

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2022/0009

Formerly [ANUHLTAP2019/0007]

BETWEEN:

KIER CONSTRUCTION LIMITED

First Respondent/Appellant

and

[1] SUNDRY WORKERS

Second Respondent

**[2] GEORGE DEXTER TAVERNIER
(Trading as Tavernier Construction)**

Applicant/Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Eddy D. Ventose
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kendrickson Kentish for the Applicant/Respondent
Ms. Safiya Roberts for the First Respondent/ Appellant
Mr. Cosbert Cumberbatch for the Second Respondent

2025: February 24;
May 7.

Application for conditional leave to appeal to His Majesty in Council - Section 122(1)(a) of the Antigua and Barbuda Constitution Order 1981 - Appeal as of right - Whether the order of the Court is a final order or interlocutory – Section 122(2)(a) of the Antigua and Barbuda Constitutional Order 1981 – Application of ‘or otherwise’ limb

Kier Construction Limited (“Kier”) was engaged to work on the expansion project of the Sandals Resort Hotel in Antigua (“the Sandals Expansion Project”). By agreements dated

31st August 2005 (“the August Agreement”) and 20th December 2005 (“the December Agreement”), Kier subcontracted the applicant, George Dexter Tavernier t/a Tavernier Construction (“Tavernier”) for the construction of a superstructure at the Sandals Expansion Project, as well as to supply skilled tradesmen for the construction of the superstructure. These skilled tradesmen are represented by the second respondent, Sundry Workers. Kier and Tavernier also entered into a Subcontractor Agreement dated 13th September 2006 for Tavernier to install the structure for a restaurant, dive pool, dive shop facility, outside class, pool equipment room and stormwater holding tank. The Subcontractor Agreement also required that Tavernier submit to Kier the names and addresses of all ‘operatives he chose to employ to the work’.

On 4th November 2008, the Sundry Workers filed a reference against Tavernier, alleging that it had carried out a series of layoffs between October 2006 and July 2007, resulting in unfair dismissals. In May 2015, the court granted leave to add Kier as a defendant, with the claim that Kier, as a principal contractor, was jointly liable with Tavernier for all payments due to the employees. On 30th September 2016, the Industrial Court ordered a preliminary hearing to determine whether Kier and Tavernier were employers in relation to the unfair dismissal claims.

On 13th September 2019, the Industrial Court ruled that the Sundry Workers were employees of Kier, and that it was liable to meet all payments to which the employees became entitled. Kier appealed on 4th October 2019. By judgment dated 13th March 2024, the Court of Appeal held that Tavernier was in fact and in law the employer, and therefore liable to meet the payments owed to the employees upon termination.

Being dissatisfied with the judgment of this Court, Tavernier filed an Amended Notice of Motion on 30th September 2024, seeking leave to appeal the decision to the Privy Council. Tavernier makes the application pursuant to: (1) section 122(1)(a) of the Constitution of Antigua and Barbuda (“the Constitution”) by which this Court is empowered to grant leave to appeal to His Majesty in Council as of right; or (2) section 122(2)(a) by which this Court is empowered to grant leave to appeal to His Majesty in Council as a matter of discretion but focuses on the ‘or otherwise’ limb of that section.

Held: dismissing the Amended Notice of Motion for leave to appeal to His Majesty in Council, ordering costs to the first respondent only to be assessed if not agreed within 21 days that:

1. The Privy Council in **Inderjit Kaur Chhina v Muhammed Nazir Muhammed Ismail**, confirmed that the ‘application test’ is the correct standard for determining whether a decision is ‘final’ in the Eastern Caribbean Supreme Court jurisdictions. Therefore, the application test must be applied in respect of the decision for which the applicant seeks leave to apply to His Majesty in Council, namely the decision of the Court of Appeal holding that Tavernier was the employer of the Sundry Workers for the purposes of the claim for unfair dismissal. Applying the application test, the decision of this Court did not determine the matter in litigation for either of the parties. If the decision of this Court had been different, the matter in dispute between the parties (the unfair dismissal claim) would have continued against either Tavernier or Kier and, the Industrial Court would then have had to determine whether the claim for unfair dismissal was proved against either of them. Consequently, Tavernier cannot

ground its appeal to His Majesty in Council in section 122(1)(a) of the Constitution because the order of the Court of Appeal is not a 'final decision' which is a necessary condition for the grant of leave under that section.

