

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ST. CHRISTOPHER AND NEVIS

SKBHCVAP2019/0038

BETWEEN

WYCLIFFE H. BAIRD

Applicant

and

[1] DAVID GOLDGAR
[2] PAUL B. COBURN
[3] CARIBE (REALTIES) CANADA LIMITED
[4] IMMEUDBLES CARIBE CANADA LTEE
[5] BETTS REALTY LIMITED

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Christopher Hamel-Smith SC with Mr. Terence V. Byron and Ms. Talibah
Byron for the Applicant
Ms. Midge Morton, Ms. Maurisha Robinson and Mr. Errol Williams for the
Respondents

2024: January 31;
April 15.

Leave to appeal to His Majesty in Council – Section 99(1)(a) of the St. Christopher and Nevis Constitution Order 1983 (“Constitution”) – Appeals as of right - Whether the appeal arises from a final decision of the Court – Applicable test in determining whether an order is interlocutory or final – Special leave to appeal - Section 99(2)(a) of the Constitution - Whether question involved in intended appeal is one of great general or public importance or otherwise

The applicant filed a claim on 7th May 1993 in the High Court against the respondents seeking specific performance, or in the alternative, damages for breach of contract in respect of an agreement with the respondents dated 6th February 1989 (the "Option Agreement"). The applicant was given the option under the Option Agreement to purchase an area of land comprising of 175.65 acres located in Major's Bay, St. Christopher and Nevis (the "Land"), subject to a final survey. The applicant contended that he had the right to exercise an option to purchase the Land, and had so exercised that option, but that the third respondent, Caribe (Realties) Canada Limited, had breached the Option Agreement. The Government of Saint Christopher and Nevis compulsorily acquired the lands of the respondents including the Land. The respondents were successful in their claim against the Government, and they received a payment of over US\$17 million.

The first trial judge decided the matter by way of trial on a preliminary issue, finding on 24th November 2009, among other things, that it was the applicant who had failed to close the agreement for the sale of the Land. The matter then came on for hearing on 4th - 6th May 2016 before another judge on the question of whether the decision of the first trial judge should stand. The learned judge handed down her decision on 30th July 2019 in which she held that the decision of the first trial judge must stand, that the claim against the fifth respondent be dismissed, and that the trial should proceed. The learned trial judge concluded that the applicant was entitled to the return of monies paid by him under the Option Agreement and for the purchase of the Land. Consequently, the learned trial judge dismissed the applicant's claim and a freezing order previously granted against the respondents was discharged.

The applicant, on 11th September 2019, filed an appeal to the Court of Appeal against the decision of the learned trial judge dismissing his claim and discharging the injunction on 13 grounds. After the filing of the notice of appeal, the applicant received the transcript of the proceedings in the court below in April 2020, however, the respondents were not informed that the applicant had obtained the transcripts until July 2021. Subsequently, counsel for the applicant wrote to counsel for the respondents stating that he had been instructed to make every effort to have the appeal disposed of at the next sitting of the Court of Appeal in St. Christopher and Nevis in December 2021. The applicant proposed dates for the filing of submissions and authorities, the filing of the respondents' submissions in reply and authorities and the completion of the record of appeal. These dates came and passed but no submissions and authorities were filed by the applicant to which the respondents could respond, nor was the record of appeal filed. Consequently, the matter could not be heard at the December 2021 Court of Appeal sitting in St. Christopher and Nevis. Upon the written request of the respondents, the matter was then listed for status hearing before the Chief Registrar on 13th June 2022. At the status hearing, directions were given to the applicant and the respondents for the preparation of the record of appeal and the filing of submissions. Again, the applicant neither filed submissions nor the record of appeal in accordance with the orders given at the status hearing. The respondents then applied on 13th October 2022 for an order that the Notice of Appeal be struck out or dismissed for abuse of process or want of prosecution.

The issue for the Court of Appeal was whether the appeal should be struck out for abuse of process of the court and or dismissed for want of prosecution due to the protracted delay by

the applicant in filing the record of appeal. The Court explained that the factors that must be considered in determining whether to dismiss an appeal for want of prosecution were: (1) the length of the delay; (2) the reasons for the delay; (3) the merits of the appeal; and (4) the prejudice to the litigants. Upon considering the circumstances, particularly the inordinate delay by the applicant in pursuing the appeal; the lack of cogency in the reasons advanced by the applicant for the delay; the fact that the appeal, though arguable, could not be said to be one with a strong prospect of success; the prejudice to the respondents; and the overriding objective; the Court concluded that the notice of appeal should be struck out for abuse of process. The Court also found that the conduct of the appeal by the appellant amounted to a want of prosecution of the appeal by the appellant and that the appeal should be dismissed on that basis as well.

Being dissatisfied, the applicant filed a notice of motion on 4th January 2024 for the grant of leave to appeal to His Majesty in Council: (1) as of right under section 99(1)(a) of the Constitution of Saint Christopher and Nevis (the “Constitution”);¹ and (2) with leave of this Court under section 99(2)(a) of the Constitution, against the decision of the Court striking out the applicant’s appeal. The applicant relied on two main grounds, that: (1) the decision of the Court is a final decision in civil proceedings indirectly involving a claim to or question respecting property over the prescribed value of five thousand dollars; and (2) the decision of the Court is a decision in civil proceedings where the question involved in the appeal is one which ought to be submitted to His Majesty in Council by reason of it being of great general or public importance or otherwise.

