IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

YANDAL INVESTMENTS PTY LTD., a Western Australia corporation, and TAHLIA FAMILY TRUST, Plaintiffs-Appellants vs. WHITE RIVERS GOLD LIMITED, a Marshall Islands corporation, and HARRY MASON, Defendants-Appellees.	Supreme Court No. 2011-003 High Court Civil Action No. 2010-158 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS APPEAL

FILED
JAN 2 5 2012
CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

BEFORE: Cadra, C.J.; Seabright, A.J.; and Kurren, A.J.

CADRA, C.J., with whom SEABRIGHT, A.J.[1], and KURREN, A.J.[2], concur:

I. INTRODUCTION

Appellees have moved to dismiss Appellants' appeal from (1) the High Court's December 14, 2010 Order dismissing plaintiffs' original complaint against White Rivers Gold Limited for failure to state a claim with leave to amend, and (2) the High Court's May 19, 2011 Order (a) dismissing all claims against defendant Harry Mason for lack of personal jurisdiction, (b) dismissing securities law claims against defendant White Rivers Gold Limited, and (c) staying the remainder of the claims against White Rivers Gold Limited for negligence and fraud on grounds of *forum non conveniens* pending completion of a related case in Australia (Western Australia Action CIV 2418 of 2010).

[1] J. Michael Seabright, United States District Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Barry M. Kurren, United States Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

Appellants have filed a timely opposition to the motion to dismiss.

We find the parties' briefing adequate to resolve the motion to dismiss and therefore dispense with oral argument.

We conclude that, unless the High Court directs entry of judgment pursuant to MIRCP, Rule 54(b), the orders appealed from (with exception of the High Court's May 19, 2011 "stay order") are not "final decisions" and we, therefore, lack jurisdiction to entertain an appeal from those orders at this time.

We also conclude that the High Court's May 19, 2011 "stay order" is immediately appealable as an exception to the "final judgment" rule under *Moses H. Cone* or, alternatively, is an appealable "collateral order" over which we can assert jurisdiction.

We finally conclude we do not have pendent appellate jurisdiction over the interlocutory orders appealed from.

We therefore GRANT IN PART and DENY IN PART appellees' motion to dismiss. We assert jurisdiction over the appeal from the High Court's May 19, 2011 "stay order" and dismiss the remainder of the appeal without prejudice to appellants seeking an MIRCP, Rule 54(b) determination or, alternatively, awaiting entry of a final decision disposing of all claims against all parties.

II. PROCEDURAL AND FACTUAL BACKGROUND

Our inquiry on appellees' motion to dismiss is limited to whether we have jurisdiction to hear the decisions appealed from *at this time*. The intricate facts underlying the dispute between the parties are therefore not relevant except as they provide light on the jurisdictional question.

On September 22, 2010, appellants filed its "Original Complaint for Declaratory and Injunctive Relief" against appellee White Rivers Gold Limited (WRGL). Appellants' complaint

sought declaratory and injunctive relief based on their alleged preemptive rights as shareholders of WRGL under the Marshall Islands Business Corporations Act. Appellants alleged that Thames Holdings Limited, a non-domestic corporation organized under the laws of the Marshall Islands, was formed in September, 2008, by filing Articles of Incorporation with the RMI Registrar of Corporations. Thames Holdings Limited was created to implement a joint venture agreement entitled "Heads of Agreement (HoA) Witwatersrand Project" between Mark Creasy and Harry Mason. The complaint alleged appellant-plaintiff Yandal Investments is the "associated entity" of Creasy, referenced in the HoA. Apparently, the Articles of Incorporation of Thames Holdings Limited authorized the issuance of 50,000 shares at a par value of $1.00 per share. On October 1, 2008, appellant-plaintiff Yandal, an Australia corporation, was issued Certificate No. 0003 for 40,000,000 shares. On that same date, appellant Tahlia Family Trust, a discretionary common law trust, was issued Certificate No. 0006 for 850,000 shares. The HoA called for formation of a new company (NEWCO) to be formed in a suitable jurisdiction. Amended Articles of Incorporation were filed on November 2, 2009 changing the name of the corporation to White Rivers Gold Limited. Harry Mason is alleged to be the managing director of WRGL. Amended Articles were filed on March 29, 2010 authorizing the issuance of additional shares. The complaint alleges WRGL has issued shares since October 1, 2008 and has solicited new investment without offering appellants-plaintiffs the opportunity to exercise preemptive rights. Appellants' complaint sought a declaratory judgment that they are entitled to exercise their preemptive rights in accordance with the RMI Business Corporations Act, section 78; that their preemptive rights had been violated; and that any previous shares issued in violation of their preemptive rights are null and void. At the time the original complaint was

filed, there was a lawsuit pending in Western Australia between Creasy and Mason arising out of the HoA.

