

Court of Appeal

Grenada

Civil Appeal No. 001 of 2007

Sands, Controller of Bank Crozier Limited (in Liquidation)
and
Louison, Liquidator of Bank of Crozier Limited et al

September 16, 2008

Barrow, J.A.; Rawlins, J.A.; Thomas, J.A. (Ag.)

Civil practice and procedure - Privy Council — Application for conditional leave to appeal — Applicant's case not satisfying any of the criteria for granting leave — Application dismissed.

Appearances:

Mr. Steven Singh and Ms. Leslie Ann Seon for the appellants.

Mr. C.E. Lashley, QC and Mr. Sean Lewis for the first respondent.

Mr. Anthony Astaphan, SC for the second respondent.

Held: refusing the application for conditional leave to Her Majesty in Council and awarding costs to the respondent:

- (1) An applicant must apply to the Court of Appeal for leave even where an appeal lies as of right. *William Martin v. Ursil Peters Antigua and Barbuda* Civil Appeal No. 36 of 2004 which applied *Electrotec Services Ltd. v. Issa Nicholas (Grenada) Ltd.* (No. 1) [1998] 1 W.L.R. 202 followed.
- (2) The issue before the Court did not relate to a “value” but the existence of a right to indemnity. As such, the issue upon which leave to appeal to Her Majesty in Council was sought did not fall within the purview of section 104(1)(a) of the Constitution.
- (3) The Court is permitted to grant leave under section 104(2)(a) of the Constitution where the appeal involves a question of great general or public importance. The criteria to be considered by the Court when granting conditional leave to appeal under section 104(2)(a) are whether there is a serious question of law to be tried, a constitutional provision or area of law which has not been settled or a legal question, the resolution of which presents dire consequences for the public. The Court was satisfied that the issue of an entitlement to an indemnity in priority to other creditors was an ordinary issue of law, which did not fall within any of these categories so as to justify the grant of leave under section 104(2)(a) of the Constitution. *Martinus Francois v. The Attorney General Saint Lucia* Civil Appeal No. 37 of 2003 followed. *Barbados Sugar Industry Ltd. v. Barbados National Bank and others* (No 2) (1995) 50 W.I.R. 64, *Vehicles and Supplies Limited et al v. The Minister of Foreign Affairs, Trade and Industry* [1989] 26 J.L.R. 390, *Daily Telegraph Newspaper Company Limited v. McLaughain* [1904] A.C. 776, *Etoile Commerciale SA v. Owens Bank Ltd* (No.2) (1993) 45 W.I.R. 136 and *Douglas and Other v. Pindling* (1996) 48 W.I.R. 1 considered.

Thomas, J.A. (Ag.): Before the Court, is an application for the grant of conditional leave to appeal to Her Majesty in Council from the judgment of this Court, delivered on 26th November 2007.

Background

In broad outline, the entire proceedings center on Bank Crozier Limited (“the Bank”), which was licensed in Grenada as an offshore bank pursuant to the Offshore Banking Act 1996 No. 39 (“the Act”). Also in the equation are Daryl Sands and Garvey Louison, former controller and liquidator of the Bank, respectively.

The Bank became insolvent which resulted in the Minister of Finance, Government of Grenada, appointing Daryl Sands as the controller of the Bank pursuant to section 20(1) of the Act and at a later date the Bank's license was revoked.

On 24th July 2003 following the filing of a winding-up petition, Madam Justice Charmaine Pemberton ordered the Bank to be wound up and appointed Garvey Louison as liquidator.

This application for conditional leave to appeal to the Privy Council has its origins in the decision of Baptiste, J. of 20th December 2006 (Civil Suit: GDAHCV 2003/0255 – Daryl Sands v. Garvey Louison (Grenada)) in which he determined, inter alia, that Mr. Daryl Sands as Controller of the Bank had no right of indemnification from the estate of the Bank with respect to all costs and expenses arising from his functions as Controller. Specifically, His Lordship held that the laws of Grenada made no provision for an indemnity to be imposed or granted to a person.