Held: granting the notice of motion for leave to appeal to His Majesty in Council on the conditions set out at paragraph 43 of the judgment and making the orders at paragraph 44, that:

1. The application test has been the yardstick by which the courts of the Eastern Caribbean determine whether a decision or order is final or interlocutory. The decision in **Othniel Sylvester v Satrohan Singh** did not settle the question of whether the application test or the order test must be used in determining whether an order is final or interlocutory, however it revealed the preference for the application test over the order test. This position has been subsequently approved by this Court on numerous occasions and consistently applied in several decisions of this Court. The practice of using the application test to determine whether a decision or order is interlocutory or final was undoubtedly settled by 2003 in **Pentium (BVI) Limited et al v The Bank of Bermuda**.

Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported) followed; **Othniel Sylvester v Satrohan Singh** Saint Vincent and the Grenadines, Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported) considered; **Nam Tai Electronics, Inc v David Hague and Another** Territory of the Virgin Islands Civil Appeal No 12 of 2003 (delivered 21st September 2004, unreported) followed; **Pirate Cove Resorts Limited et al v Euphemia Stephens et al** St. Vincent & The

¹ The Saint Christopher and Nevis Constitution Order 1983.

Grenadines Civil Appeal No. 11 of 2002 (delivered 5th March 2003, unreported) considered; **Nigel Hamilton-Smith et al v Alexander M. Fundora** ANUHCVP2010/0031 (delivered 31st August 2010, unreported) followed; **Cukurova Holding A.S v Sonera Holding B.V** BVIHCVP2012/0029 (delivered 5th December 2012, unreported) considered; **TSJ Engineering Consulting Ltd. v Al-Rushaid Petroleum Investment Company et al** Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2010 (delivered 27th July 2010, unreported) followed; **Oliver McDonna v Benjamin Wilson Richardson** Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported) followed; **Pentium (BVI) Limited et al v The Bank of Bermuda** Territory of the Virgin Islands Civil Appeal No. 3 of 2003 (delivered 12th January 2003, unreported) followed.

2. The use of the application test in determining whether an order is final or interlocutory for the purposes of applications for leave to appeal to His Majesty in Council is not grounded in the Civil Procedure Rules 2000. The inclusion of the application test in the Civil Procedure Rules 2000 was done to codify the settled practice of this Court in relation to appeals to the Court of Appeal, not appeals to His Majesty in Council which is governed exclusively by section 99 of the Constitution. There is no question that in making the determination, even under the Constitution, decisions of this Court are the body of substantial case law that must be applied. These decisions make it clear that it is the application test that governs that determination, even under similar constitutional provisions relating to appeals to His Majesty in Council.

Part 62.1(3) of the **Civil Procedure Rules 2000** considered; **Jacpot Ltd v Gambling Regulatory Authority (Mauritius)** [2018] UKPC 16, [2018] LLR 754 applied.

3. The accepted definition of the application test is that an order is final if it would have determined the matter in litigation for whichever side the decision was given. Applying this test, the order of the Court striking out the appeal for abuse of process and or want of prosecution is not a final order. Had the Court not dismissed and or struck out the appeal, the legal dispute between the parties would have not been determined. The appeal would have remained extant, and proceedings continued to enable a final determination of the legal dispute between the parties. Consequently, the applicant cannot ground his appeal to His Majesty in Council in section 99(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.
4. The questions of: (1) whether it is correct to apply the same test to determine if to strike out an appeal for abuse of process as for determining whether to strike out an appeal for want of prosecution; (2) whether it is incorrect to apply the same test, and, if so, what is the correct test to apply to determine if to strike out an appeal for: (a) abuse process or (b) want of prosecution, and (3) whether the Court of Appeal was correct in calculating the period of delay from a period prior to any date or time specified in the Civil Procedure Rules for that step to be taken and prior to the date

the court ordered the party to take that step, are questions of great general or public importance that should be settled by the Judicial Committee of the Privy Council. The applicant therefore satisfies the criteria under section 99(2)(a) of the Constitution for leave to appeal to His Majesty in Council.

Multibank FX International Corporation v Von Der Heydt Invest SA BVIHCMAP2022/0008 (delivered 7th July 2023, unreported) followed.

JUDGMENT

- [1] **VENTOSE JA:** This is an application made by way of notice of motion for leave to appeal to His Majesty in Council filed by the applicant on 4th January 2024 with a supporting affidavit against the decision of this Court dated 22nd December 2023 striking out the applicant's appeal for want of prosecution and or abuse of process. The applicant also filed on 4th January 2024 a notice of application to stay the order of the Court of Appeal pending the determination of the application for leave to appeal to His Majesty in Council.

Background

- [2] The applicant filed a claim on 7th May 1993 in the High Court against the respondents seeking specific performance, or in the alternative, damages for breach of contract in respect of an agreement with the respondents dated 6th February 1989 (the "Option Agreement"). The Option Agreement concerned an area of land comprising 175.56 acres located in Major's Bay on the island of Saint Christopher in the State of Saint Christopher and Nevis (the "Land"). The applicant was given the option under the Option Agreement to purchase the Land subject to a final survey. The price of the Land under the Option Agreement was US\$2.5 million. The applicant paid a deposit of US\$560,000.00. The closing date that the parties ultimately agreed upon of 19th February 1991 did not take place. The applicant alleged that the fifth respondent, Betts Realty Limited, was not able to close because it was struck off the Register of Companies in 1976 and was not reinstated until 13th December 1991. The applicant contended that he had the right to exercise an option to purchase the Land, and had so exercised that option, but that the third respondent, Caribe (Realities) Canada Limited, had breached the Option Agreement. The Government of Saint Christopher

and Nevis compulsory acquired the lands of the respondents including the Land. The respondents were successful in their claim against the Government, and they received a payment of over US\$17 million.

