

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2003

BETWEEN:

**PENITUM (BVI) LIMITED
LANDCLEVE CORPORATION**

Appellants

and

THE BANK OF BERMUDA

Respondent

Before:

The Hon. Brian Alleyne, SC
The Hon. Michael Gordon, QC
The Hon. Denys Barrow, SC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. James Goudie Q.C. and Mr. Jeffrey Elkinson for the Appellant
Mr. Stephen Moverley Smith, Q.C. for the Respondents

2005: January 10, 12.

JUDGMENT

[1] **ALLEYNE J.A.:** The Bank of Bermuda Limited has applied for leave to appeal to Her Majesty in Council from the decision of this court delivered on 20th September 2004 dismissing its appeal, and the respondent's cross appeal against a judgment of the High Court granting an application for summary judgment against the Bank on a claim of Landcleve Limited in the action, and dismissing the application of Pentium, declaring that the only issue for trial is whether Pentium is estopped from denying that the Bank lawfully debited its account on wire instructions purportedly signed by Norman Gibson and Pentium's managing director, thereby limiting the Bank in its defence to its plea of estoppel.

- [2] At the outset Mr. Goudie, Q.C. for the applicant indicated his position that the issues to be determined are first, whether or not the order of the High Court was a final judgment, which issue would determine whether the proposed appeal is as of right or discretionary; and secondly, if the order was not a final order, whether the court should exercise its discretion to grant leave to appeal to the Privy Council by reason of the general public importance of the matters raised in the proposed appeal. Mr. Moverley Smith Q.C. for the respondent agreed that those are the issues to be determined. We also agree.
- [3] Learned Queen's Counsel for the applicant conceded that the decision to limit the Bank's defences to the issue of estoppel is clearly not final, but submitted that the order for summary judgment is a final order. Mr. Goudie submitted that the appropriate test for determining the issue, particularly in the case of an order for summary judgment, is not the application test but the order test. In support of this submission learned counsel urged that there are two lines of authority on the issue, that the decisions of the Privy Council favour the order test, that none of the decisions of this court or other courts in the Caribbean which favour the application test have been considered by the privy Council, but that this court should be guided by the decisions of the Privy Council in regard to the appropriateness of the order test, more particularly in matters relating to orders for summary judgment.
- [4] Learned counsel reviewed a number of decided cases in favour of both approaches. He made a critical analysis of the case of **Sylvester v. Singh**¹, and argued that this case was not clearly determinative of the issue. Counsel conceded that the application test is the settled English position, but submitted that this court has not a settled position.

¹ Civil Appeal No. 10 of 1992, Saint Vincent & the Grenadines (September 2004, unreported)

- [5] Learned Queen's Counsel referred to the case of **Re Lim Kim Guan, ex parte Four Seas Bank Ltd**², a judgment of the High Court of Singapore which applied the order test in bankruptcy proceedings; **Haron Bin Mohammed Zaid v. Central Securities (Holdings) BHD**³, a decision of Her Majesty's Privy Council on appeal from the Federal Court of Malaysia, which decided that a question of whether an order was final or interlocutory was a matter for the Federal Court to decide in accordance with its own practice and procedure, and accordingly affirmed the Federal Court's application of the order test; **Allen v Wright**⁴, a decision of the West Indies Federal Supreme Court (long defunct), which applied the order test in respect of an order striking out an election petition; **Duporte v. Freeman**⁵, a decision of the Court of Appeal of the West Indies Associated States, the predecessor of this court which also applied the order test on an issue arising out of an election petition.
- [6] However, as submitted by Mr. Moverley Smith Q.C. for the respondent, while in **Sylvester v. Singh** Byron J.A. as he then was admittedly expressed the opinion that there was no settled practice in this court, several subsequent decisions of this court, following the decision in that case, have adopted and treated as settled practice in this jurisdiction the application test in preference to the order test. Mr. Moverley Smith Q.C. cited in support the cases of **Harry Samuel v Commissioner of Police and Attorney General**⁶, and **Nam Tai Electronics v. David Hague**⁷, both decisions of this court relying on *Sylvester v. Singh* and treating it as 'well established in this jurisdiction that in determining whether a matter is procedural (interlocutory) or final the court will apply the application test rather than the order test'⁸

²[1990] 1 SLR 979.

³[1983] AC 16.

⁴[1960] 2 WIR 100.

⁵[1968] 11 WIR 497.

⁶Civil Appeal No. 2 of 2004 (British Virgin Islands July 2004, unreported)

⁷Civil Appeal No. 12 of 2003 (Virgin Islands September 2004, unreported)

⁸*Nam Tai v. Hague supra* at paragraph 8.

- [7] We reaffirm that the application test is the test applied in this jurisdiction, and consequently that the proposed appeal is not as of right. It therefore falls for us to consider whether the court should exercise its discretion to grant leave pursuant to section 3(2)(a) of the Virgin Islands (**Appeal to privy Council**) Order⁹. That section provides that the court may grant leave to appeal where in the opinion of the court 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.
- [8] The question of what circumstances would move the court to grant leave under the provision was most recently considered in depth in this court, and the decision affirmed by the Privy Council, in **Francois v. Attorney General of Saint Lucia**¹⁰. In that case Saunders J.A. held at paragraph 13 of the judgment that leave under that ground is normally granted where there is a difficult question of law involved, matters that involve a serious issue of law, a Constitutional provision that has not been settled, an area of law in dispute (i.e. in which there are conflicting decisions of the courts which need to be settled with a degree of certainty), or a legal question the resolution of which poses dire consequences for the public.
- [9] I agree with Mr. Moverley Smith for the respondent that it would be difficult to envisage circumstances justifying the exercise of the discretion to grant leave where the issue is limited to a dispute of fact, or a matter which affects only the private rights as between the parties. In such cases there would be no question of general or public importance arising.
- [10] Learned counsel for the applicant argues that the learned trial judge wrongly exercised his discretion on the facts in granting an order for summary judgment, in that the claim that a third party was guilty of forgery was based merely on an assertion and not supported by documentary evidence or forensic enquiry. The applicant's position is that had the matter been permitted to go to trial there is a

⁹ Statutory Instrument No. 234 of 1967.

¹⁰ Civil Appeal No. 37 of 2003, St. Lucia (June 2004).

possibility that evidence might have emerged that supported the applicant's case. The learned trial judge treated this as a merely speculative argument, and exercised his discretion accordingly. That may have dire consequences for the applicant, but could hardly be classified as a matter of great general or public importance.

[11] We can find no basis on which we can properly exercise our discretion to grant leave to appeal to Her Majesty in Council under section 3(2)(a) of the Rules and the application is dismissed with costs of \$5,000.00 to the Respondent.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal (Ag.)