



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023 No: 309

**BETWEEN:**

**HILLCREST PROPERTIES LTD.**

Plaintiff

**And**

**IAN ROBERT MACDONALD-SMITH**

Defendant

## RULING

Dates of Hearing: Thursday 2 April 2026

Date of Ruling: Friday 24 April 2026

Plaintiff: Mr. Paul Harshaw (Canterbury Law Limited)

Defendant: Mr. Conor Doyle (Conyers Dill & Pearman Limited)

*Application for Leave to Appeal against decision to set aside irregular judgment entered in default of appearance and against grant of permanent stay of proceedings pursuant to section 7 of the Arbitration Act 1986 / Application for Leave to Appeal against refusal to grant security of costs - test for an appellate court's interference with a judge's exercise of discretion*

RULING of Shade Subair Williams J

## Introduction

1. This is an application for leave to appeal against the decisions of this Court as reported in *Hillcrest Properties Ltd and Ian Robert Macdonald-Smith* [2025] SC (Bda) 124 civ (3 December 2025) (the “Ruling”). The application for leave to appeal was brought before this Court, the Plaintiff, Hilcrest Properties Ltd (“Hilcrest”), by way of a Notice of Motion for Leave to Appeal dated 15 December 2025 (the “Notice of Motion”). The Notice of Motion is supported by the third affidavit of Mr. Richard Harold Goodwin, a director of Hillcrest. Exhibited to Mr. Goodwin’s evidence is a draft Notice of Appeal by which the proposed grounds of appeal are advanced.
2. In the Ruling I granted the Defendant the relief prayed on his summons dated 16 January 2025 (the “Defendant’s summons”). The Defendant’s summons contained two applications before this Court, namely (i) an application to set aside judgment in default of appearance and (ii) an application for a permanent stay of proceedings pursuant to section 7 of the Arbitration Act 1986.
3. By its summonses dated 14 April 2025 and 19 June 2025, Hilcrest sought an order that the Defendant be required to provide security for costs pursuant to RSC Order 23 Rule 1(1(a)) and / or (b) and / or Order 13 Rule 9 and / or the inherent jurisdiction of the Court. In the Ruling, I refused Hilcrest’s application for security for costs.
4. The application for leave to appeal was argued before me and at the close of the hearing I reserved my decision which I now give with reasons.

## The Test for Leave to Appeal

5. In *Templar Capital Limited v Griffin Line Trading LLC et al* [2023] CA (Bda) 20 Civ Bell JA, sitting as a single judge of the Court of Appeal:

*“Both counsel were agreed upon the principles to be applied on granting leave, expressed most recently in this jurisdiction in the case of Apex Fund Services Ltd v Clingerman [2020] SC (Bda) 12 Comm, where the different tests of arguability in terms of ‘reasonably arguable’ ‘arguable prospects of success’ and ‘reasonable prospect of success’ were held to have no meaningful distinction. The hurdle is recognised by appellate courts considering the grant of leave as being a relatively low one.”*

6. This approach to the threshold for the granting of leave to appeal was necessarily followed by Martin J in *In re Grosvenor Balanced Growth Fund Limited (In Liquidation)* [2025] SC (Bda) 31 civ at [10].

7. Subsequently, however, the Court of Appeal in *Trew v White et al* [2025] CA Bda 21 Civ. outlined the legal test for the granting of leave to appeal. At paras [24]-[35] Subair Williams A/JA provided:

“24. In *Credit Suisse Life (Bermuda) Ltd v Mr. Bidzina Ivanishvili* [2020] BM 2020 SC 43 this Court distinguished between the test applicable to applications for leave to appeal in accordance with the current English Civil Procedure Rules and the test which previously governed leave to appeal applications under the former English procedural rules. Under the old procedural rules, the threshold for a successful leave application was grounded on the question of whether the applicant had established an ‘arguable’ case by way of appeal. However, from 26 April 1999 when Lord Woolf’s reforms were implemented in the form of the CPR, the test changed. Part 52 of the CPR introduced a stricter standard for obtaining permission to appeal. CPR 52.6 provides:

“Permission to appeal test – first appeals

52.6 (1) Except where rule 52.3B (appeals from Court of Appeal to the Supreme Court), rule 52.7 (second appeals) or Rule 52.7A (contempt proceedings where an appeal lies from the Court of Appeal to the Supreme Court) applies, permission to appeal may be given only where— (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.”