- [3] The first trial judge, Belle J, decided the matter by way of trial on a preliminary issue, finding on 24th November 2009, among other things, that it was the applicant who had failed to close the agreement for the sale of the Land. The matter then came on for hearing on 4th - 6th May 2016 before Carter J on the question of whether the decision of Belle J should stand. Carter J handed down her decision on 30th July 2019 in which she held that the decision of Belle J must stand, that the claim against the fifth respondent be dismissed, and that the trial should proceed on the following issues: (1) whether the agreement for sale between the parties was terminated as a result of the applicant's failure to close as determined by Belle J; (2) whether there was any repudiatory breach of the agreement for sale by the applicant and/or acceptance of that breach by the respondents; (3) whether the applicant retained an equitable interest in the Land, namely, the right to specific performance; and (4) whether the equitable interest subsisted following the compulsory acquisition of the Land by the Government of Saint Christopher and Nevis.
- [4] In relation to the first issue, the learned trial judge held that the exercise of the option under the Option Agreement which was communicated by the applicant on 6th February 1991 converted the Option Agreement into an agreement for sale (the "Agreement for Sale"). The learned trial judge held that the applicant's failure to close on 19th February 1991 did not in and of itself terminate the Agreement for Sale. The learned trial judge noted that the ultimate effect of the failure to close by that date was related to the question of whether there was a repudiatory breach and if so whether that breach was accepted by the respondents. In respect of the second issue, the learned trial judge also held that the breach occurred because there was no indication that the applicant sought to reinstate time as being of the essence of the Agreement for Sale. The learned trial judge explained that the applicant's demand for the repayment of monies advanced by him for the purchase of the Land and not

for the payment for the option, were all factors that could lead to the inference that the applicant also treated the Agreement for Sale as at a close. The learned trial judge also explained that the actions of the applicant caused and entitled the respondents to believe that the applicant recognised the effects of his failure to close and that he accepted the consequences of his breach of the Agreement for Sale. The learned trial judge stated that the fact that the respondents were treating the Agreement for Sale as at a close was also to be inferred from the without prejudice discussions between the parties following the close of the Option Agreement. The learned trial judge held that, first, there was a repudiatory breach of the Agreement for Sale, and second, the respondents accepted that breach.

- [5] In answering the third issue, the learned trial judge held that the applicant was, upon exercise of the option, entitled to an equitable interest in the Land, and that he did not thereby acquire the beneficial ownership of the Land. The learned trial judge also held that, based upon her findings on the second issue, the applicant ceased to be entitled to enforce his equitable interest by way of specific performance after 19th February 1991, when his failure to close resulted in a repudiatory breach of the Agreement for Sale which was accepted by the respondents. The learned trial judge explained that, even if it could be argued that the nature of the breach was not repudiatory, the applicant did not attempt to extend the option even to the 21st February 1991 to which, arguably, he might have been entitled. The learned trial judge also explained that the applicant's demand for repayment also solidified her view that the applicant knew that his equitable interest in the Land, and any right to specific performance, was at an end. In relation to the fourth issue, the learned trial judge stated that, having found that the applicant did not hold an equitable interest in the Land, there was no need to address this issue further since it was accepted by both parties that the Government compulsorily acquired the Land.
- [6] The learned trial judge concluded that the applicant was entitled to the return of monies paid by him under the Option Agreement and for the purchase of the Land.

Consequently, the learned trial judge dismissed the applicant's claim and the freezing order previously granted against the respondents was discharged.

- [7] The applicant, on 11th September 2019 filed an appeal to the Court of Appeal against the decision of the learned judge dismissing his claim and discharging the injunction on 13 grounds, two (2) of which have three (3) additional subheadings (the "Notice of Appeal").

The Application to Dismiss the Appeal

- [8] The respondents applied on 13th October 2022 with a supporting affidavit for an order that the Notice of Appeal be struck out or dismissed for abuse of process or want of prosecution. The chronology of events from the date of the filing of the Notice of Appeal to the respondent's application to strike out to the date of the hearing of the appeal has been summarised by this Court in its decision dated 22nd December 2023, so I will gratefully reproduce them here for the purpose of these proceedings.
- [9] On 10th April 2020, the transcript of the proceedings before Carter J was prepared by the Registry of the High Court and was obtained by the applicant sometime in April 2020. The applicant did not inform the respondents that he had obtained the transcript until 14th July 2021, the day after the respondents' legal practitioners had written to the Registrar of the High Court (and copied to the applicant's legal practitioners) requesting an update on the preparation of the transcript. By an email dated 5th August 2021, the applicant's legal practitioners wrote to the respondents' legal practitioners, stating, among other things, that: (1) they were instructed by the applicant to make every effort to have the appeal ready to be disposed of at the next sitting of the Court of Appeal for Saint Christopher and Nevis during the week of 6th December 2021; (2) the applicant proposed to file submissions and authorities in support of the appeal by 6th September 2021, that the respondents would file submissions and authorities in response by 6th October 2021, with the applicant at liberty to reply by 29th October 2021; and (3) the applicant proposed to complete the

record of appeal in two (2) paginated bundles, with the first bundle to be completed during the course of the month of August 2021.

