appeal stated by the English Court of Appeal in the Bank of Credit case is consistent with the ratio in Hadmor Productions Ltd v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042, HL where the House of Lords granted leave to appeal from the Court of Appeal which set aside an interlocutory injunction ordered by Dillon J at first instance. Lord Diplock delivering the unanimous judgment of the House of Lords held as follows [page 220-221]:*
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> > *"… An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application or it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of the appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review. When he set aside the judge's exercise of his discretion on the ground that it was based*

upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified with acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where no erroneous assumption of law or fact could be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside from the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It's only if and after the appellate court has reached a conclusion that the judge's exercise of his transgression must be satisfied for one or other of these reasons, that it becomes entitled to exercise and original discretion of its own…

…

29. It was made clear by the House of Lords in Hadmor Productions that the function of the appellate court is not to substitute its view for the original decision merely because of the difference of opinion. The emphasis here is an appellate Court is a review panel charged with the task of deciding whether or not the judge erred in exercising his or her discretionary powers. Only where the appellate Court is satisfied the that the judge so erred will it then go on to exercise and original discretion of its own." [Emphasis added]

3. The recent UK Court of Appeal case of *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 concerned appeals from four cases which had been consolidated and addressed simultaneously. The President of the Family Division, Lady Justice King and Lord Justice Holroyd gave Judgment which, *inter alia*, confirmed the position regarding the test to apply in applications for leave to appeal in cases where a judge is exercising his or her discretion. Whilst I appreciate that *Re H-N and Others* specifically addresses leave to appeal a fact-finding decision, the legal principles would apply in this instance. The Learned Justices of Appeal addressed the legal principles at paragraphs 75 and 76 as follows:

"*75. Although the House of Lords decision in Piglowska v Piglowska [1999] 1 FLR 763 Concerned and appeal against the courts exercise of discretion in matrimonial finance proceedings, much of Lord Hoffmann's description of the general approach to appeals is expressly applicable to fact finding cases:*

"In G v G (minors: custody appeal) [1985 1 WLR 647, 651-652, this House, In the speech of Lord Fraser of Tullybelton, approve the following statement of principle by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife:

> *'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order we are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, wrong, that an appellate body is entitled to interfere.'*

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. That applies also to the judge's evaluation of those facts. If I may quote what I said in Biugen Inc v Medeva Ltd [1997] RPC 15:

> *'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His express findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*

The second point follows from the first. The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he's demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account."

> *76.* *In hearing and determining present appeals we have endeavored to apply the well-established understanding and approach described in Piglowska, and elsewhere. Full allowance is to be afforded to the trial judge who has heard the evidence of being exposed to the parties and the detail of each case over an extended."* [Emphasis added]

4. In the most recent decision of the Court of Appeal in the case of *BHD v IAH* [2025] CA (Bda) 8 Civ, Justice of Appeal Hargun confirmed the legal position as above by reliance on the case of *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343, 345 which was relied on by the Justices of Appeal in *Re H-N and Others*. Hargun JA stated as follows at [4]:

> "*4.* *As noted by Purchas LJ in Edwards, a decision in relation to issues of access and custody necessarily involves the exercise of discretion by a judge and it would be a rare case where this Court would consider it appropriate to interfere with such a decision. In Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All E.R. 343, Asquith L.J., dealing with the issue when it may be appropriate for an appellate court to interfere with a discretionary decision in matrimonial proceedings, said, at p. 345:*
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> > *"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*" [Emphasis added]

5. Having considered each ground of appeal raised by Mr Brown (as set out in his Notice of Motion, Notice of Appeal, as well as his affidavit in support), I am of the view that each ground of appeal is bound to fail as I do not accept that the Ruling is '*plainly wrong*'. Specifically, I do not accept that any of the following bases would apply:

    i. That I exercised my discretion under a mistake of law or misapprehension of the facts;
    ii. That I took irrelevant matters into consideration or that I failed to take relevant matters into consideration; or
    iii. That I reached any illogical conclusion on any reasonable view.

6. I must also emphasize that an appeal of a decision is not an opportunity for a party to simply attempt to relitigate his or her case. Likewise, it is not an opportunity to advance new arguments which were not raised Counsel at the hearing such as, the allegations that there was "*judicial disruption*" and *"judicial bias*".

7. Accordingly, the Leave to Appeal Application is dismissed. Furthermore, as a direct consequence of leave to appeal being denied, there is no pending appeal before the Courts, which means no relief can be granted for an application to stay execution pending an appeal.[1]

DATED this **4th** day of **June 2025**

ALEXANDRA WHEATLEY
ACTING JUSTICE OF THE SUPREME COURT

[1] Denton Simons et al v Howard Hayward et al [2024] SC (Bda) 19 Civ.