Inderjit Kaur Chhina v Muhammed Nazir Muhammed Ismail and another [2024] UKPC 10 applied.

2. Section 122(2)(a) of the Constitution provides that an appeal shall lie from the decisions of the Court of Appeal to His Majesty in Council with the leave of the Court of Appeal in decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise ought to be submitted to His Majesty in Council. To satisfy the 'or otherwise' limb, an applicant must demonstrate that there is some good reason or ground why leave to appeal ought to be granted. This limb may be invoked where an applicant can demonstrate that the decision sought to be further appealed is so flawed or so incorrect that it ought not to be allowed to stand or where there is some other good reason why the guidance of their Lordships' Privy Council is desirable.

Section 122(2)(a) of the **Antigua and Barbuda Constitution 1981**, Cap 23 of the Revised Laws of Antigua and Barbuda applied; **Multibank FX International Corporation v Von De Heydt Invest** BVIHCVAP2022/0008 (delivered 7th July 2023, unreported) applied.

3. Tavernier's core objection is the statement of the Court of Appeal that Kier is a well-established construction company in Antigua and Barbuda. However, Tavernier failed to provide transcripts of evidence from the court below to make good its submission. In the Amended Notice of Motion, the applicant has not sought to impeach the reasoning of the Court regarding this statement. Having regard to the threshold required for an applicant to invoke the 'or otherwise' limb, Tavernier has not demonstrated that the decision of this Court is so flawed or so incorrect that it ought not to be allowed to stand or that there is some other good reason why the guidance of His Majesty in Council would be desirable.

Multibank FX International Corporation v Von De Heydt Invest BVIHCVAP2022/0008 (delivered 7th July 2023, unreported) applied.

JUDGMENT

- [1] **VENTOSE JA:** The applicant applied on 30th September 2024 under sections 122(1)(a) and 122(2)(a) of the **Constitution of Antigua and Barbuda** (the

“Constitution”)¹ for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal dated 13th March 2024 in which this Court allowed an appeal against a decision of the Industrial Court of Antigua.

The Factual Background

- [2] The facts are reproduced from the decision of this Court at paragraphs [1] to [6] as follows. The first respondent, Kier Construction Limited (“Kier”), was engaged to work on the expansion of the Sandals Resort Hotel in Antigua (“the Sandals Expansion Project”). By agreements dated 31st August 2005 (the “August Agreement”) and 20th December 2005 (the “December Agreement”), Kier subcontracted the applicant, George Dexter Tavernier t/a Tavernier Construction (“Tavernier”) for the construction of a superstructure at the Sandals Expansion Project, as well as to supply skilled tradesmen for the construction of the superstructure. These skilled tradesmen are represented by the second respondent, Sundry Workers. Kier and Tavernier also entered into a Subcontractor Agreement dated 13th September 2006 for Tavernier to install the structure for a restaurant, dive pool, dive shop facility, outside class, pool equipment room and stormwater holding tank. The Subcontractor Agreement also required that Tavernier submit to Kier the names and addresses of all ‘operatives he chose to employ on the work’.
- [3] The Sundry Workers, on 4th November 2008, filed a reference against Tavernier alleging that it had effected a series of layoffs of employees between October 2006 and July 2007, which resulted in those employees being unfairly dismissed. In May 2015, the court granted the Sundry Workers leave to add Kier as a defendant employer and the Sundry Workers claimed that Kier, as principal contractor, was jointly liable with Tavernier to meet all payments to which the employees became entitled. On 30th September 2016, the Industrial Court ordered that a preliminary hearing be held to determine the issue of whether Kier and Tavernier were the employers in respect of the Sundry Workers’ claim for unfair dismissal.