- [10] Nothing happened in August 2021 or December 2021 and no submissions and authorities were filed by the applicant to which the respondents could respond and no record of appeal (whether first or second bundle) was filed by the applicant. The respondents' legal practitioners wrote to the Chief Registrar by letter dated 31st March 2022, pointing out that the record of appeal had still not been filed by the applicant and requested that the appeal be listed for status hearing.
- [11] The appeal was listed for status hearing by the Chief Registrar on 13th June 2022 where it was ordered that: (1) the respondents inform the applicant by 17th June 2022 of the documents they wished to be included in the record of appeal; (2) the applicant file the record of appeal and submissions by 6th September 2022; (3) the respondents file submissions in reply by 7th October 2022; and (4) the matter be listed for hearing at the Court of Appeal sitting in Saint Christopher and Nevis during the week commencing 7th November 2022.
- [12] On 13th June 2022, the very day of the status hearing order, the respondents' legal practitioners wrote to the applicant's legal practitioners informing them of the documents which the respondents wished to be included in the record of appeal. The matter came before the Chief Registrar for case management on 30th September 2022, in advance of the scheduled hearing of the appeal during the week of 7th November 2022. Neither the record of appeal nor the applicant's submissions had, however, been filed by the applicant by the date of case management. Counsel appearing for the applicant at the case management conference informed the Chief Registrar that he was having difficulty preparing the record of appeal because some pages were illegible and that he intended to file an application for an adjournment of the appeal set down for hearing during the week of 7th November 2022.

- [13] These above-mentioned facts precipitated the application filed by the respondents, as mentioned earlier, to strike out or dismiss the Notice of Appeal for abuse of process or want of prosecution.

The Decision of the Court of Appeal

- [14] The issue for the Court of Appeal was whether the appeal should be struck out for abuse of process of the court and or dismissed for want of prosecution due to the protracted delay by the applicant in filing the record of appeal. By the date of the hearing of the Court of Appeal on 26th April 2023, the applicant had already filed the record of appeal on 20th March 2023. The Court explained that the factors that must be considered in determining whether to dismiss an appeal for want of prosecution were set out in the decision of this Court in **The Barbuda Council v The Attorney General et al**,² namely: (1) the length of the delay; (2) the reasons for the delay; (3) the merits of the appeal; and (4) the prejudice to the litigants. In applying these factors, the Court, first, accepted that on these facts and the applicable law, the applicant's delay in filing the record of appeal was inordinate; and second, stated that the explanation proffered, and the reasons advanced, by the applicant for the delay in filing the record of appeal were not good, acceptable, or satisfactory. In relation to the third factor, the Court noted that it must be kept in mind that the Court's role at this juncture is not to decide the appeal, but rather to examine the relative strengths and weaknesses of the appeal. The Court accepted that it was at least arguable that the fifth respondent, though ready and willing, was unable to close on 19th February 1991. However, the Court explained that **First Domestic Insurance Co. Ltd. et al v Industrial Enterprises Ltd. et al**³ was an authority for the view that this factor alone would not warrant dismissing the strike out application and that the Court must have regard to all the factors and the circumstances of the case.
- [15] In respect of the fourth and final factor to be considered, the Court noted that the applicant made no assertion that he suffered any prejudice by reason of his own

² ANUHCVP1994/0012 (delivered 15th January 2004, unreported).

³ DOMHCVP2014/0024 (delivered 27th May 2020, unreported).

delay. The Court also noted it was the respondents who had suffered and continued to suffer prejudice because of the applicant's inordinate and unreasonable delay in progressing the appeal. The Court also explained that even then, it would have been prepared to hold that in a situation in which a party is deprived of the benefits of a judgment in his favour in order that the other party can pursue an appeal against that judgment, it is the prejudice to the first party which alone should be considered by the court, particularly when the second party is protected by a stay of execution order. The Court also explained that with a stay of execution granted by a single judge on 24th March 2020 and affirmed by the Full Court on 12th June 2020, the respondents had never had all of the benefits of the judgment which was given in their favour.

[16] After considering all the factors, the Court concluded as follows:

“Conclusion

[47] It is clear from the foregoing that I am persuaded that the respondents had the better argument. In view of all the circumstances, particularly the inordinate delay by the appellant in pursuing the appeal; the lack of cogency in the reasons advanced by the appellant for the delay; the fact that the appeal, though arguable, cannot be said to be one with a strong prospect of success; the prejudice to the respondents; and the overriding objective; this Court ought properly to exercise its discretion to grant the application to strike out the appeal. I am fortified in my view by the fact that the appellant did not avail himself of the other avenues open to him to enable his appeal to be progressed, including by applying for an extension of time to file the record of appeal and his skeleton arguments, or filing what might have been an incomplete record of appeal and seeking to amend it once the missing documents were located and the illegible papers were replaced or at least rendered decipherable.

[52] By reason of all of the above, I find that the inordinate, inexcusable and prejudicial delay by the appellant in progressing his appeal is an abuse of the process of the court, on the basis of which the appeal should be struck out. The pertinent facts justifying the court's use of its nuclear weapon bear repeating.

[53] The appellant filed the appeal on 11th September 2019, within the 42 days provided for under the CPR, obtained the transcript of proceedings in the court below between 10th and 30th April 2020, and did not file the record of appeal until 20th March 2023, and only after application (sic) was made to strike out or dismiss the appeal. The reason given by the appellant's lawyer for this delay is that he was having difficulty preparing the record because some pages were illegible – a reason given for the first time at a

case management conference held on 30th September 2022 (2 years and 5 months after the last day by which the appellant must have obtained the transcript). The respondents have in the meantime been prejudiced by being denied the full benefits of their success in the court below since 30th July 2019 – the date of the judgment of Carter J in the High Court.