On appeal, Justice of Appeal Denys Barrow, SC in giving the decision of the Court noted that (Grenada Civil Appeal 2007 No. 1 (delivered on 26th November, 2007) at para. 1):

“The principal issue on this appeal is whether a Controller, appointed pursuant to the Offshore Banking Act... ‘with like power of a receiver under the Bankruptcy Act’ to control the affairs of an offshore bank that subsequently went into liquidation, is entitled to be indemnified like a Court appointed receiver, for all costs and expenses arising from his function as controller, including contingent liabilities, out of the funds of the bank in priority to the general body of creditors.”

The appeal was dismissed with prescribed costs to the liquidator.

THE APPEAL

The notice of application filed by the appellant reads thus:

The applicant Daryl Sands Controller of Bank Crozier Limited hereby applies to the Court for an Order that:

- “1. The appellant/applicant be granted conditional leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal (comprising The Honourable Mr. Justice Denys Barrow, S.C., The Honourable Mr. Justice Hugh Rawlins, Justices of Appeal and the Honourable Mrs. Dancia Penn-Sallah, Q.C., Justice of Appeal [Ag.]) given on the 26th of November, 2007 and upon such conditions and security as may be deemed just and further and Order;
2. An Order for a Stay of Execution of the said judgment of the Court of Appeal until the hearing and determination of the Appeal to Her Majesty in Council; and
3. An Order that the Conservatory Order of the Court of Appeal made on the 26th day of November, 2007 do continue until the hearing and determination of the Appeal to Her Majesty in Council.”

The grounds of the application are as follows:–

1. The said judgment of the Court of Appeal is a final decision in civil proceedings.
2. The matter in dispute on appeal to Her Majesty in Council is of value of upwards of \$1,500.00 which involves questions respecting property or rights of a value of upwards of \$1,500.00.

3. By virtue of Section 104(1) of the Constitution of Grenada, an Appeal lies as of right from the decision of the Court of Appeal to Her Majesty in Council.

4. Further, the questions involved in this appeal (namely, whether the appellant/applicant who was appointed by the Minister as Controller was/is entitled to a right of indemnification out of assets of the Bank in priority to all claims other than the claims of secured creditors, and whether the second respondent ought to be granted leave to intervene where the Bank is in liquidation) are that by reason of their great general or public importance, ought to be submitted to Her Majesty in Council by virtue of Section 104(2) (a) of the Constitution of Grenada.

5. The appellant/applicant is dissatisfied with the said judgment of the Court of Appeal and is desirous of exercising his constitutional right of appeal to Her Majesty in Council and in the event that the appeal succeeds, the judgment of Her Majesty's Privy Council would be rendered nugatory as the funds would be distributed to insolvent creditors of Bank Crozier Limited, which itself is in liquidation. Alternately, this Honourable Court ought in all the circumstances ensure that the estate of the insolvent Bank is preserved pending the hearing and determination of the Appeal to Her Majesty in Council.”

The application for leave is supported by an affidavit sworn to on 17th December 2007 by Ms. Leslie Ann Seon, principal Solicitor in the firm of Seon & Associates, Instructing Solicitors for the appellant. In the affidavit Ms. Seon outlines the history of the matter, the issues arising in the appeal, the grounds of the application and the prayer.

THE GOVERNING LAW

As indicated in the notice of application, the application depends on section 104 of the Constitution of Grenada (“the Constitution”) which is in fact the governing constitutional law. Section 104(1) to (3) provide as follows:

“104(1) Subject to the provisions of section 37(7) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases—(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards, final decisions in any civil proceedings;(b) final decisions proceedings for dissolution or nullity of marriage;(c) final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and(d) such other cases as may be prescribed by Parliament.