¹ Cap 23 Order 1981 of the revised laws of Antigua and Barbuda.

- [4] The Industrial Court, in a judgment delivered on 13th September 2019 held that the Sundry Workers were in fact employees of Kier and that it was liable to meet all payments to which the employees became entitled. Kier filed a Notice of Appeal on 4th October 2019 appealing the judgment of the Industrial Court. This Court, allowing the appeal, held that Tavernier is in fact and law the employer of the employees and that Tavernier is liable to meet all payments to which the employees became entitled upon termination of their services.

The Notice of Motion for Leave to Appeal to the Privy Council

- [5] Tavernier filed an Amended Notice of Motion on 30th September 2024 seeking leave to appeal the decision of this Court dated 13th March 2024. Tavernier makes the application pursuant to: (1) section 122(1)(a) of the **Constitution** by which this Court is empowered to grant leave to appeal to His Majesty in Council as of right; or (2) section 122(2)(a) of the **Constitution** by which this Court is empowered to grant leave to appeal to His Majesty in Council as a matter of discretion but focuses on the 'or otherwise' limb of that section.

Appeal as of right

- [6] Section 122(1)(a) of the **Constitution** provides for appeals to His Majesty in Council as of right as follows:

“An appeal shall lie from decisions of the Court of Appeal to [His] Majesty in Council as of right in the following cases-

- (a) final decisions in any civil proceedings where the matter in dispute on the appeal to [His] Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards...”

- [7] Tavernier submits that the decision of the Court of Appeal reversed a decision made at a trial, not on the hearing of an interim application. It ought not to be disputed that the appeal is against a final decision in civil proceedings. As the appeal involves the compensation due to the Sundry Workers consequent upon the termination of their

services, it clearly involves directly or indirectly a question respecting property. Tavernier therefore submits that it is entitled to appeal to His Majesty as of right.

[8] Kier submits that in applying the application test to the case at hand, it is evident that if the court had found in Tavernier's favour, this would not have determined the issues in the claim as it would simply have meant that the matter would have proceeded to trial at which point the issues would have been finally determined. In other words, the case would not have ended at that stage if the court had decided in Tavernier's favour. Even if the Court of Appeal had not quashed the Industrial Court's decision, the effect of that ruling on the preliminary hearing is that the substantive matter would have proceeded to trial with Kier still involved in the matter and having to answer the claims made by the Sundry Workers. Kier concludes it is therefore evident that the decision in the case at hand is not a final decision of the court and therefore does not fall within the provisions of section 122 (1)(a) of the **Constitution**.

[9] The use of the application test in this context was restated by this Court in **Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al**² where it stated as follows:

"[6] ...Sir Dennis Byron JA (as he then was) analysed and compared the application test and the order test and concluded that the application test applied in the Eastern Caribbean. At paragraph [11] of the judgment he summarised the application test –

"Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J. would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued."

The essence of the application test resulting in an interlocutory order is that the claim, or the subject matter of the application, will come to an end if the application is determined one way, but will continue if it is determined the other way. This is illustrated by the example given by Byron JA – the application to strike out the writ succeeded and the strike out order brought the claim to an end. On the other hand, if the application had failed the claim would have continued.

² BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) at paragraphs 6-7.

[7] On the other hand, if the result of the application is that the resulting order would determine the matter in litigation for whichever side the decision is given, it is a final order (using the application test). This type of order is usually made at the end of a trial – it disposes of the claim whichever way it is decided. This is a final order, and its essence is captured in the first sentence in the dictum of Sir Dennis Byron JA in **Sylvester v Singh** cited in paragraph [6] above.”