[54] I also find that the inordinate, inexcusable and prejudicial delay in the conduct of the appeal by the appellant amounts to a want of prosecution of the appeal by the appellant and that the appeal should be dismissed on this basis as well.

[55] To be clear, either of these findings, that is, the abuse of process or the want of prosecution, suffices as a basis to determine the appeal. I find though that they are both made out on the relevant facts and applicable law.”

- [17] The Court, therefore, struck out the appeal as an abuse of process and or dismissed the appeal for want of prosecution and set aside the stay of execution granted by the single judge on 24th March 2020 and affirmed by the Full Court on 12th June 2020.

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

- [18] The applicant, as mentioned above, filed on 4th January 2024 a notice of motion for the grant of leave to appeal to His Majesty in Council: (1) as of right under section 99(1)(a) of the **Constitution of Saint Christopher and Nevis** (the “**Constitution**”);⁴ and (2) with leave of this Court under section 99(2)(a) of the **Constitution**, against the decision of the Court striking out the applicant’s appeal for want of prosecution (the “Notice of Motion”). The two main grounds in the Notice of Motion are as follows: (1) the decision of the Court is a final decision in civil proceedings indirectly involving a claim to or question respecting property over the prescribed value of five thousand dollars; and (2) the decision of the Court is a decision in civil proceedings where the question involved in the appeal is one which ought to be submitted to His Majesty in Council by reason of it being of great general or public importance or otherwise.
- [19] In relation to the second ground, the applicant states that the following are questions of great general or public importance or otherwise. First, the striking out or dismissal

⁴ The Saint Christopher and Nevis Constitution Order 1983.

of a potentially meritorious appeal without a determination on the merits is a necessary, but draconian, power for the Court to exercise. It is therefore of great general and/or public importance that there should be clarity and certainty concerning how the test for striking out such an appeal for abuse of process and/or the test for dismissing it for want of prosecution should be applied. Second, it is also of great general and/or public importance that there should be clarity and certainty concerning whether the Court of Appeal has the power to strike out an appeal by reference to calculating the delay of a party to take a particular step in the proceedings (here to file the record of appeal) from a date which is earlier than any date specified, either by the Civil Procedure Rules or an order of the Court, for the party to take that step.

Appeal as of Right

[20] Section 99(1)(a) of the **Constitution** states as follows:

“99. Appeals to Her Majesty in Council.

(1) An appeal shall lie from decisions of the Court of Appeal to Her 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 Her 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;”

Section 99 (5) goes on to state:

“(5) In this section the prescribed value means the value of five thousand dollars or such other value as may be prescribed by Parliament.”

[21] It is not disputed that the current proceedings are civil proceedings or that the value of the claim is over \$5,000.00. The only question that remains to be answered is whether the decision of the Court is a ‘final decision’. The issue was recently considered in **Inderjit Kaur Chhina v Muhammad Nazir Muhammad Ismail et al**⁵ where it was stated that:

“[6] It is settled law in the Eastern Caribbean that the court applies the application test to determine whether an order is final or interlocutory. This was settled by this Court on 18th September 1995 in **Othniel Sylvester v**

⁵ BVIHCMAP2020/0024 (delivered 23rd March 2023, unreported), paragraphs 6 – 9.

Satrohan Singh. The trial judge had struck out the claimant's claim and he appealed against the striking out without getting leave to appeal. 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.

[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.

[8] The application test is now codified in the **Civil Procedure Rules 2000** (“CPR”) Part 62.1(3) which states simply that ‘In this Part – (a) a determination whether an order or judgment is final or interlocutory is made on the ‘application test’.

[9] The test has been followed in numerous decisions of this Court since then. In **Nam Tai Electronics, Inc v David Hague et al** Gordon JA stated that ‘it is 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...’.

[22] The statement in paragraph [6] of **Inderjit** was applied in **Sian Participation Corp v Halimeda International Limited**.⁶

⁶ BVIHCP2021/0017 (delivered 24th April 2023, unreported).

[23] Counsel for the applicant submits that **Othniel Sylvester v Satrohan Singh**⁷ did not settle the position of this Court to use the application test to determine whether an order is final or interlocutory. This submission is correct because in **Singh**, after examining various decisions of the Privy Council and those in England and Wales, the Court stated (at page 9) that:

“Although it would seem that prior to *White v Brunton* Judges in the Caribbean had a preference for the order test and I am unable to conclude, that this court has any settled practice in applying either the order or the application test.”

[24] After examining decisions from the Commonwealth Caribbean, it was also stated (at page 10) that:

“In conclusion the English Courts are now committed to the application test in determining whether an order or judgment is interlocutory. Applying that test, the order under appeal is interlocutory.”

The Court in **Singh** applied the application test to conclude that the order was interlocutory. The Court continued that it did not think that the order test would have produced a different result, because whereas the order effectively terminated the litigation, it did not determine any of the issues raised by the litigation. Although the application test was applied, the Court merely suggested that had it applied the order test the same result would have ensued. While the decision in **Singh** did not settle the question of whether the application test or the order test must be used in determining whether an order is final or interlocutory, it does reveal the preference for the application test over the order test.

[25] In **Nam Tai Electronics, Inc v David Hague and Another**⁸ the Court stated that:

“Based on the authority of **Sylvester v Singh** and **Pirate Cove Resorts Limited et al v Euphemia Stephens et al** it is 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, though I am not sure that in this case either test would not have yielded the

⁷ Saint Vincent and the Grenadines, Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported).

