



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

**CAUSE NO. FSD 304 OF 2023**

**IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT ACT (1997  
REVISION)**

**AND IN THE MATTER OF THE ARBITRATION ACT, 2012**

**AND IN THE MATTER OF AN ARBITRATION BETWEEN CARREFOUR NEDERLAND B.V.  
(Claimant) AND SUNING INTERNATIONAL GROUP CO., LIMITED (First Respondent) AND  
SUNING.COM CO., LTD (Second Respondent)**

**BETWEEN:**

**CARREFOUR NEDERLAND B.V.**

**Plaintiff**

**v**

**(1) SUNING INTERNATIONAL GROUP CO., LIMITED**

**(2) SUNING.COM CO., LTD**

**Defendants**

**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:** Mr Liam Faulkner of Campbells LLP on behalf of the Plaintiff

Mr Alex Potts KC of counsel and Ms Sean-Anna Thompson of Conyers  
Dill & Pearman LLP, on behalf of the Defendants

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2023(IKJ) -Reasons for Ruling*

<b>Heard:</b>	24 July 2024
<b>Date of decision:</b>	24 July 2024
Draft Reasons circulated:	2 August 2024
<b>Reasons delivered:</b>	7 August 2024

*Application for leave to appeal and for stay pending appeal-public interest point raised-no realistic prospects of success on merits of appeal*

## REASONS FOR RULING

### Introductory

1. On 2 November 2023, the Plaintiff obtained an *ex parte* order granting leave to enforce an arbitration award obtained against the Defendant's in Hong Kong on 30 April 2023 (the "**Ex Parte Order**" and the "**Final Award**", respectively). The Defendants applied to set aside the Ex Parte Order on 24 November 2023 (the "**Set-Aside Summons**"). Following an *inter partes* hearing on 21 February 2024, by a Judgment dated 15 April 2024 I dismissed the Set-Aside Summons (the "**Judgment**").
2. The Defendants applied for leave to appeal against that decision on 1 May 2024, and for a stay pending appeal. The latter applications were heard on 24 July 2024 when I:
  - (a) granted leave to appeal; and
  - (b) refused the stay application.
3. These are the reasons for that decision.

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## The impugned decision

4. The Judgment began by summarising the issues to be decided as follows:

*“1. By Summons dated 24 November 2023, the Defendants applied for:*

- (a) a declaration that the Ex Parte Order obtained by the Plaintiff on 2 November 2023 (the ‘Ex Parte Order’) and the Ex Parte Originating Summons and First Affirmation of Roger Wong dated 10 October 2023 (‘Originating Summons’ and ‘Wong 1’, respectively) were not validly served on either Defendant;*
- (b) an Order setting aside the purported service of the said documents on the grounds that the Plaintiff had failed make full and frank disclosure or make a fair presentation when applying for the Ex parte Order and/or on the grounds that paragraphs 2 and/or 4 of the Ex Parte Order were irregular for non-compliance with GCR Order 65 and/or Order 73 rule 31 (6), and/or GCR Order 73 rule 32 (1) (d); and/or*
- (c) an Order staying the Ex parte Order under the Court's inherent jurisdiction and/or pursuant to the Court's case management powers and/or pursuant to GCR Orders 18 rule 19 (d) and/or Order 45 rule 11 and/or pursuant to sections 7 (2) (f) and 7 (5) of the Foreign Arbitral Awards Enforcement Act (1997 Revision) (‘FAAEA’).”*

5. Complaint was made as regards the Ex Parte Order authorising service on the Defendants’ Hong Kong lawyers rather than on their principal addresses in Hong Kong and in the mainland People’s Republic of China (“**PRC**”). The decision on ground (a) was summarised in the Judgment as follows:

*“20. I accept entirely that the way in which I have previously construed Order 73 rule 31 (6) is ‘broad’ and ‘generous’, but reject the suggestion that it is ‘casual’. I further reject the suggestion that the structure of the rules prioritises service on the respondents themselves, acknowledging entirely that in domestic litigation service on parties is the general rule unless attorneys agree to accept service or special service methods have been contractually agreed. I take into account (1) the pro-enforcement policy of the FAAEL, (2) the fact that Order 73 rule 31 is a bespoke rule for the enforcement of foreign awards and (3) the fact that paragraph (6) is only concerned with giving notice of an ex parte order which has already been. In my judgment, taking these considerations into account, the words ‘by delivering a copy to the respondent personally or by sending a copy to the respondent at the respondent's usual or last known place of residence or business or in such other manner as the Court may direct, including electronically’ cannot fairly be read as meaning what they do not say...*

*24. The elaborately articulated service complaints were, as Mr Faulkner pointed out, merely designed to impede the Plaintiff's enforcement efforts. The only valid complaint was entirely non-substantial, because no formal service of the leave application itself occurred despite the unfortunate but superfluous mention of these documents in the Order. I accordingly refuse the Defendant's application for an Order declaring that they were not validly served with the Ex Parte Order in the manner authorised by paragraph 2."*