[10] Tavernier relies on the decision of this Court in **Gregory Brown et al v Dipcon Engineering Services Ltd**³ where this Court observed at paragraph [16] that:

“[16] It is perhaps helpful to add another proposition, which comes out of the decision by the English Court of Appeal in the case of **White and Bruton**. Sir John Donaldson stated that if on the determination of a preliminary issue in a final hearing, any issue that is joined between parties is determined, then, that would also be a final determination although the entire or all of the issues before the court have not been determined.”

[11] Tavernier misunderstands the import of that paragraph of the decision of this Court in **Gregory Brown**. This Court refers to **White v Bruton**⁴ where the Court of Appeal of England and Wales stated that:

“The court is now clearly committed to the application approach as a general rule and Bozson's case [1903] 1 K.B. 547 can no longer be regarded as any authority for applying the order approach. However, the decision in Bozson's case, as distinct from the reasoning, can be upheld on a different ground as an exception to the general rule. It was a case of a “split trial,” all questions of liability and breach of contract being tried before and separately from any issue as to damages. If the two parts of the final hearing of the case had been tried together, there would have been an unfettered right of appeal, even if the judgment had been that there was no liability and that accordingly no question arose as to damages. It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials. I would therefore hold that where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party

³ GDAHCVAP2004/0022 (delivered 8th December 2005, unreported).

⁴ [1984] 2 All E.R. 606.

may appeal, without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing.

In effect that is the position in the present case for in directing a preliminary issue on a point of construction, the district registrar was seeking to divide the final hearing into two parts in the justified belief that it was possible that by adopting this course the expense of part of the hearing might be avoided. That the division may not have run exactly along the line dividing liability from quantum is, I think, immaterial. The decisive feature is that the “preliminary issue” was not, when analysed, an issue preliminary to a final hearing, but the first part of a final hearing.”

[12] The English Court of Appeal in **White v Bruton** makes clear that the issue of whether the determination of a preliminary issue is a final or interlocutory order is first done by analysing the preliminary issue. In that case, the preliminary issue was one of liability and therefore any such decision was a final decision applying the application test. Contrary to the submission of Tavernier, the decision of this Court in **Gregory Brown** is not an authority that an order made on a bifurcated trial or on a preliminary issue is itself a final order. Everything depends on the nature of the preliminary issue.

[13] The Privy Council in **Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail and another**,⁵ after examining its previous authorities on the issue of the applicable test to determine whether a decision is ‘final’, concluded as follows:

“50. In the [States and Territories served by the Eastern Caribbean Supreme Court] it is well established that the application test is used to determine whether a decision is final, and this is expressly stated in the applicable civil procedural rules. In accordance with the approach of the Board set out above, it is appropriate for the Board to use that test to determine whether a decision is “final” for the purpose of appeals as of right to the Board under section 3(1) of the 1967 Order. It follows that the Court of Appeal applied the correct test and reached the correct conclusion. Applying the application test the decision in the present case was not a “final” decision and accordingly there is no appeal as of right.”

⁵ [2024] UKPC 10.

- [14] Tavernier during the hearing of the appeal cited the decision of **Inderjit Kaur Chhina** where the Privy Council stated the following about the decision in **Meyer v Baynes**.⁶

“Meyer v Baynes (Antigua and Barbuda)

[24] Mr Baynes made a claim against Mr Meyer for personal injuries suffered as a result of a road traffic accident and obtained judgment in default of defence. Mr Meyer succeeded in setting aside that judgment before the Master on the grounds that there were exceptional circumstances. Mr Baynes successfully appealed against this decision on the basis that there were no such circumstances. Mr. Meyer applied to the Court of Appeal of the Eastern Caribbean for leave to appeal to the Board contending that the decision was a final decision and that he was entitled to appeal as of right. The Court of Appeal disagreed and refused his application, but the Board granted permission to appeal. The Board dismissed the appeal, but it also addressed the question of whether the Court of Appeal retained any control over appeals as of right where there was no genuinely disputable issue. The Board held that it did. At para 21 of the judgment of the Board given by Lord Kitchin it was stated as follows:

'Section 122(1) of the Constitution Order provides that an appeal shall lie to the Judicial Committee of the Privy Council as of right against final decisions in cases such as the present which involve a claim concerning a right which has a value in excess of a prescribed threshold. Both parties accept that the decision of the Court of Appeal was final and that the threshold requirement was met. The question, therefore, is whether the Court of Appeal retained any control over a further appeal.'