⁸ Territory of the Virgin Islands Civil Appeal No 12 of 2003 (delivered 21st September 2004, unreported), paragraph 8.

same result, namely that the judgment sought to be appealed from is not a final order.”

[26] I have already commented on the question of whether **Singh** is the authority for the view that it is well established in this jurisdiction that in determining whether a matter is interlocutory or final the application test rather than the order test will apply. The Court in **Nam Tai Electronics** also cites the 2003 decision of **Pirate Cove Resorts Limited et al v Euphemia Stephens et al**⁹ for that well established practice. In **Stephens**, it was noted that: (1) in **Singh**, the decision of **White v Brunton**¹⁰ was approved and followed; and (2) the courts throughout the Commonwealth had employed either the application test or the order test in determining whether an order is final or interlocutory. While the Court in **Stephens** quoted the definitions of both the application test and the order test articulated in **Singh** and noted that the position in England and Wales accorded with the application test, the Court reiterated that the deployment of either test would have resulted in the order in **Singh** being an interlocutory order. In respect of the order before it, namely, one revoking a previous order of the court authorising a real estate agent to sell a parcel of land, the Court in **Stephens**, without explaining whether it was applying either the application test or the order test, concluded that it was satisfied that this was a case which required leave for the appeal to be prosecuted.

[27] Notwithstanding that neither **Singh** nor **Stephens** establishes that, in this jurisdiction, in determining whether an order is interlocutory or final, this Court will apply the application test rather than the order test, the preference for the application test was approved by this Court in: (1) September 2004 in **Nam Tai Electronics**; (2) March 2023 in **Inderjit**; and (3) April 2023 in **Sian Participation Corp**. In the 2010 decision of **Nigel Hamilton-Smith et al v Alexander M. Fundora**¹¹ it was stated that:

“[11] In the absence of a statutory definition as to what is an interlocutory judgment or an interlocutory order, it is well established in a plethora of decisions that our courts apply the “application test” to determine whether or not the order or decision is interlocutory. The observations of Vaughan

⁹ St. Vincent & The Grenadines Civil Appeal No. 11 of 2002 (delivered 5th March 2003, unreported).

¹⁰ (1984) 2 All E.R. 606.

¹¹ ANUHCVP2010/0031 (delivered 31st August 2010, unreported).

Williams LJ in **Herbert Reeves** reflect our preferred approach. The “application test” looks at the outcomes that were possible on the application. The test is whether a decision on the application had it been decided in favour of the appellant or the respondent would have brought an end to the proceedings. A final order must generally be one which ends the litigation and leaves nothing for the court to do but execute the judgment. In other words, the final order must conclusively determine the substantive rights of the parties.”

[28] In **Cukurova Holding A.S v Sonera Holding B.V.**,¹² it was also stated at paragraph [5] that it was beyond contention that the applicable test in determining whether an order is interlocutory or final is the application test, citing **TSJ Engineering Consulting Ltd. v Al-Rushaid Petroleum Investment Company et al**¹³ and **Oliver McDonna v Benjamin Wilson Richardson**.¹⁴ The Court in **Sonera Holding B.V.** also noted that **Singh** did not have to decide whether the application test as commonly understood, or the approach set out in the 1998 English White Book, should be applied, but held that the order in that case would have been interlocutory ‘whatever test is used’.

[29] It is necessary also to refer to the two decisions mentioned in **Sonera Holding B.V.** In **TSJ Engineering Consulting Ltd**, the Court stated that:

“A determination whether an order is final or interlocutory is made by our courts on the “application test”. An order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application is decided. If the issues of liability on the claim are finally determined whether the outcome on an application is in favour of either party to the claim, the order would be final. The order would however be interlocutory, for example, if a ruling on the application in favour of the claimant would determine the issues of liability in favour of the claimant whereas a ruling in favour of the defendant would re-open the issue of liability for continued litigation. In determining whether an order is final or interlocutory, the court should consider the nature of the application and order and the circumstances that gave rise to them.”¹⁵

¹² (BVIHCVAP2012/0029 (delivered 5th December 2012, unreported).

¹³ Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2010 (delivered 27th July 2010, unreported).

¹⁴ Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported).

¹⁵ TSJ Engineering, n. 12, paragraph 8.

[30] In **Richardson**, the Court also stated that:

“The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order.”¹⁶

[31] In **Pentium (BVI) Limited et al v The Bank of Bermuda**,¹⁷ counsel for the applicant argued that **Singh** was not clearly determinative of whether the Court applies the application test or the order test but conceded that the application test was the settled English position but nonetheless submitted that this Court did not have a settled position. Counsel for the respondent submitted that although the Court in **Singh** expressed the opinion that there was no settled practice, several subsequent decisions of this Court, following **Singh**, have adopted and treated as settled practice in this jurisdiction the application test in preference to the order test, citing **Nam Tai Electronics** and **Harry Samuel v Commissioner of Police and Attorney General**.¹⁸

[32] Without citing **Singh**, the Court in **Pentium (BVI) Limited** reaffirmed that the application test is the test to be applied in this jurisdiction, and consequently held that the proposed appeal was not as of right. The Court was aware of the criticism that **Singh** did not establish or assert the settled practice that was repeated in **Nam Tai Electronics** but nonetheless decided to declare and reaffirm the position of this Court that in determining whether an order is interlocutory or final the Court will apply the application test rather than the order test. In the 2004 decision of **Harry Samuel** the Court, citing **Singh**, stated that it is also settled that as between the order test and the application test, the latter is the appropriate one to be applied in determining whether an order is final or interlocutory.