(2) Subject to the provisions of section 37(7) of this Constitution, an appeal lie from decision of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases—(a) 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, decisions in any civil proceedings; and(b) such other cases as may be prescribed by Parliament.

(3) An appeal shall lie to Her Majesty from any decision of the Court of Appeal in any civil or criminal matter.”

Provisions which are similar, if not identical, to section 104 of the Constitution of Grenada are to be found in those Commonwealth Caribbean jurisdictions which still retain appeal to the Privy Council. This means that applications for leave to appeal to the Privy Council are not infrequent and in a recent decision of this Court, Justice of Appeal Hugh Rawlins (as he then was), summarised the constitutional position with respect to such appeals in the case of William Martin v. Ursil Peters (Williams Martin and Ursil Peters, Antigua and Barbuda Civil Appeal No. 36 of 2004 delivered on 17th September 2007). In the circumstances it is instructive to highlight the relevant portions of that judgment.

Beginning at paragraph 11 this is what His Lordship said with respect to the Grenada case of Electrotec Services Ltd. v. Issa Nicholas (Grenada) Ltd (No.1) [1998] 1 W.L.R. 202:

“11. The reasoning by their lordships in Electrotec Ltd. is instructive because they reminded us that the

procedure for appeals to the Privy Council is governed by the West Indies Order [FN6: The Eastern Caribbean (Appeals to the Privy Council) Order 1967] and the Judicial Committee Rules [FN7: The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982], which must be construed as a coherent code. [FN8: see page 204C-D of the judgment] Their Lordships stated that even where an appeal lies as of right, an applicant must yet apply to the Court of Appeal for leave. This, they said, is because rule 2 of the Judicial Committee Rules states that an appeal shall be either with the leave of the Court appealed from or with the special leave of the Privy Council. It is significant that their Lordships continued as follows [FN9: at page 304 E-F]:

‘It follows that notwithstanding that the case may be one in which an appeal lies as of right, the leave of the Court of Appeal must be obtained. Such leave is not, however, a matter of discretion for that Court. Article 3 of the West Indies Order provides:

‘An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceedings originating in a state in such cases as may be prescribed by or in pursuance of the constitution of that state.’ (Emphasis added).

‘It would therefore appear that the function of the Court of Appeal upon an application for leave is to satisfy itself that the case is one in which, under the Constitution of Grenada, a right of appeal exists and, if so satisfied, to consider the exercise of the power to impose conditions conferred by article 5. Leave is granted “in the first instance” subject to compliance with those conditions and final leave is granted when the conditions have been complied with.”

Leave “in the first instance” refers to conditional leave”.

SECTION 104(1) OF THE CONSTITUTION

Section 104(1) of the Constitution prescribes four circumstances in which a right of appeal lies from a decision of the Court of Appeal. That at paragraph (a) is the one identified by the appellant. It speaks of the matter in dispute ‘is of a value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred or upwards, final decisions in any civil proceedings....’

It is reasonable to say that the parties agree that the applicable circumstance is that which speaks to the matter in dispute being of a value of fifteen hundred dollars or upwards. But this is not entirely free from difficulty.

Submissions

Learned counsel for the appellant, Mr. Stephen Singh submits that Justice Denys Barrow, SC in the Court of Appeal identified the right of indemnification as being the issue for determination and thus, according to Mr. Singh, the question pertaining to leave to appeal is the value attributable to that right in order to qualify under section 104(1) (a) of the Constitution. Mr. Singh contends further that there is no affidavit in opposition to that sworn to by Ms. Leslie-Ann Seon and therefore the value attributable to the right is approximately US\$1 million which is in excess of the prescribed requirement under the section in issue.

For the first respondent, Mr. Clement Lashley, QC, argues that the appellant has not shown that the matter in dispute is of a value of \$1500.00 or upwards or that the appeal involves directly or indirectly some claim or question relating to or respecting property or a right of the value of \$1500.00, which according to learned counsel is fatal to the application.