[25] A decision in relation to an application for judgment in default would only be final applying the order test. However, it was common ground that the decision of the Court of Appeal was final and this was not addressed as a contentious issue by the Board. Again, there was no consideration of whether or not the decision was final or of the appropriate test for so determining.

[26] In summary, in none of the cases relied upon by the appellant did the Board itself consider whether the decision under appeal was final or what test should be applied on appeals to the Board to determine that question. They are of no material assistance.”⁷

- [15] The Court allowed the respondent to file supplemental submissions in relation to the decision of the Privy Council in **Inderjit Kaur Chhina** and the applicant to file

⁶ [2019] UKPC 3.

⁷ [2024] UKPC 10 at paragraphs 24-26.

submissions in reply if necessary. In the supplemental submissions, Kier submits that, applying this test, the application was for a preliminary issue to be determined by the court as to whether Kier or Tavernier was liable to answer the claims of the Sundry Workers (in essence determining if Kier was correctly added as a party to the claim). In the first respondent's view, this application would not bring finality to the matter. The applicant filed its supplemental submissions of 6 pages (together with a bundle of 158 pages) on 24th March 2025, five days outside the deadline ordered by the Court at the hearing of the appeal. I have not read either of them.

- [16] In my view, the statements of the Privy Council in **Inderjit Kaur Chhina** concerning the decision of the Privy Council in **Meyer v Baynes** do not assist the applicant. The Privy Council in **Inderjit Kaur Chhina** made clear that: (1) only if the order test were applied that the decision under appeal in **Meyer v Baynes** (application to set aside the default judgment) would be a final one; and (2) the Privy Council in **Meyer v Baynes** did not have to determine which test to apply as it was not a contentious issue before it.
- [17] It is not disputed that the application test must be applied in respect of the decision for which the applicant seeks leave to appeal to His Majesty in Council, namely, the decision of the Court of Appeal. In the instant matter, the decision for which Tavernier seeks leave to appeal was the decision of the Court of Appeal, overruling the Industrial Court, and holding that Tavernier was the employer of the Sundry Workers for the purposes of the claim for unfair dismissal. Applying the application test, the decision of this Court did not determine the matter in litigation for either of the parties. If the decision of this Court had been different, the matter in dispute between the parties (the unfair dismissal claim) would have continued against either Tavernier or Kier and, the Industrial Court would then have had to determine whether the claim for unfair dismissal was proved against either of them.

- [18] Consequently, Tavernier cannot ground its appeal to His Majesty in Council in section 122(1)(a) of the **Constitution** because the order of the Court of Appeal is not a 'final decision' which is a necessary condition for the grant of leave under that section.

Special Leave to Appeal

- [19] Section 122(2)(a) of the **Constitution** provides that:
- “...an appeal shall lie from the decisions of the Court of Appeal to [His] Majesty in Council with the leave of the Court of Appeal in the following cases-
- (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance **or otherwise**, ought to be submitted to Her Majesty in Council.” (Emphasis added)
- [20] In supplemental submissions filed, Tavernier states that it is entitled to Conditional Leave to Appeal pursuant to section 122(2)(a) of the **Constitution** in that the instant appeal raises meritorious grounds of appeal specifically that at paragraph [42] of the judgment, the Court of Appeal made conclusions which were not featured in nor supported by the evidence and which were not the subject of argument in the Court of Appeal nor in the court below. Tavernier submits that this additional ground is intended to capture the jurisdiction for conditional leave to appeal established by the words 'or otherwise' in section 122(2)(a) of the **Constitution**. Tavernier submits that the analysis in paragraph [42] of the judgment is fundamentally flawed and that the reasoning undermined the *raison d'être* of the contract between the parties. Tavernier continues that nowhere in the record is it represented or established that the company, Kier, was established or based in Antigua and Barbuda; nor was such a submission made to the Court. Tavernier therefore submits that this was a fundamental error and submits further, that accordingly, it has met the threshold for the grant of leave.
- [21] Kier submits that the appeal in this case does not fall within any of the above categories and is not otherwise of general or public importance and as such does not satisfy the provisions of section 122(2)(a) of the **Constitution**. It must be noted that the application relates only to the 'or otherwise' limb of section 122(2)(a) of the