Appellee WRGL moved to dismiss Appellants' original complaint for failure to state a claim upon which relief can be granted and on grounds of *forum non conveniens*.

On December 14, 2010, the High Court issued an "Order Granting Plaintiffs Leave to Amend Complaint." The High Court concluded that the shares issued plaintiffs were void because those shares were issued in excess of the number of shares authorized in the Articles of Incorporation and because the shares were issued for less than par value. Because the shares were void, appellants-plaintiffs had no preemptive rights as shareholders and therefore the original complaint failed to state a cause of action. The High Court also found the defendant's motion to dismiss on *forum non conveniens* grounds was premature and denied it without prejudice. Plaintiffs were granted leave to amend.

On January 14, 2011, Appellants filed their "First Amended Complaint" (FAC) alleging claims for "Negligence," "RMI Securities Law violations," and "Common Law Fraud" against WRGL and Harry Mason.

On February 15, 2011, WRGL filed a motion to dismiss the FAC or, alternatively, stay the proceedings before the High Court. WRGL argued that Appellees' claim for RMI securities law violations failed to state a claim upon which relief can be granted and the claims for negligence and common law fraud should be dismissed on grounds of *forum non conveniens* or stayed pending outcome of the litigation in Australia.

On March 14, 2011, Appellee Mason filed a motion to dismiss the FAC in its entirety for lack of personal jurisdiction over Mason, for failure to state a claim upon which relief can be

granted, and for failure to join an indispensable party (i.e. Creasy). Alternatively, Mason moved for an order dismissing the claim for alleged RMI securities law violations and/or dismissing the FAC in its entirety on grounds of *forum non conveniens*.

On May 19, 2011, the High Court issued a written order granting Mason's motion to dismiss for lack of personal jurisdiction. The High Court also dismissed Appellee's claim for "RMI Security Laws violations" for failure to state a claim upon which relief can be granted. The High Court found the securities law claim fails because there was no act, with regard to securities, taken within the Republic; no stock was issued and even if issued was not issued in the Marshall Islands. Finally, the High Court ordered the remaining matters at issue (i.e. the negligence and fraud claims against WRGL) stayed until the pending related civil action in Australia has been resolved.

Appellants filed a timely Notice of Appeal on June 9, 2011. The record was certified on August 25, 2011. On October 3, 2011, Appellees filed a motion to dismiss appeal arguing this Court lacks jurisdiction over the appeal because the orders appealed from are not "final decisions." After a brief extension of time, Appellants filed an opposition to the motion to dismiss on October 19, 2011.

III. DISCUSSION

A. The Supreme Court Only Has Jurisdiction Over "Final Decisions" or "Interlocutory Decisions" Permitted by Statute or Rule.

Generally, our jurisdiction to entertain appeals from the High Court is limited to "final decisions." The RMI Constitution, Article VI, Section 2(2)(a), provides in relevant part: "An appeal shall lie to the Supreme Court: as of right from any final decision of the High Court in the

exercise of its original jurisdiction." That Constitutional provision gives this Court jurisdiction only over appeals from "final decisions." *See, e.g, Bokmej v. Lang and Jamodrei,* 1 MILR (Rev.) 85, 86 (1987); *RMI v. Balos,* 1MILR (Rev.) 67, 68 (1987).

A "final judgment or order" is "one that disposes of the case, whether before or after trial. After such an order or judgment, there is nothing further for the trial court to do with respect to the merits and relief requested." *Lemari, et al, v. Bank of Guam,* 1 MILR (Rev.) 299, 300 (1992). This Court "has consistently held that appeals from interlocutory orders will not be entertained." *Id.*

The general rule governing appeals in multiple party, multiple claim cases is that they may be taken only after the entire case is disposed of on all substantive issues. For a judgment to be final, absent certain exceptions, it must end the litigation on the merits for all claims and all parties. *See, e.g., FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 273-74 (1991).

It is sometimes important, however, that review not be delayed until all questions are decided by the trial court. S.Ct. Rule 4(a)(1) provides for review of "interlocutory orders where permitted by statute or rule."

In cases involving multiple claims or multiple parties, Marshall Islands Rules of Civil Procedure (MIRCP) Rule 54(b) grants the power to the High Court, in its discretion, to make final an order determining at least one claim or the entire interest of at least one party. That judgment is then immediately appealable if the trial court expressly determines there is no just reason for delay and expressly directs the entry of judgment. MIRCP 54(b).

In the absence of a final judgment entered under Rule 54(b) "any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and

liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." In other words, the order or other form of decision which adjudicates some but not all claims or determines liabilities as to some but not all parties remains interlocutory and is not appealable.

B. With The Exception Of The High Court's May 19, 2011 "Stay Order," The Orders Appealed From Are Not "Final" For Purposes of Appeal.

1. The May 19, 2011 order dismissing all claims against Mason is not a final, appealable order over which we can independently assert appellate jurisdiction in the absence of a Rule 54(b) determination.

The portion of the High Court's May 19, 2011 order dismissing the entire case against Mason for lack of personal jurisdiction is not a final appealable order because claims remain pending against defendant WRGL and the High Court has not directed entry of final judgment as to defendant Mason pursuant to MIRCP 54(b).

The federal courts have consistently held that unless a district court directs the entry of a final judgment pursuant to Rule 54(b), an order in which the district court dismisses a defendant for want of personal jurisdiction but where other defendants remain cannot in itself be a final order for purposes of appeal. *See, e.g., Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004)("An order dismissing one party for lack of personal jurisdiction while allowing suit to continue against the remaining defendants is not a final, appealable order absent an 'express determination that there is no just reason for delay and ... an express direction for the entry of judgment.'"); *see also, Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 200 (3rd Cir. 1998)(district court order dismissing some, but not all, defendants for lack of personal

jurisdiction not considered final and appealable although appellate jurisdiction existed because district court granted permission for an interlocutory appeal); *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997)(dismissing appeal for lack of appellate jurisdiction when district court dismissed one of two defendants for lack of personal jurisdiction); *Chapple v. Levinsky*, 961 F.2d 372, 374 (2nd Cir. 1992)(dismissal of three defendants for lack of personal jurisdiction could not be appealed absent certification under Rule 54(b), because case remained pending against other defendant, even though court transferred action as to that defendant to a more convenient venue).

Because Appellants have not obtained a Rule 54(b) determination on the High Court's order dismissing Mason as a defendant we do not have an independent basis to assert appellate jurisdiction over that portion of the High Court's May 19, 2011 order. As discussed below, we decline to assert pendent appellate jurisdiction over this order.

2. The December 14, 2010 and May 19, 2011 Orders are not final appealable orders in the absence of a Rule 54(b) determination.

Similarly, the High Court's December 14, 2010 order regarding Appellants' preemptive rights and shareholder status *vis a vis* WRGL and the May 19, 2011 order dismissing the securities law claims against WRGL are not final appealable orders because claims remain pending against WRGL and the High Court has not directed entry of a final judgment as to those orders pursuant to MIRCP 54(b).

The December 14, 2010 order dismissing Appellants' original complaint against WRGL based on theories of shareholder and preemptive rights with leave to amend is not a final order. Claims dismissed with leave to amend require a final order to be appealable. *See, e.g., WMX*

Techs., Inc. v. Miller, 104 F.3d 1133, 1136 & n.1 (9th Cir. 1997 en banc). Appellants could have stood up to their pleading and appealed at that time but would still need to obtain a final order of dismissal to appeal that order. *Id.* Instead, Appellants chose to amend their complaint setting forth different theories of liability. The High Court then dismissed the securities law claims pled against WRGL in the amended complaint but stayed the remainder of the claims for negligence and fraud in its May 19, 2011 order. An appeal of the May 19, 2011 order dismissing the securities law violation claim would also require a final order of dismissal because claims remain pending against WRGL.

If appellants want to appeal the December 14, 2010 order and/or any portion of the May 19, 2011 order, they must first obtain a final order of dismissal. Rule 54(b) provides a mechanism for doing so. Without a Rule 54(b) determination we lack appellate jurisdiction over Appellants' appeal from the December 14, 2010 and May 19, 2011 orders.

C. The May 19, 2011 "Stay" Order Is Appealable Under The Rule Announced In *Moses H. Cone* And/Or Under The "Collateral Order" Doctrine.

1. The High Court's "Stay Order" puts Appellants "effectively out of court."

It is generally held that a "dismissal" on *forum non conveniens* grounds is a final, appealable judgment even though it does not end the litigation. *See, e.g., Sirotelstvo Bulgaria, Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 421 (7th Cir. 2009); *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1378-89 (11th Cir. 2009) In this case, the High Court "stayed," rather than "dismissed," the claims remaining against WRGL on *forum non conveniens* grounds pending resolution of the case in Western Australia.

Generally, a stay order does not constitute a final decision and is not considered an appealable order. A stay order is appealable, however, if it puts the plaintiff "effectively out of court." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 10 (1983).

In *Moses H. Cone*, the U.S. Supreme Court held that an order staying litigation in federal court pending resolution of a case in state court that would have *res judicata* effect on the federal action essentially amounted to a dismissal. Relying on its earlier decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), the Supreme Court concluded that the stay was appealable because there would be "no further litigation in the federal forum" and the state's decision would be *res judicata*, leaving the defendant "effectively out of court." *Moses H. Cone*, 460 U.S. at 10. In *Idlewild*, a federal district court stayed an action seeking to invalidate a New York law to allow the state court the opportunity to address the plaintiff's various claims. *Idlewild, supra*, at 714. Notably, the Supreme Court held that the stay was appealable despite the fact that the state court decision might not moot the federal proceedings. *Id.* at 714, 715 n.2 (holding that Idlewild was "effectively out of court" where the district court's stay allowed the state court to address issues that would not necessarily dispose of the case); *see also, Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1101-04 (9th Cir. 2005)("Even ... where the case might well come back to federal district court, Idlewild Liquor was 'effectively out of court' for purposes of appealability of the stay order.").

Following *Moses H. Cone*, the federal courts have held that a stay may be an appealable order "when it effectively puts the parties out of the district court, either permanently because it terminates the action as a practical matter, or, as some courts have held, for a protracted or indefinite period." *See, e.g., Spread Spectrum Screening, LLC., v. Eastman Kodak Co., et al.*,

657 F.3d 1349 (Fed. Cir. 2011); *Blue Cross & Blue Shield of Ala. v. Navigators Ins. Co.*, 490 F.3d 718, 724 (9th Cir. 2007)(concluding certain stay orders are appealable final orders because "lengthy and indefinite stays place a plaintiff effectively out of court"); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007)(finding stay order effectively put appellant out of court under *Moses H. Cone* and, alternatively, finding that stay order was an appealable "collateral order.").

The High Court's stay order clearly anticipated and intended that proceedings would resume once the Australia case is concluded. It is not known, however, how long the court in Australia will take to reach a resolution of the issues before it. The High Court's stay order is indefinite. Given the indefiniteness of the stay we find appellants-plaintiffs are "effectively out of court" and the stay order is appealable.

2. The "stay order" is an appealable "collateral order."

The court in *Dependable Highway* went on to consider whether appellate jurisdiction was established under the so-called "collateral order" doctrine. The court concluded that even if the stay did not constitute a final order under *Moses H. Cone*, appellate jurisdiction was established under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Supreme Court concluded that under certain circumstances a small class of collateral orders is immediately appealable. To fall with *Cohen's* ambit, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Dependable Highway*, 498 F.3d at 1065, citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, (1978).

Citing *Lockyer*, the court in *Dependable Highway* found the first *Cohen* criteria was satisfied "because, even though the stay order could theoretically be modified, the district court did not impose a time limit on the stay or note circumstances that might result in its modification." *Dependable Highway, supra*, at 1065. We, likewise, find the first *Cohen* criteria met here because the High Court did not impose a time limit or indicate that it might consider modifying its stay order. We have no indication from review of the record as to when a decision might be reached by the Australian court and proceedings resume in the High Court. Again, the High Court's stay is indefinite. Generally stays should not be indefinite in nature. *Dependable Highway*, 498 F.3d at 1066-67 citing *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000).

The *Dependable Highway* court found that *Cohen's* second criterion was met because "the district court order staying the federal action in light of the English proceedings was a refusal to address the merits of Dependable's breach of contract claims and related challenges to the arbitration clause found in Navigators' Columbus Wording." *Id.* We, likewise, find the second *Cohen* criterion met. The High Court's stay and deferral of issues to the Australia court is a refusal to adjudicate the merits in this forum. The propriety of granting the stay "presents an important issue separate from the merits."

Finally, the third criterion of *Cohen* is met because the "propriety of the stay will be unreviewable on appeal" regardless of whether the Australia proceedings moot the litigation in the RMI. If the Australia proceedings do not put an end to the RMI proceedings, the High Court will lift the stay and eliminate its reviewability. *Id.* at 1065.

We therefore conclude that the High Court's May 19, 2011 stay order is appealable under *Cohen* as a collateral order.

D. We Do Not Have "Pendent Appellate Jurisdiction" Over The Interlocutory Orders Appealed From.

Having concluded appellate jurisdiction exists over the High Court's order staying proceedings, the question then becomes whether this Court has pendent appellate jurisdiction over the other interlocutory orders appealed from (i.e. the December 14, 2010 order and May 19, 2011 order dismissing the entire case against Mason and dismissing the securities law violation claim against WRGL).

In *Swint v. Chambers County Commission*, 514 U.S. 35, 50-51 (1995), the U.S. Supreme Court declined to settle definitely "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently reviewable." The Court made clear, however, that appellate courts should exercise restraint in reviewing on interlocutory appeal otherwise non-appealable orders because "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen* type collateral orders into multi-issue interlocutory appeal tickets ...." *Id.* at 49-50 (citing *Abney v. United States*, 431 U.S. 651, 633 (1977)); *see also, Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966)(cautioning that jurisdiction over interlocutory appeals should be applied "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders."); *see also, Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 757 (2nd Cir. 1998), *cert denied*, 527 U.S. 1003 (1999)("[a] system in which parties could get immediate appellate review of multiple issues once the door was opened for review of one issue would tempt parties to rummage for rulings that would authorize interlocutory appeals" expressing concern that a "party will appeal a flimsy collateral issue with the intention of obtaining interlocutory review for other issues its presses.").

Pendent appellate jurisdiction allows an appeals court to exercise jurisdiction over a non-final [and therefore otherwise unappealable] claim where the issue is "inextricably intertwined" with an issue over which the court properly has appellate jurisdiction. *See, e.g., Britt v. Garcia*, 457 F.3d 264, 273 (2nd Cir. 2006); *see also, Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000)("Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on interlocutory appeal if raised in conjunction with other issues properly before the court."). The Ninth Circuit has held that "[t]wo issues are not 'inextricably intertwined" if we must apply different legal standards to each issue." *See, e.g., Meredith v. Oregon*, 321 F.3d 807, 814 (9th Cir. 2003); *Cunningham*, at 1285. "Rather, the legal theories on which the issues advance must either (a) be so inextricably intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Meredith, supra*, at 814.

The standard of review of a stay order is "abuse of discretion." *See, e.g., Dependable Highway Express, Inc.*, at 1066, citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912 (9th Cir. 1993); *see also, Adams v. Merck & Co.*, 353 Fed.Appx. 960, 962 (5th Cir. 2009)("We review rulings based on the doctrine of forum non conveniens for 'abuse of discretion.'") citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-49 (1981). The other High Court orders appealed from are reviewed "de novo" as conceded by Appellants in their briefing. The issues presented by the other interlocutory orders appealed from are therefore not "inextricably intertwined" with the issues presented on appeal of the stay order for purposes of asserting pendent appellate jurisdiction.

Pendent appellate review of the interlocutory orders is not "necessary to ensure meaningful review" of the High Court's stay order. The issue on appeal from the stay order is whether the High Court abused its discretion in ordering the stay. In determining that issue, it is not necessary that the December 14, 2010 order regarding Appellants' shareholder and preemptive rights or the May 19, 2011 orders dismissing the entire case against Mason and dismissing the RMI securities law claims against WRGL be addressed.

We conclude we do not have appellate jurisdiction over the December 14, 2010 order and the remaining issues determined by the May 19, 2011 order pendent to our assertion of jurisdiction over the "stay order" appealed from.

IV. CONCLUSION

For the reasons set forth above, we assert jurisdiction over the May 19, 2010 "stay order." We, therefore, DENY appellees' motion to dismiss the appeal from the May 19, 2010 "stay order" and GRANT the motion to dismiss the appeal from the remaining High Court orders without prejudice to appellants obtaining a Rule 54(b) determination or awaiting a final order disposing of all claims against all parties.

Dated this 17 day of January, 2012.

Daniel N. Cadra, Chief Justice

J. Michael Seabright, Associate Justice

Barry Kurren, Associate Justice