6. The second main ground for setting aside the Ex Parte Order was material non-disclosure. I found that no matter material to refusing enforcement had not been disclosed. This complaint was rejected in the Judgment in the following pertinent terms:

*"27...In my judgment the only matters which it would have been material for the Plaintiff to disclose would have been a matter potentially supporting a ground for refusing enforcement under section 7 of FAAEA. It must be borne in mind that since the burden is on a respondent to establish a qualifying refusal ground, the ambit of materiality will generally be further narrowed by that consideration. This ex parte context is markedly different from the ex parte injunction application context where the applicant is required to show that there is a serious issue to be tried."*

7. The third limb of relief sought was a stay and/or adjournment. This application was refused for the following pivotal reasons:

*"35. Mr Potts KC, Pied Piper like, almost succeeded in leading me off the well-trodden path of FAAEA orthodoxy with his powerful advocacy. It was tempting to consider that the Court could, with a view to achieving a practical form of justice, grant a short stay now, merely to let the Hong Kong Court decide the merits of a similar stay application which had already been fully argued. Such an unprecedented approach would potentially undermine the foundations of foreign arbitral award enforcement under Cayman Islands law. Arbitral award enforcement is a streamlined process designed allow an award to be converted into a domestic judgment. It merely serves as a gateway to substantive enforcement remedies and in many cases justice delayed will be justice denied.*

*36. Section 7 of FAAEA means what it says when it provides:*

*'(1) Enforcement of a Convention Award shall not be refused except in the cases mentioned in subsections (2) and (3).'*

*37. The Defendants advanced no or no arguable grounds for refusing to enforce the Final Award. The adjournment and/or stay application must*

*accordingly be refused. Whatever residual inherent jurisdiction the Court may have to adjourn enforcement proceedings on case management grounds, such jurisdiction does not extend so far as to granting relief which is a thinly veiled form of refusing to enforce an unimpeached foreign award on grounds which contravene the express terms of an Act of Parliament. The relief sought under this limb of the Defendant's Summons is also refused.”*

8. A further complaint was made that the requirements of Order 73 in relation to the supporting affidavit setting out the accrued interest to the date of the affidavit was summarily rejected on the following grounds:

*“30. It was accepted that Wong 1 did not comply with sub-paragraph (1) (d) of this rule. An attempt was made to cure this defect in the Second Affirmation of Jonathan Wong affirmed on 14 December 2023 (‘Wong 2’), but Mr Potts KC plausibly argued that the relevant rule had still not been complied with. The lack of clarity on the face of the Ex Parte Order as to interest element of the amounts due was not advanced as a freestanding ground for setting the Ex Parte Order. It can be remedied by way of an amendment, as contemplated by GCR Order 2 rule 1 (2) and has caused no prejudice to the Defendants who are not impatiently waiting to write a cheque in settlement of the Final Award.” [Emphasis added]*

9. As Mr Potts KC pointed out in oral argument, paragraph 30 of the Judgment was plainly wrong because paragraph 2(c) of the Defendants’ Set-Aside Summons did in fact (to my mind incomprehensibly) seek to set aside the Ex Parte Order on the grounds of that procedural irregularity. He also fairly complained that the Judgment did not deal with the stay-related reliance the Defendants placed upon section 7(2)(f) of the Foreign Arbitral Awards Enforcement Act which lists the following ground for refusing enforcement:

*“(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.”*

10. I indicated in the course of argument during the set-aside hearing, that section 7(2)(f) clearly applied to the award not being binding by virtue of challenges to an award. No such challenge had been made.

### Legal test for granting leave to appeal

11. The legal principles governing the grant of leave to appeal against interlocutory decisions were essentially common ground. Quin J in *Embassy Investments Limited-v-Houston Casualty Company*, FSD 94/2011 (CQJ), Judgment dated 20 June 2012, to which Mr Potts KC referred, confirmed that the Cayman Islands courts have consistently applied the principles set out in English Practice Direction, *Court of Appeal: Leave to Appeal and Skeleton Arguments* [1999] 1 W.L.R. 2. Paragraph 10 critically provides as follows:

*“.. The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.”*  
[Emphasis added]

### The proposed grounds of appeal and their merits

12. The Defendants’ Summons seeking leave to appeal set out the following grounds of appeal:

*“1.1 The Judge was wrong, in law, to reject the Defendants’ submissions on the issue of ‘service’ (paragraphs 8 to 24 of the Ruling);*

*1.2 The Judge was wrong, in law, to reject the Defendants’ submissions on the issue of ‘full and frank disclosure’ and ‘fair presentation’ (paragraphs 25 to 28 of the Ruling);*

*1.3 The Judge was wrong, in law, to reject the Defendants’ submissions on the issue of ‘interest’ (paragraphs 29 to 30 of the Ruling);*