Constitution. Kier also submits that Tavernier’s notice of motion for conditional leave to appeal from the Court of Appeal to His Majesty in Council should be dismissed with costs to the first respondent. Kier contends that Tavernier had not included the transcript of the evidence before the Court of Appeal and that this Court had evidence before it to make the statement that it did. Kier also contends that that statement was not relevant to the decision of the Court as the Court had already analysed the three agreements and decided that they did not make any commercial sense.

[22] In relation to the ‘or otherwise’ limb, this Court also provided useful guidance in **Multibank FX International Corporation v Von De Heydt Invest**⁸ as follows:

“The ‘or otherwise’ limb

[13] The ‘or otherwise’ limb of article 3(2)(a) of the 1967 Order accords to an applicant for conditional leave an additional limb upon which to persuade the Court to grant the application. To satisfy this ground, an applicant must demonstrate that there is some good reason or ground why leave to appeal ought to be granted. Perhaps the most persuasive of such reasons is where there is reasonable doubt as to the correctness of the Court of Appeal’s decision as, for example, where the decision was based on a principle which has been overruled by higher and binding authority or where it was based on a statute or statutory provision which has been repealed prior to such decision being rendered. In short, the ‘or otherwise’ limb may be invoked where an applicant can demonstrate that the decision sought to be further appealed is so flawed or so incorrect that it ought not to be allowed to stand or where there is some other good reason why the guidance of their Lordship’s Privy Council is desirable. As stated in *Renaissance v Comodo Holdings Ltd*:

“[13] But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if it is satisfied that there are good grounds which would otherwise justify referral to [His] Majesty in Council, as for example where there is some reasonable doubt as to the correctness of the decision of [the] court.”

[14] The ambit and application of the ‘or otherwise’ limb was also considered by the Court of Appeal of Bermuda in *Imran Siddiqui and others v Athene Holding Limited*. This case dealt with a contest over whether Bermuda rather than New York was the forum conveniens for the trial of claims brought before the Bermuda courts by the respondent, a Bermudian exempt company, against the appellants/applicants. In the judgment

⁸ BVIHCVAP2022/0008 (delivered 7th July 2023, unreported) at paragraphs 13-16.

(delivered by Smellie JA), the court, having considered the principles applicable to the expression 'great general or public importance' as set out by this Court in *Martinus Francois, Pacific Wire, and Renaissance Ventures v Comodo Holdings*, turned to a consideration of the 'or otherwise' limb under section 2(c) of the Appeals Act 1911 (1989 Revision) of the laws of Bermuda. This provision is in pari materia with section 3(2)(a) of the 1967 Order.

[15] Having commented that the grounds relied on by the applicant will be examined later in the judgment as to whether they meet the 'great general or public importance' requirement, the learned Justice of Appeal opined that, if they are found not to, 'it cannot be right that leave should be given on the basis of the "or otherwise" limb.' The Justice of Appeal also observed that at its core the dispute in that matter is a private dispute about forum conveniens between a Bermuda company and other privately interested parties (one of its former directors, and one of its former officers/employees), and a private Bermuda company which those individuals established (*Caldera*). Also, 'important as it is to the parties themselves and interesting as it may be to the wider business community for all its wider implications, this is at its core a private dispute...' Specifically in relation to the 'or otherwise' limb, the learned Justice of Appeal issued the following cautionary statement:

"A finding that in these circumstances there are "otherwise" good reasons for the grant of leave to appeal, could readily become a charter for frustration and delay by way of future forum contests, regardless of well- settled principles of governing law."