Placing reliance on the case of *Zuliani and others v. Veira* [1994] 1 W.L.R. 1149 and *Alleyne Forte (Learie) v. Attorney General of Trinidad and Tobago* [1998] 1 WLR 68, Mr. Lashley further contends: Firstly, that in the pleadings, the appellant has not shown any specific sum claimed and that as a result the

application should be dismissed; secondly, that even although the Court has no discretion in the matter, nevertheless the Court must still be satisfied that the proposed appeal raises a genuinely disputable issue in the prescribed category before it grants leave to appeal.

Mr. Astaphan, SC for the second respondent argues that a claim for US\$1 million is not in issue and relying on Zuliani he refers to “utmost probability or certainty.” Learned senior counsel also makes mention of the fact that the applicant has not produced his letter of appointment – a fact referred to at paragraph 42 of the decision of the Court of Appeal.

The matter of the value

This is a matter with a history. It arose in one form or another throughout the litigation at all levels with respect to the issue of the appellant's duties as controller of the Bank and certain expenditures by him and the right of indemnification in the context or circumstances of an offshore bank in liquidation.

It will be recalled that earlier, I made reference to the fact that Justice of Appeal Barrow, SC in giving the decision of this Court in the appeal identified, in essence, that the issue for determination was the entitlement of a controller to indemnification like a Court appointed receiver for all costs and expenses arising from his function as controller, including contingent liabilities, out of the funds of the bank in priority to the general body of creditors.

At various places in the judgment of the Court, Justice Barrow uttered dicta which I consider have a bearing on the issue of the value of the right claimed by the appellant. He begins at paragraph 3 where in putting forward the case of the parties he said:

“The second respondent makes the point that the appellant has consistently refused to disclose the terms contained in the letter of appointment, which is commonly accepted, the Minister issued.”

Continuing at paragraphs 8 and 9 the learned Justice of Appeal said:

“The appellant indicated that he has incurred significant costs and continues to incur costs on an ongoing basis in defending the lawsuits brought against him in relation to his actions while he was controller. It is important, we think, to settle at the outset that the issue that this Court has been asked to determine on appeal is whether the Controller was appointed on terms that he was entitled to a right of indemnification out of the assets of the bank in priority to all claims other than the claims of secured creditors. The issue, therefore, was as to the terms of the Controller's appointment. The issue was not whether the liquidator should honour the Controller's claim. Mr. Lashley, QC., counsel for the liquidator, stated in his written submissions in the Court below that despite filing 4 affidavits in 2003 the Controller never once itemised any alleged expenses in support of a claim for indemnity and it was long after the Controller's application was filed in July 2003 that the Controller's agent, in January 2006, notified the liquidator of certain expenses for the years 2004 to 2005 so, it seems clear to us, a claim for the payment of expenses incurred by the Controller was not the footing for the Controller's application. As counsel further submitted, an assertion of a claim for an unquantified sum for litigation expenses already incurred and a claim for as yet unincurred expenses are not claims in the liquidation.”

I consider that the issue is substantially addressed by Barrow, J.A.'s conclusion that the payment of expenses incurred by the Controller was not the footing for the Controller's application. This in turn may account for the absence of pleadings in this regard – a submission made by learned counsel for the first respondent. And to complicate the issue, learned counsel for the appellant, advances the notion of the value of the right of indemnification.

In her affidavit, Ms. Leslie Ann Seon identifies the principal issue before the Court as being:

“...whether a Controller appointed pursuant to the Offshore Banking Act No. 39 of 1996 of the Laws of Grenada ‘with like power of a receiver appointed under the Bankruptcy Act’...to control the affairs of an offshore bank...is entitled to be indemnified like a Court appointed receiver, for all costs and expenses arising from his function as Controller, including contingent liabilities out of the funds of the Bank in priority to the general body of creditors, other than secured creditors.”
(Paragraph 3 of the Affidavit)

Ms. Seon continues at paragraph 5 of her affidavit and addresses the grounds of the application in these terms:

- “(i) The said judgment of the Court of Appeal is a final decision in civil proceedings.
- (ii) The matter in dispute on appeal to Her Majesty in Council is of value of upwards of \$1,500.00 which involves questions respecting property or rights of a value of upwards of \$1,500.00. The appellant/applicant has filed a claim with the Liquidator for the sum of approximately US\$1,000,000.00. In the event that the appellant/applicant is successful in the appeal to Her Majesty in Council he will be entitled to prove for this sum in the liquidation proceedings, in priority to all other creditors, except secured creditors.”