25. **CPR 52.6, however, has no application under our procedural law. So, any reliance on that provision to promote the ‘real prospects of success’ test under Bermuda law would be flawed in principle.** How the “real prospects of success” and the “arguable” tests diverge was regrettably misconceived in *Apex Fund Services Ltd v Matthew Clingerman (as Receiver of a segregated account of Silk Road Funds Ltd)* [2020] Bda LR 12. In that case, sitting as a first instance judge, I erred in stating that there is no meaningful distinction between the “real prospects of success” test and the “arguable” test. That was plainly incorrect.

26. **The ‘arguable’ test set by the former English rules did not pin an applicant so firmly against the wall. All that was required was for the applicant to demonstrate that the case on appeal was arguable, otherwise put as “reasonably arguable” or “arguable prospects of success”** (see *Dobie v Interinvest (Bermuda) Ltd and Black* [2010] Bda LR 25, per Kawaley J<sup>1</sup>).

27. The ‘arguable test’ has long been recognized by Bermuda Courts as having been seeded by the then Master of the Rolls, Lord Donaldson of Lynton, in *Credit Commercial de France v Iran Nabuvat* [1990] 1 WLR 1115. ....

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<sup>1</sup> Former Chief Justice and current President of the Court of Appeal

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33. *In the commentary provided in the White Book 1999, it was observed that the test is more prone to favour the granting of leave rather than a refusal. Additionally, it was recognized that leave may be granted where the appeal raises the need for the establishing of a general principle or where a question of importance needs to be decided for the advantage of the public. At [59/14/18] the following appeared:*

*“Circumstances in which leave will be granted- The general test which the Court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospects of success (Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538; [1997] 4 All ER 840, CA). The Court of Appeal may also grant leave if the question is one of general principle, decided for the first time (Ex p Gilchrist, Re Armstrong(1886) 17 QBD 521, per Lord Esher MR t 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes LJ, in Bubkle v Holmes[1926] 2 KB 125 at 127).”*

34. *As stated in the White Book [59/14/27] under the commentary addressing applications by a respondent who seeks to have the grant of leave rescinded, the English Court of Appeal in First Tokyo Index Trust Ltd v Morgan Stanley Trust Co. (1995) The Times, October 6, CA confirmed its decision in the Iran Nabuvat case.*

35. **The Bermuda law position on the granting of leave to appeal aligns with the development of these principles culminating in the ‘arguable’ threshold.** *That was confirmed by this Court in Credit Suisse v Ivanishvili where clear judicial endorsement was given to this approach to applications for leave to appeal.*

8. Having quoted from the *Trew v White et al* judgment, Segal AJ added in *Re Cassatt Insurance Company Ltd* [2025] SC (Bda) 121 Civ at paras [39]–[40]:

*“39. The arguable case standard establishes a low threshold and the applicant has the benefit of a “starting bias.” The Court is required to assess whether it appears, without a detailed analysis of the grounds relied on, that the appeal will in all probability fail and therefore that there is no injustice in denying the applicant the opportunity to appeal and that the case is one which should not take up Court of Appeal time.*

*40. But it cannot be sufficient for the applicant just to say that he/she disagrees with the Court’s findings and decision (i.e., that the Court refused to accept the applicant’s case and evidence as set out at the hearing). Otherwise, the requirement for leave would cease to have any useful*

*screening function. In my view the applicant must still show a cogent basis for challenging the Court's decision, albeit not one with a substantial chance of success. Where the decision that is challenged involved the Court exercising a broad discretion, it will be relevant whether the applicant has identified, and in my view important for the applicant to identify, factors which the Court failed to take, or improperly took, into account."*

9. Refusing leave to appeal, Segal AJ found it necessary to explain his reasoning in "a little more detail than would usually be the case." He cited *Re Bittrex Global (Bermuda) Limited* (in liquidation) [2025] SC (Bda) 113 Civ. quoting from Martin J at para [41] as follows:

*"The reasons for the refusal of leave to appeal are often short and pithy. This is because the refusal of leave is reserved for applications which are "doomed to fail", and it is usually easy to explain why a proposed appeal is hopeless in a few short, well-chosen sentences. However, in some cases, such as this one, the background and the number of points taken (especially in a technical area of the law) requires the Court to give a more detailed explanation as to why the points which are being raised on appeal have, on proper analysis, no realistic prospects of success."*

### **The Test for Interference with a Judge's Exercise of Discretion on Appeal**

10. In *Siddiqui v Athene Holding Ltd* [2019] CA (Bda) 12 Civ at [62] the Court of Appeal approved the following statement from Brandon LJ in *The Abidin Daver* [1984] AC 398:

*"... Where the judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he has made are of limited character. It cannot interfere simply because its members considered that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where the decision is plainly wrong."*

11. Clarke P (as he then was) in *Siddiqui v Athene Holding Ltd* at [63] also referred to the English Court of Appeal Practice Direction "Leave to Appeal in Skeleton Arguments" [1999] 1 WLR 2 at paragraph 16 per Lord Woolf MR, quoting as follows:

*"The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong. The burden on an appellant is a heavy one...It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so*

*if the case raises a point of general principle on which the opinion of a higher court is required" (emphasis added)."*

12. Martin J in *In re Grosvenor Balanced Growth Fund Limited (In Liquidation)* at paras [8]-[10] [footnotes omitted]:

*"8. The Court's decision was an interlocutory case management decision as to the most appropriate way to determine the questions pending in litigation before this Court and was therefore based on the exercise of the Court's broad discretion against the background facts of this particular case.*

*9. The rules regarding the grant of leave to appeal against an interlocutory decision of the court when a discretion of this kind is involved are well established. Although the threshold is a low one, the applicant for leave must show that the appeal is arguable, in the sense that, on proper analysis, it is not "doomed to fail".*

*10. The grounds for appeal against an interlocutory decision must therefore demonstrate an arguable case that the judge (i) made an error of law or disregarded a relevant legal principle (ii) misunderstood the facts (iii) took into account irrelevant facts (or failed to take into account relevant facts) (iv) failed to exercise the discretion at all or (v) came to a conclusion that is outside the generous ambit with which reasonable disagreement is possible—i.e. it was plainly wrong."*

13. As expressly stated in Martin J's judgment, the above statement is a summary of the common formulation of the test based on the cases commonly cited before the Court.

## **The Draft Notice of Appeal**

14. The proposed grounds of appeal are as follows:

- (1) The Learned Judge failed to give any or any adequate consideration to the discrepancy in the evidence of the Defendant where he deposed in his first affidavit sworn on 14 January 2025 that he resided at 'Hillcrest Apartments, Unit 1, 5 Clarendon Lane, Flatts Village FL 04' and his second affidavit sworn on 31 January 2025 that he did not 'have a fixed place of residence' and did not indicate where he could be found, or where documents might effectively be sent to him, or in what country or countries he might be found from time to time ;

- (2) The Learned Judge failed to give any or any adequate consideration to the fact that the Plaintiff did not know where the Defendant resided or even in what country the Defendant resided when she ruled that *'further efforts should have been made by the Plaintiff to locate the Defendant before seeking the varied Substituted Service'* (paragraph 27);
- (3) The Learned Judge failed to give any or any adequate consideration to the fact that the Defendant's former attorney, Christopher E. Swan & Co. had not responded to a letter inquiring about the Defendant or to the principle that there is no such thing as a general retainer and the fact that an attorney being instructed in relation to one matter does not mean he is authorised to act for the same client in relation to a separate cause of action when she ruled that *'better efforts ought to have been employed to at least ascertain the country in which Defendant was currently living ... may have been achieved by the Plaintiff contacting the sub-tenant or by more persistent contact with the Defendant's former attorney'* (paragraph 28) ;
- (4) The Learned Judge failed to give any or any adequate consideration to the fact that the Plaintiff did not know where the Defendant resided or even in what country the Defendant resided when she ruled that *'had the enquiries revealed where the Defendant was then residing, an Order for service out of the jurisdiction pursuant to RSC Order 11 may have proved more suitable'* (paragraph 29) ;
- (5) The Learned Judge failed to give any or any adequate consideration to the fact that because the Defendant *'travels all over the world and does no[t] remain in any one place for more than a few months at a time'* (paragraph 16) any information gleaned from the Defendant's tenant might be obsolete by the time service of process is attempted on the Defendant;
- (6) The Learned Judge failed to give any or any adequate consideration to the fact the judgment actually came to the attention of the Defendant in June 2024 but no action was taken to seek to set aside the judgment until January 2025;
- (7) The Learned Judge failed to give any or any adequate consideration to the fact that the Defendant made no attempt to demonstrate a defence to the action with any real prospect of success;
- (8) The Learned Judge failed to give any or any adequate consideration to the principle that even if an applicant can persuade the Court that a judgment should be set aside for some technical reason, that is not the end of the matter. If there is no justice in setting aside a default judgment, for example because the case is bound to be decided in favour of the plaintiff at a different hearing, there is no justice in setting aside the default judgment and causing the parties to incur more costs;

- (9) The Learned Judge failed to give any or any adequate consideration as to how an arbitration clause contained in a lease of premises bound the shareholders of the Plaintiff / Intended Appellant to submit disputes under the Bye-laws of the company to arbitration in circumstances where the power to stay of proceedings in favour of arbitration is discretionary and it is for the applicant to prove the requisite matters under section 7 of the Arbitration Act 1986 ; and
- (10) In the circumstances of the case, the Ruling was against the weight of the evidence.

## **Analysis and Decision**

15. In this case, the application for leave to appeal challenges two discretionary decisions made by this Court, namely:

- (i) The setting aside of judgment in default (see *Harshaw v Lowe* [2016] Bda LR 10, per Kawaley CJ at [18]) and
- (ii) The granting of a stay in favour of the matter proceeding to arbitration (see *Minister of Works and Engineering v Village Gotels of Bermuda Ltd* [1996] Bda LR 11)

16. Grounds 1-8 all make complaint of my decision to set aside the judgment entered in default. Ground 9 related to my decision to stay of these proceedings for the dispute to be referred to adjudication by arbitration. Ground 10 can be fairly characterised as the catch-all ground of appeal.

17. In my judgment, leave to appeal should be declined. The reasons set out in the Ruling are relied on to support the findings of this Court.

18. In summary leave to appeal is refused on the following basis:

- (i) No arguable error of law or disregard of relevant legal principle is identified on the proposed grounds of appeal;
- (ii) The proposed grounds of appeal do not give way to an arguable case that the underlying facts were misunderstood;
- (iii) It is not reasonably arguable that this Court failed to exercise its discretion at all

- (iv) It cannot be reasonably said that this Court took irrelevant facts into account or that it failed to take into account relevant facts.
- (v) The conclusions reached by this Court cannot reasonably be said to have been plainly wrong.

19. In my judgment, the grounds of appeal proposed and argued by Mr. Harshaw merely establish that the Defendant disagreed with the findings of this Court. That, alone, is not sufficient to justify the granting of leave to appeal.

### **Conclusion**

20. Leave to appeal is refused.

21. Either party may be heard on the issue of costs upon filing a Form 31TC within 7 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Defendant on a standard basis to be taxed if not agreed.

Dated this 24<sup>th</sup> day of April 2026



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**HON. MRS JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE OF THE SUPREME COURT**