[16] In summary, an applicant for conditional leave to appeal to His Majesty in Council under section 3(2)(a) of the 1967 Order, is required to establish to the Court that the grounds of the proposed appeal satisfy one or the other of the limbs of the section. In seeking to do so, a particular ground advanced need only satisfy one of the two limbs of the section. Alternatively, certain grounds may fail to satisfy either limb while others may satisfy one limb. In such circumstances, leave to appeal should be granted only with respect to the proposed grounds of appeal which satisfied section 3(2)(a)."

[23] The reasoning of the Court of Appeal in respect of whether the Industrial Court was correct in concluding that *Tavernier* was engaged for the limited purpose of supplying employees as tradesmen is found in paragraph [41] where it states as follows:

"[41] Whether applied literally or contextually, it is apparent and reasonable to arrive at the conclusion that the August Agreement, December Agreement, and the Subcontractor Agreement all contemplated that *Tavernier* would have at his disposal employees to complete the work subcontracted for and that such employees would not be the employees of

Kier. Further, commercially, it is quite difficult and tenuous to contemplate a reality where a subcontractor would be paid such a lucrative subcontract sum for works limited to the transport of labour and that there would be no direction, or supervision of the subcontracted works by the subcontractor if those subcontracted works were performed by the employees. Contract interpretation necessitates that good commercial sense should prevail, and in accepting the evidence of Tavernier that he had solely been contracted to transport the tradesmen, the Industrial Court came to a conclusion which was not borne out in the agreements, nor did that conclusion make sound commercial sense.”

- [24] This conclusion was based on the Court’s analysis and interpretation of the three agreements in paragraphs [30] to [40] of the written judgment. The Court of Appeal then stated:

“[42] From all accounts, Kier is a well-established construction company in Antigua and Barbuda. If it so wished, it could have contracted these tradesmen directly without going through the extensive task of executing 3 agreements which emphasised that it was not liable for hiring, supervising or paying these tradesmen. Further, Tavernier’s evidence contradicts the idea of commercial sense. Under cross-examination, Tavernier states the following:

‘Between 2005-2007 other than Kier Workers I had no employees’.”

- [25] Tavernier’s core objection is the statement of the Court of Appeal that Kier is a well-established construction company in Antigua and Barbuda. In the hearing bundle, Tavernier does not provide this Court with the transcript of proceedings, or the pleadings or other evidence that was deployed in the court below to make good his submission that the statement made by the Court of Appeal in the first sentence of, and analysis at, paragraph [42] is fundamentally flawed. This is not surprising since Tavernier only belatedly sought leave pursuant to the ‘or otherwise’ limb of section 122(2)(a) of the **Constitution**. The statement of this Court at paragraph [44], as Kier contends, was not relevant to the decision of the Court because the Court has already analysed the agreements at paragraphs [30] to [40] and decided at paragraph [41] that they did not make commercial sense. The statement at paragraph [42] would therefore be superfluous considering the reasoning of the Court that was clearly and rationally set out at paragraphs [30] to [40]. The applicant in its Amended Notice of Motion has not sought to impeach the reasoning of the Court in those

paragraphs. Having regard to the threshold required for an applicant to invoke the 'or otherwise' limb as articulated by this Court in **Multibank**, in my view Tavernier has not demonstrated that the decision of this Court is so flawed or so incorrect that it ought not to be allowed to stand or that there is some other good reason why the guidance of His Majesty in Council would be desirable.

Disposal

[26] For the reasons given above, I would dismiss the Amended Notice of Motion for leave to appeal to His Majesty in Council. The second respondent has not opposed this appeal, therefore I would order costs to the first respondent only to be assessed if not agreed within 21 days.

[27] I am grateful for the assistance provided by all counsel for the parties.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal



By the Court

Chief Registrar