In my view, paragraph 5(ii) of the affidavit does not assist the appellant's case. For one thing it speaks of ‘approximately US\$1,000,000.00’ which lets in the question of utmost probability and certainty. More importantly the issue advanced by the appellant does not relate to a value – it concerns a right and whether or not it exists.

Therefore, in the wider context, I hold the view that given the issue before the Court, the appellant cannot be granted conditional leave under section 104(1)(a) of the Constitution which speaks to a right of the value of fifteen hundred dollars, or upwards. This is because the issue before the Court does not involve a ‘value’ as such. And the attempts in the affidavit and in submissions to attribute a value to the right are of no moment. As Justice of Appeal Barrow put it: “the payment of expenses incurred by the Controller, was not the footing of the Controller's application.” Put otherwise, the affidavit and the submissions by learned counsel for the appellant, cannot transform the issue that was specifically ordered by this Court to be considered on remission (The issues directed to be determined by the High Court were: (1) the applicant's claim to be entitled to a right of indemnification from the estate of the Bank with respect to all costs and expenses arising from the estate of the Bank with respect to all costs and expenses arising from his function as Controller including any contingent liability; (2) whether such a right was to be secured by the assets of the Bank in priority to the liquidator and the general body of creditors subject only to prior secured rights.” See order of the Court in Civil Appeal No. 27 of 2003 dated 20th February 2006 and entered on 24th February 2006.)

The rule in these circumstances, is that a Court of appeal has no discretion in the matter of leave so long as the requirements, in this case section 104(1) (a) of the Constitution, are satisfied. Therefore in this case, leave must be refused since the issue upon which leave is sought to appeal to the Privy Council does not fall within the purview of section 104(1) (a) of the Constitution.

Alternatively, even if the issue does fall within section 104(1) (a) of the Constitution there is no certainty as to the value of the right and as such leave can be refused on this limb (See, *Zuliani v. Veira*, supra 8 to the High Court.).

SECTION 104(2) (A) OF THE CONSTITUTION

This section of the Constitution permits the Court of Appeal to grant leave to appeal:

“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, decisions in any civil proceedings....”

SUBMISSIONS

Mr. Stephen Singh for the appellant, submits that the question of the priority of the Controller's right to indemnification is of great importance to the offshore sector in Grenada, and further, that the issue may constitute a disputed area of the law. In his regard learned counsel placed reliance on the case of *Martinus Francois v. The Attorney General of Saint Lucia* Civil Appeal No. 37 of 2003.

In denying that the issue before the Court is of general or public importance, learned counsel for the respondent cited a number of cases. (The following cases were cited: *Barbados Sugar Industry Ltd. v. Barbados National Bank* (No. 2) (1995) 50 W.I.R. 64; *Jamculture Ltd. v. Black Liver Upper Morass Development Company Limited* Suit No. 79/1988 – Feb. 13, 1989 (unreported). *Daily Telegraph Newspaper Company Limited v. McLau ghain* [1904] A.C. 776; *Vehicles and Supplies Limited et al v. Minister of Foreign Affairs, Trade and Industry* [1989] 26 J.L.R. 390; *Etoile Commerciale SA v. Owens Bank Ltd* (No. 2) (1993) 45 W.I.R. 136; *McColl-Frontenac Oil Co. Ltd v. Saulnier et al* [1949] 3 D.L.R. 777.) These bear on the critical phrase ‘general or public importance’.

THE AUTHORITIES

The case of *Martinus Francois* was decided on the basis of section 108 of the St. Lucia Constitution. This provision is identical to section 104 of the Grenada Constitution. The critical words that are common to both provisions are: “by reason of its general or public importance or otherwise....” The context is of course, leave to appeal to Her Majesty in Council.

In the above-mentioned case, the question of leave arose in the context of an appeal relating to the withdrawal by the Minister of Finance of certain monies from the consolidated fund, to meet a government guarantee to the developers of a hotel. This Court determined that such a question was not one of general or public importance.

Saunders, J.A. (as he then was) gave the decision of the Court, and in so doing sought to clarify the import of the phrase ‘general or public importance’ by saying that it must “perforce connote importance through the eyes of the law.” According to His Lordship:

“Strong public comment does not in and of itself indicate great legal importance. Equally, a case which gives rise to a matter of enormous general or public importance might well attract little or no comment in the press.”

At paragraphs 13 and 14 of the judgment Justice of Appeal Saunders identified the basis upon which leave is granted under this ground as follows:

“Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase ‘general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public.

Perhaps the most critical aspect of the instant case was whether the Minister was entitled to have Parliament consider for approval, and whether parliament could validly approve, pursuant to section 39(1) of The Finance (Administration) Act 1997, a loan for the purpose of refinancing Government's obligations to the former Hyatt Hotel. If that question were answered in the affirmative, as it was by all the members of this Court, then this was a hopeless case. The rationale for this Court's positive answer to that question has emphatically been stated and restated in several previous decisions. See: *Williams v. Attorney General* [(1964) 14

W.I.R. 177], *Spencer v. Attorney General* [(1999) 3 LRC 1] and *The Cabinet of Antigua & Barbuda v. H.M.B. Holdings Limited* [Antigua and Barbuda Civil Appeal No. 16 of 2001]. At least, so far as this Court is concerned, this is an area of law that is so well settled that further litigation on the subject will not be regarded by this Court as being of great importance. In all the circumstances, leave to appeal to Her Majesty must be refused.”

In *Barbados Sugar Industry Ltd. v. Barbados National Bank and others* Loc cit, Sir Frederick Smith, J.A. gave the matter short shrift by saying:

“There is no doubt in my mind that the law in section 64(2) (Ibid to page 65. This is a reference to section 64(2) of the Supreme Court of Judicature Act [Barbados] which provides that: “With leave of the Court of appeal from any other decision of the Court of appeal whether final or interlocutory, if in the opinion of the Court of appeal the question involved in the appeal is one that by reason of its general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision.”) cannot apply since the payment of remuneration to Court-appointed receivers cannot be a question of general or public importance or such as otherwise ought to be submitted to Her Majesty.”

On the other hand, in *Vehicles and Supplies Limited et al v. The Minister of Foreign Affairs, Trade and Industry* Loc cit, it was held that the question whether the appellant's statutory powers enabled him to make allocation or determine the quantities and types of vehicles that may be imported, involved a matter of general or public importance.

As noted above, Saunders, J.A. in *Martinus Francois* detailed some of the legal criteria or tests which Courts apply in order to measure whether or not a matter, is of ‘great general or public importance’. According to him, these are: a serious issue of law, a constitutional provision that has not been settled, an area of the law that has not been settled or a legal question the resolution of which poses dire consequences for the public. In a real sense these criteria are substantially reflected in the holding in the Privy Council decision in *Daily Telegraph Newspaper Company Limited v. McLaughain* Loc cit, notwithstanding the fact that the issue concerned an application for special leave. The headnote reads:

“An application for special leave to appeal from the High Court of Australia will be treated in the same manner as an application for special leave from the Supreme Court of Canada. It will not be entertained save where the case is of gravity involving [a] matter of public interest; or some important question of law, or affecting property of considerable amount; or where the case is otherwise of some public importance or of a very substantial character.”

Based on these criteria the decision cited above relating to matters of great general or public importance are readily understood. In *Barbados Sugar Industry Ltd* the Court had “no doubt” that the remuneration of receivers did not satisfy the statutory test of general or public importance. By implication, the Court seemed to be saying that there was no serious legal or constitutional question involved. Equally, the decision in *Vehicles and Supplies Limited* can be understood against the backdrop of criterion of serious question of law involved. It is of some significance to note that the Court did identify the criteria of great public importance interest and important question of law. But again the enactments involved differed from those relating to Grenada and St. Lucia as cited before.

Etoile Commerciale SA v. Owens Bank Ltd. (1993) 45 W.I.R. 136 concerned the grant of leave in relation to the question of the law governing the circumstances under which the enforcement of a foreign judgment might be resisted on the ground that it had been obtained by fraud.

In the circumstances, Sir Vincent Floissac, C.J. noted that: “We are therefore required to form an opinion as to whether the question involved in the proposed appeal ought to be submitted to Her Majesty in Council by reason of their ‘great general or public importance or otherwise.’ His Lordship, with whom the

two other justices concurred, came to this conclusion: (Ibid, at page 141)

“In this jurisdiction, where several international companies are domiciled and transact business, it is necessary to clarify the law governing the circumstances under which the enforcement of a foreign judgment may be resisted on the ground that it was obtained by fraud. I am therefore of the opinion that the question involved in the proposed appeal is ‘one that, by reason of its great general or public importance or otherwise; ought to be submitted to Her Majesty in Council.’”

The case of *Douglas and Others v. Pindling* (1996) 48 W.I.R. 1 forms part of the leave to appeal equation. The case concerned the quashing by the Court of Appeal of the Bahamas of summonses issued by Sir William Douglas, the chairman of a commission of inquiry appointed under the Commissions of Inquiry Act, section 10(3) requiring commercial banks to produce all banking records relating to the respondent.

Again, although the enactment governing leave to appeal to the Privy Council differed from those relevant to Grenada and the nature of the leave involved was not as of right but special leave, the criteria were applied by the Court. Speaking for the Board this is what Lord Keith of Kinkel said (Ibid at page 6)

“Their lordships considered it appropriate that they should advise Her Majesty to grant special leave, since the case raises important issues regarding the right test to be applied by a commission of inquiry in deciding to issue a summons under the Banker's Books Evidence Act, and the nature of the supervisory jurisdiction of the Court over a decision to issue such a summons.”

SHOULD LEAVE BE GRANTED

In the context of section 104(2) of the Constitution of Grenada and other similar or relevant provisions which prescribe that the matter in respect of which leave is required must be one of general or public importance, the authorities analysed make it clear that the criteria laid down by the Courts fall within a strict and narrow compass. And they are not to be taken lightly. The question now becomes whether the appellant's issue, being essentially a question of the priority claimed by him, satisfy any of the said criteria.

With the question posed, it is of abundant necessity to identify the legal characterization which Justice of Appeal Denys Barrow placed on the right claimed. This is to be found at paragraphs 45 to 47 of the judgment and reads thus:

“The Controller's claim for indemnification can stand in no better position than his claim to recover expenses. Assuming for present purposes that the Controller is entitled to indemnification, it is a claim that has no priority, by virtue of the fact of, or the law surrounding, his appointment, over the claims of other creditors in the liquidation. We are inclined to the view that the Act, by providing that the Minister may appoint a controller at the expense of the Bank, gave the Minister (not the Controller) an indemnity, using the word indemnity in the sense of a right to be indemnified or relieved or protected from a burden or obligation – in this case, the obligation to meet the expense of the Controller. But it was a bare indemnity; a bare right to be indemnified. The Act conferred no lien or other security over the assets. And it conferred no right to priority of payment. Because the Controller was purely a creature of statute and not an officer of the Court he had no right beyond that which the Act conferred; and the Act conferred no priority.

Any misgiving that the Controller is treated unkindly by this conclusion is diminished upon consideration of the reality to which Ward, L.J. pointed in the following passage, quoted by Simon Brown, L.J. in *Hughes*:

“So much appears to be settled. The ordinary rule is that receivers should not accept their appointment unless satisfied that the receivable assets shall be sufficient to meet their claim for costs and for remuneration or that they would be otherwise indemnified, by contract or by order of the Court, by the party responsible for their appointment. In this case there was an agreement between the receiver and HM Customs and Excise that Customs and Excise would indemnify the receiver if she were unable to bring in sufficient assets to meet her costs. That did no more than replicate the statutory provisions [under section 88(2) of the CJA]...”

Insolvency practitioners and others who accept appointment as receivers or controllers should see, before accepting appointment, that satisfactory provisions exist to remunerate and indemnify them. If prospective appointees do not do so, that is entirely their fault and they must not look to the Court to relieve against their imprudence. It is hoped that the Controller's letter of engagement, which he has steadfastly refused to disclose, contained terms adequate to protect him.”

I interpret the learned Justice of Appeal to be saying that in the context of the Offshore Banking Act and the other relevant law, it is clear that it is the Minister of Finance, not the Controller, who has bare indemnity but no priority, as claimed. He is also saying that his conclusion is well supported by the general law and learning. The learned Justice of Appeal even went on to give advice to insolvency practitioners and others who accept appointment as receivers or controllers.

Against the foregoing, it is absolutely necessary to repeat the criteria identified above that are considered by the Court in granting conditional leave to appeal. They are: (1) there is a serious question of law to be tried; (2) a constitutional provision that has not been settled; (3) an area of law that has not been settled; and (4) a legal question, the resolution of which, presents dire consequences for the public.

Having regard to the authorities cited and analysed, I cannot conclude that the appellant's case satisfies any of the criteria. To begin with, learned counsel for the appellant relies on Martinus Francois. But rather than supporting his case, it undermines it because this Court determined that there was no merit in the appellant's case and further that the matter of public sentiment was not a matter for the Court.

Another reason which is adverse to Daryl Sands, the appellant, is that the question of priority is a fairly ordinary issue of law which in reality boils down to a matter of statutory context and statutory interpretation. In this connection the following sentence from the judgment (At paragraph 45) of Barrow, J.A. bears repetition. He said: “Because the controller was purely a creature of statute and not an officer of the Court he had no right beyond what the Act conferred; and the Act conferred no priority.” In other words, it is a question of vires.

Learned counsel also submitted that the Controller's right to indemnification is of great importance to the offshore sector in Grenada. As framed that result is purely a matter for Parliament – not the Court. And if implicit reliance is being placed on what Chief Justice Floissac said in *Etoile Commerciale SA*, such reliance is absolutely misplaced. The similarity between Grenada and St. Vincent and the Grenadines, in this regard, ends with the fact that in both jurisdictions there are ‘offshore sectors’. What Floissac, C.J. said was that in the case of St. Vincent and the Grenadines there are several international companies domiciled there and which transact business. But this was a mere precursor to his statement of the question of law in respect of which leave to appeal was sought. As noted before, it is the clarification of law governing the circumstances under which the enforcement of a foreign judgment may be resisted on the ground that it was obtained by fraud.

It is my further determination that there is no disputed area of law so as to activate one of the remaining criteria. With that said I do not consider it necessary to say anything further on the other criteria as they are simply not relevant in the circumstances.

Result

The application for conditional leave to appeal to Her Majesty in Council is therefore refused.

Costs

The appellant must pay costs to the respondent to be assessed, if not agreed on, within twenty-one days from the date of this judgment.

Justice of Appeal

Errol L. Thomas

Justice of Appeal (Ag.)

I concur.

Denys Barrow, SC

Justice of Appeal

I concur.

Hugh A. Rawlins