*1.4 The Judge was plainly wrong, in the exercise of his discretion, not to stay, adjourn or suspend the Cayman Islands proceedings and/or any further enforcement and/or execution of the HKIAC First Arbitration Award in the Cayman Islands pending the final determination of proceedings pending before the Hong Kong High Court and/or the HKIAC Second Arbitration (paragraphs 31 to 38 of the Ruling), while at the same time allowing the Defendants a further opportunity to make an application for a stay of any “specific execution steps the Plaintiff may elect to pursue”; and/or*

*1.5 There is sufficient uncertainty in the procedural rules and local Court practice at first-instance relating to the recognition and enforcement of foreign arbitration awards in the Cayman Islands (including the procedural rules as to service outside of the jurisdiction, having regard to the Hague Service Convention) that this provides a compelling reason for the Court of Appeal to review and consider such matters, as raised by the Defendants' appeal, on an authoritative basis, at an appellate level."*

13. As regards the first four merits-based grounds of appeal, I found that each of them had no realistic prospect of success for the following reasons:
- (a) I did not consider it was realistically arguable that the statutory and procedural scheme for enforcing Convention awards could be sensibly construed as entitling an award debtor which had been given effective notice of an order granting leave to enforce an award to set aside that order because of alleged procedural irregularities which occasioned no discernible prejudice;
  - (b) I did not consider it was realistically arguable that that the statutory and procedural scheme for enforcing Convention awards could be sensibly construed as requiring the Court to have regard to facts and matters unconnected to grounds for refusing enforcement when considering an ex parte application for leave;
  - (c) I did not consider it was realistically arguable that the statutory and procedural scheme for enforcing Convention awards could be sensibly construed as entitling an award debtor to set aside that order because of a failure to specify how much interest was due in circumstances which occasioned no discernible prejudice; and
  - (d) I did not consider it was realistically arguable that it was not properly open to me, in my discretion, to decline to grant a stay of enforcement of the Final Award. By the date of leave to appeal hearing, the Hong Kong Court had in any event refused to grant a stay of enforcement of the Hong Kong judgment based on the Final Award.

**Was a public interest point raised?**

14. Was there a public interest point raised by this otherwise unmeritorious appeal? In my judgment, there was. Mr Faulkner submitted that the service provisions of Order 73 rule 31 relating to service of an *ex parte* order granting leave to enforce an award were by their terms free from any doubt. I ultimately felt unable to accept this submission, despite the strength of my own convictions about how the rules should be construed. This was because I found that the Defendants' service complaints had no realistic prospect of success because of the combined effect of two factors:
- (a) the proposition that giving notice of an *ex parte* order abroad required the same formalities as applied to originating process was weak (but not, in abstract terms, unarguable); and (additionally)
  - (b) even if the service complaints were technically valid, the absence of prejudice in the present case made it equally unrealistic to conceive that the Ex Parte Order should be set aside.
15. The Court's ability to effectively enforce foreign arbitration awards against entities with assets here, implementing international obligations assumed on behalf of this territory by His Majesty's Government, was obviously of public importance. The absence of appellate authority on how flexible the service regime for orders actually is, in light of the challenge which has now been raised, opened the door to further similar challenges at the first instance level in future cases. A cloud of doubt has been raised which it would be in the public interest for the Court of Appeal to dispel, one way or the other, even though the appeal as a whole had no realistic prospects of success.

**Stay****Governing principles**

16. Mr Faulkner relied on the stay principles helpfully summarised by Doyle J in *Re Aquapoint LP (in Official Liquidation)*, FSD 157/20221 (DDJ), Judgment dated 29 September 2022 (unreported). He pointed out that Justice Doyle's summary of principles has received the imprimatur of the Cayman Islands Court of Appeal in *Re Trina Solar Limited*, CICA (Civil) Appeal No. 009/2021, Judgment dated 4 August 2023 (unreported). In *Aquapoint*, Doyle J most pertinently opined as follows:  
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“20. It can be seen from the local Cayman authorities that:

- (1) an appeal does not operate as a stay;
- (2) the starting point is that there should be no stay and a successful party at first instance should not be deprived of the fruits of that success;
- (3) there must be ‘good cause’ or ‘good reason’ for a stay. In some of the English authorities there is reference to ‘solid grounds’;
- (4) the court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance; and
- (5) in deciding whether or not to impose a stay the court will consider the grounds of the appeal, their likelihood of success and the balance of convenience having regard to the interests of the relevant parties. The overriding feature is the interests of justice.”

#### **Merits of stay pending appeal application**

17. I was guided by these principles. It followed from the conviction of my findings as to the lack of merit in the appeal and the pro-enforcement policy of the Act, that the stay application could only rationally be refused. After all, as I noted in the Judgment (at paragraph 38), declining to stay enforcement of the Final Award would not exclude this Court’s jurisdiction to stay execution of enforcement of a judgment based on the Final Award should justice so require at such stage.

#### **Conclusion**

18. For the above reasons, I granted the Defendants’ leave to appeal but refused to stay the Judgment pending appeal.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT**

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