¹⁶ Oliver McDonna, n.13, paragraph 19.

¹⁷ Territory of the Virgin Islands Civil Appeal No. 3 of 2003 (delivered 12th January 2003, unreported).

¹⁸ Territory of the Virgin Islands Civil Appeal No. 2 of 2004 (delivered 13th July 2004, unreported).

[33] If there was any doubt as to the origin of this settled practice of this Court, there can be no doubt that it was settled by 2003 in **Pentium (BVI) Limited**. Although **Nam Tai Electronics** based its view on **Singh** and **Stephens** and the Court in **Inderjit** based it solely on **Singh**, it cannot now be doubted that since **Pentium (BVI) Limited** the approach adopted in **Nam Tai Electronics** and **Inderjit** represents the correct legal position. On numerous occasions this Court has stated and restated that it is the application test that must be used in determining whether an order is interlocutory or final. In **Candey Limited v Russell Crumpler et al**,¹⁹ the Court, citing **Fundora**, accepted at paragraph [21] that the application test has been consistently applied in several decisions of this Court. As recently as December 2023, the Court in **Vargas v Vargas (Nee Pierre) et al**,²⁰ citing **Fundora** and **Crumpler**, stated at paragraph [27] that the application test has long been the yardstick by which the courts of the Eastern Caribbean determine whether a decision is final or interlocutory.

[34] The issue that now needs to be determined is whether the order made by the Court of Appeal is a final order. This requires a determination of whether the order of the Court of Appeal striking out the appeal for abuse of process and or want of prosecution conclusively decided the substantive rights of the parties and brought an end to the litigation. The definition of the application test accepted in **Singh** and subsequently applied numerous times by this Court is that 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. In applying the application test to the order of the Court of Appeal in dismissing and or striking out the applicant's appeal for want of prosecution and or an abuse of process, the order is not a final one because had the Court not dismissed and or struck out the appeal, the legal dispute between the parties would have not been determined. The appeal would have remained extant, and proceedings continued to enable a final determination by this Court of the legal dispute between the parties.

¹⁹ BVIHMAP2020/0021 (delivered 21st September 2021, unreported).

²⁰ ANUHCVP2020/0034 (delivered 6th December 2023, unreported).

- [35] The use of the application test in determining whether an order is final or interlocutory for the purposes of applications for leave to appeal to His Majesty in Council is not grounded in the **Civil Procedure Rules 2000** (the “CPR” or “CPR 2000”). Part 62.1(3) which states that “[i]n this Part – (a) a determination whether an order or judgment is final or interlocutory is made on the “application test”.” I agree with the applicant’s submission that CPR 62.1(3(a) does not determine the test to be applied under section 99(1)(a) of the **Constitution**. Part 62 deals only with appeals to the Court of Appeal, not to appeals to His Majesty in Council which is governed exclusively by section 99 of the **Constitution**. The inclusion of the application test in the CPR 2000 was done to codify the settled practice of this Court in relation to appeals to the Court of appeal.
- [36] The applicant submits that CPR 62.1(3(a) cannot be used to determine whether an order is final in the **Constitution**. The test to be applied under section 99(1)(a) of the **Constitution** is the application test accepted by numerous decisions of this Court. While the word ‘final’ is found in section 99(1)(a) of the **Constitution** relating to appeals to His Majesty in Council, that of itself does not require a different interpretation to be given to the word ‘final’ when used elsewhere. The applicant would prefer if the order test is applied, but that preference suggests that a test is required to give meaning to the word ‘final’ as found in section 99(1)(a) of the **Constitution**. In **Jacpot Ltd v Gambling Regulatory Authority (Mauritius)**,²¹ the Privy Council had to consider a similar question, namely, whether an appeal to the Judicial Committee was available as of right under Article 81(1)(b) of the Constitution of Mauritius. One of the issues considered was whether the decision was a ‘final decision’. In answering that question, the Privy Council stated that:

“‘Final decision’

9. Constitutional and statutory provisions dealing with appeals commonly distinguish between appeals from interlocutory and final orders. In England, the distinction has given rise to a substantial body of case law which, although not entirely consistent, generally favours what has been called the “applications approach”: see *White v Brunton* [1984] 1 QB 570 (CA), where the authorities are reviewed. The applications approach is based on the

²¹ [2018] UKPC 16, [2018] LLR 754.

nature of the decision. It treats it as final if (subject to appeal) it will determine the outcome of the litigation either way. Thus a judgment in default of defence or a striking out order finally disposes of the litigation but is treated as interlocutory because it would have been interlocutory if it had gone the other way. The alternative approach, which can be called the "order approach", is that a decision is final if the order actually made disposes of the litigation.

10. The question which of them applies to provisions governing appeals to the Judicial Committee has never been resolved by the Committee itself, and different views have been expressed in the various jurisdictions for which Her Majesty in Council or the Privy Council itself is the final court of appeal. The Board does not regard the present case as a suitable occasion for resolving the issue, because it appears to them that the order of the Supreme Court in this case was a final decision on either approach. The relevant proceedings for this purpose are not the proceedings before the Gambling Regulatory Authority but the proceedings before the Supreme Court. The question at issue in those proceedings was whether the decision of the Authority was lawful. Under the order approach, the decision of the Supreme Court was final, because it finally determined that the decision of the Authority was lawful. The result was that it stood. Under the applications approach it was also final, because if it had gone the other way it would have finally determined that the decision of the Authority was unlawful. The result would have been that it would be quashed. The fact that in the latter case the Authority would have had to make a fresh decision is irrelevant, because the Authority's proceedings are distinct from those of the Supreme Court on review: see *Becker v Marion City Corpn* [1977] AC 271 (PC), at 282-283."

[37] There is no question that in making the determination, even under the Constitution relating to appeals to His Majesty in Council, decisions of this Court are the body of substantial case law that must be applied. Our decisions make it clear that it is the application test that governs that determination, even under similar constitutional provisions relating to appeals to His Majesty in Council.

[38] Consequently, the applicant cannot ground his appeal to His Majesty in Council in section 99(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

[39] Section 99(2)(a) of the **Constitution** states that:

“(2) Subject to section 36(7), an appeal shall lie from decisions of the Court of Appeal to Her 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;”

[40] To succeed under section 99(2)(a) of the **Constitution**, the applicant must show that the question involved in the proposed appeal is either of great general or public importance, or that it is otherwise a matter that should be submitted to His Majesty in Council. Numerous decisions of this Court have explained equivalent constitutional provisions relating to the exercise of discretion to grant leave to appeal to His Majesty in Council. In **Multibank FX International Corporation v Von Der Heydt Invest SA**,²² the applicable principles were summarised as follows:

“[7] It is settled law that the test of what is of ‘*great general or public importance*’ warranting permission to appeal to the Privy Council is whether the questions or issues in the appeal involve a ‘difficult question of law’. In construing the said expression, a court would usually look 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 to the public.’: **Martinus Francois v The Attorney General of Saint Lucia**. ...

[8] The meaning of the expression ‘*great general or public importance*’ received further and more expansive pronouncements by this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**. There the applicable principles were summarised in this way-

“[10] ... Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh

²² BVIHCMAP2022/0008 (delivered 7th July 2023, unreported), paragraphs 7- 11.

consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt."

[41] I agree with the applicant that the questions of: (1) whether it is correct to apply the same test to determine if to strike out an appeal for abuse of process as for determining whether to strike out an appeal for want of prosecution; and (2) whether it is incorrect to apply the same test, and, if so, what is the correct test to apply to determine if to strike out an appeal for: (a) abuse process or (b) want of prosecution, are questions of great general or public importance that should be settled by the Judicial Committee of the Privy Council. In applying the factors as set out in **The Barbuda Council**, namely: (1) the length of the delay; (2) the reasons for the delay; (3) the merits of the appeal; and (4) the prejudice to the litigants, the Court of Appeal noted that it is only prejudice to the respondents that should be considered by the Court. I agree with the applicant that it is of great general or public importance for the Judicial Committee of the Privy Council to clarify the manner in which the interplay between the question of the merits of an appeal and the issue of prejudice to the litigants is to be determined.

[42] In considering the issue of the length of the delay, the Court of Appeal determined that time should be calculated from when the applicant obtained the transcript from the court office. The applicant submits that this approach is contrary to the express

terms of CPR 62.9 and CPR 62.12(3) which state that the claimant must file the record of appeal 42 days after the court office has given notice to all parties that copies of the transcript are available. I agree with the applicant that, given the draconian nature of the power to strike out an appeal without a determination on the merits, it is a question of great general or public importance as to whether the Court of Appeal was correct in calculating the period of delay from a period prior to any date or time specified in the CPR for that step to be taken and prior to the date the court ordered the party to take that step.

Disposal

[43] For the reasons given above, the notice of motion to appeal to His Majesty in Council against the judgment of the Court of Appeal dated 22nd December 2023 is hereby granted on the following conditions:

- (a) The applicant/intended appellant shall within 90 days of the date hereof enter into good and sufficient security to the satisfaction of the Registrar in the sum of £500.00 sterling for the due prosecution of the appeal, the payment of all costs as may become payable by the applicant/intended appellant in the event of not obtaining an order granting final leave to appeal or of the appeal being dismissed for want of prosecution or in the event that the Privy Council orders the applicant/intended appellant to pay the costs of the appeal. Such security and the payment of all such costs to consist of a deposit of the said amount at the court office.
- (b) The applicant/ intended appellant shall within 90 days of the date hereof, take the necessary steps for the purpose of procuring the preparation of the record of appeal and settling of such record with the attorney at law for the respondents, and the certification of the record by the Registrar of the Court of Appeal.

- (c) The attorneys at law for the applicant/intended appellant shall take all necessary steps to prepare the Record of Appeal in accordance with provisions of rules 18 to 20 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and Practice Directions 4.2.1 to 4.3.2 and 5, the same to be transmitted to the Registrar of the Judicial Committee immediately upon final leave to appeal being granted and shall include a copy of the orders granting conditional and final leave.
- (d) The applicant/intended appellant shall apply to this Court within 30 days of receipt of the certificate of the Registrar that the security for costs ordered herein had been given within the time prescribed to the satisfaction of the Registrar and that the applicant/intended appellant has otherwise complied with this order, for an order for final leave to appeal to His Majesty in Council which application shall be supported by the certificate of the Registrar.

[44] I would also grant the following orders:

- (a) A stay of execution of the judgment of the Court of Appeal dated 22nd December 2023 until the hearing and determination of the appeal to His Majesty in Council.
- (b) The costs in this application shall be costs in the notice of motion to His Majesty in Council.

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

I concur.

Margaret Price Findlay
Justice of Appeal

I concur.

Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar