

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

**SAINT LUCIA**

**SLUHCVP2019/0019**

**BETWEEN:**

**THE LANDINGS PROPRIETORS UNIT PLAN NO. 2 OF 2007  
(also known as The Landings Body Corporate or The Landings BC)**

Respondent

and

**THE DEVELOPMENT CONTROL AUTHORITY**

Applicant

and

**TWO SEAS HOLDINGS LIMITED**

Interested Party/Applicant

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mde. Vicki-Ann Ellis  
The Hon. Mr. Paul Webster

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

**Appearances:**

Mr. Richard Harwood KC with him Ms. Renee St. Rose and Ms. Marie-Ange Symmonds for the Appellant  
Mr. Dexter Theodore KC for the Respondent  
Mr. Garth Patterson KC with him Mr. Mark Maragh for the Interested Party

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2023: April 28;  
October 6.

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*Applications for conditional leave to appeal to His Majesty in Council – Applications made before amendments to Constitution of Saint Lucia coming into effect on 9<sup>th</sup> March 2023 – Parties not consenting to matters being transferred to the Caribbean Court of Justice – Standing to apply for leave to appeal to Privy Council – Whether Two Seas as an interested party had standing to apply for conditional leave – Appeal as of right – Section 108(1)(a) of*

*the Constitution – Whether Two Seas’ proposed appeal involved directly or indirectly a question respecting its property or a right of the prescribed value or more - Section 108(2)(a) of the Constitution – Whether the questions involved in Two Seas’ and the DCA’s intended appeals are of great general or public importance or otherwise*

The Development Control Authority (“the DCA”) and Two Seas Holding Limited (“Two Seas”) both applied for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 7<sup>th</sup> November 2022 allowing the appeal of the Landings Proprietors Unit Plan No. 2 of 2007 (the “Landings”). The Court of Appeal set aside the decision of the trial judge made on 4<sup>th</sup> July 2022 which upheld the decision of the DCA permitting Two Seas to carry out a commercial development on its property at Pigeon Point, Gros Islet, Saint Lucia. Both applications were filed on 28<sup>th</sup> November 2022 under the provisions of section 108 of the Constitution of Saint Lucia.

The DCA’s application was made under section 108(2)(a) stating that the intended appeal raised matters of great general or public importance or otherwise, which ought to be submitted to His Majesty in Council. They argued that the Court’s finding of a duty to consult persons who own land that is adjacent to and/or adversely affected by a development raised difficult questions of law which posed dire consequences for the public and the Court’s decision would open the floodgates to challenges to decisions by the DCA approving development plans by persons adversely affected by approved developments.

As a preliminary issue, the Landings challenged Two Seas’ standing to bring an application for leave to appeal to the Privy Council. Two Seas argued that as a party directly affected by this Court’s decision, they could seek leave to appeal since there was no restriction in section 108 of the Constitution barring them from seeking leave. The Landings countered that they had no standing to seek leave as they were not joined as a party in the lower court and could not file evidence. Their role was limited to filing submissions.

Two Seas’ substantive application for leave to appeal was made under both sections 108(2)(a) and 108(1)(a). Like the DCA, they argued that the intended appeal raised matters of great general or public importance or otherwise. As to the application under section 108(1)(a), they submitted that the appeal was as of right since it involved directly or indirectly a claim to or question respecting property or a right of the prescribed value or more.

**Held:** dismissing the applications by the DCA and Two Seas for conditional leave to appeal to His Majesty in Council and awarding costs on both applications to the Landings, that:

1. In the absence of restrictions in the enabling legislation, the Court of Appeal and the Privy Council have a wide discretion in granting leave to appeal to the Privy Council. Appeals to the Privy Council are governed by the Constitution and the Judicial Committee (Appellate Jurisdiction) Rules Order 2009. The Civil Procedure Rules do not play a role in regulating the practice and procedure for appeals to the Privy Council. Under section 108 of the Constitution, there is no restriction stating that a party must have been a party in the lower court to apply for leave to appeal to the Privy Council. Therefore, a person who has a real interest in the outcome of a decision should be allowed to apply for leave to appeal to the Privy Council. Two

Seas was joined as an interested party in the lower court and although not a full party to the proceedings, it was evident that they were directly affected by the Court of Appeal's decision and as such had standing to seek leave to appeal to the Privy Council.

**E. Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited** [2010] UKPC 28 applied; **Attorney General of the Gambia v Pierre Sarr N'Jie** [1961] A.C. 617 distinguished; **Attorney General of the Cayman Islands v James Cleaver and Co (as liquidators of Liberty Capital Limited and Sun Holding Limited) and another** [2006] UKPC 28 distinguished.

2. Section 108(2)(a) contains two independent bases for getting conditional leave to appeal and the applicant can succeed on either or both bases. In construing the phrase 'great general or public importance' the court 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. The phrase 'or otherwise' enlarges the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the Privy Council or now, the Caribbean Court of Justice as the highest judicial authority of the land.

**Emmerson International Corporation v Viktor Vekselberg et al** BVIHCVAP2019/0020 (delivered 27<sup>th</sup> July 2023, unreported) followed; **Pacific Wire & Cable Company Limited v Texan Management Limited et al** BVIHCVAP2006/0019 (delivered 6<sup>th</sup> October 2008, unreported) followed; **Martinus Francois v The Attorney General** SLUHCVP2003/0037 (delivered 7<sup>th</sup> June 2004, unreported) followed; **Olasemo v Barnett Ltd** (1995) 51 WIR 191 applied.

3. The essence of the Court of Appeal's decision is that, in the absence of a statutory duty to consult adjacent landowners, the duty to consult may arise at common law where there is a legitimate expectation to be consulted, or where failure to consult would amount to a breach of the rules of natural justice. This Court found that fairness and the rules of natural justice require that there should be some consultation where the failure to do so leads to conspicuous unfairness and an abuse of process. There was nothing groundbreaking about the decision of the Court of Appeal and the Court was pellucid in finding that the common law duty to consult was not absolute and it depended on the facts of each case. On the facts of this case, the DCA was under a duty to consult the Landings and its failure to do so was conspicuously unfair and an abuse of process. Consequently, contrary to the arguments made by both the DCA and Two Seas, the fact that this was the first time a successful challenge had been made to the DCA's decision to approve development plans, did not make it *per se* a matter of great general or public importance for the grant of leave under section 108(2)(a). Even in the face of the wide discretion granted under the 'or otherwise' limb of section 108(2)(a) neither party was able to satisfy this Court that there was reasonable doubt as to the accuracy of the Court of Appeal's decision or that the intended appeal might require

some definitive statement of the law from the Privy Council. Both parties' applications therefore failed to meet the requirements of section 108(2)(a).

**Emmerson International Corporation v Viktor Vekselberg et al** BVIHCVAP2019/0020 (delivered 27<sup>th</sup> July 2023, unreported) distinguished; **Martinus Francois v The Attorney General** SLUHCVAP2003/0037 (delivered 7<sup>th</sup> June 2004, unreported) followed.

4. Under section 108(1)(a) the intended appeal must determine the existence of a proprietary right or interest over property. The intended appeal by Two Seas, although it relates to property, does not involve or concern a proprietary interest in the property, and it does not determine ownership or occupation rights or the manner of disposing of the property. The proprietorship or other rights of Two Seas were not affected because it does not have a right to a favourable decision by the DCA. The matter in dispute in the intended appeal concerns the lawfulness of the DCA's decision to grant regulatory consent to carry out the development. This issue does not have a monetary value and does not concern, directly or indirectly, property or a right within the meaning of section 108(1)(a). For this reason, Two Seas' application for conditional leave to appeal to the Privy Council as of right was refused.

**Gladys Sarah Becker v The Corporation of the City of Marion and another** [1976] UKPC 6 distinguished; **The Cabinet of Antigua and Barbuda et al v HMB Holdings Limited** ANUHCVAP2002/0016 (delivered 28<sup>th</sup> January 2003, unreported) distinguished.

## JUDGMENT

- [1] **WEBSTER JA [AG.]:** Before the Court are applications by the respondent, the Development Control Authority ("the DCA"), and by the interested party, Two Seas Holding Limited ("Two Seas"), for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 7<sup>th</sup> November 2022 allowing the appeal of the Landings Proprietors Unit Plan No. 2 of 2007 (the "Landings"). The Court of Appeal set aside the decision of the trial judge made on 4<sup>th</sup> July 2022 which upheld the decision of the DCA permitting Two Seas to carry out a commercial development on its property at Pigeon Point, Gros Islet, Saint Lucia.

## **Background**

- [2] The relevant background to the applications is that Two Seas is in the business of developing and operating luxury hotel resorts in Saint Lucia under the “Sandals” brand. It is the owner of property at Pigeon Point, Gros Islet, Saint Lucia, on which it operates a Sandals resort known as “Sandals Grande”. In November 2017, Two Seas applied to the DCA for permission to erect on its adjacent property, registered as parcel 272, another hotel resort to be called “Sandals La Source”. The plans for the new resort included a five-storey and a nine-story building (the “Development”).
- [3] The Landings operates a hotel under the name “The Landings Hotel Resort & Spa” on property that is immediately adjacent to parcel 272. The Landings objected to the Development. The essence of their objection was that as the owners and occupiers of the property adjacent to the Development, it would be severely affected by noise and pollution during the construction of the hotel, by increased traffic congestion in the area, and that the height of the nine-storey building would cause a dramatic alteration of the views and diminished aesthetics of its property. The Landings requested copies of the Development plans from the DCA. They were not provided with copies of the plans but were allowed to view them at the DCA’s offices.
- [4] The DCA approved the plans for the Development without consulting the Landings and later informed the Landings of its decision.
- [5] On 18<sup>th</sup> April 2018, the Landings commenced judicial review proceedings against the DCA seeking an order quashing the decision to approve the plans for the Development and for damages caused by the impact of the Development on their property. Two Seas was joined in the proceedings as an interested party.<sup>1</sup>
- [6] The learned trial judge dismissed the application finding that there was no statutory duty on the DCA to consult the Landings before approving the plans. The Landings appealed against the decision of the learned judge. The Court of Appeal allowed the

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<sup>1</sup> Details of Two Seas’ joinder as an interested party are set out in paragraphs 19-21 below.

appeal, set aside the decision of the trial judge and quashed the decision of the DCA approving the plans. The decision of the Court of Appeal does not prohibit the DCA from reconsidering the plans for the Development, either in their current form or as amended by Two Seas, following consultation with the Landings.

- [7] Two Seas and the DCA applied for conditional leave to appeal to the Privy Council against the order and judgment of the Court of Appeal. Both applications were filed on 28<sup>th</sup> November 2022 under the provisions of section 108 of the **Constitution of Saint Lucia**<sup>2</sup> (the “**Constitution**”). The relevant parts of section 108 read:

“(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;
- (b) final decisions in 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) 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; and
- (b) such other cases as may be prescribed by Parliament.”  
(Emphasis added)

#### **Amendment of section 108 of the Constitution**

- [8] On 9<sup>th</sup> March 2023, the Parliament of Saint Lucia amended the **Constitution** by deleting section 108 thereby abolishing appeals from the Court of Appeal to the Privy

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<sup>2</sup> Chap. 1:01 of the Revised Laws of Saint Lucia 2020.

Council, and substituting section 108A, providing that appeals from the Court of Appeal now lie to the Caribbean Court of Justice. Subsections (4) and (5) are relevant to the applications for permission to appeal that were pending when the new procedure was introduced. These provisions provide:

“(4) Subject to subsection (5), this section does not affect proceedings pending before Her Majesty in Council immediately before the abolition of appeals to Her Majesty in Council.

(5) An appeal pending before Her Majesty in Council at the date of abolition of appeals to Her Majesty in Council may be transferred to the Caribbean Court of Justice with the consent of all parties.

(6) Proceedings are deemed to be pending where —

(a) an appeal to Her Majesty in Council has been instituted before the abolition of appeals to Her Majesty in Council;

(b) leave to appeal or special leave to appeal to Her Majesty in Council has been granted or applied for before the abolition of appeals to Her Majesty in Council.”

The effect of subsection (6)(b) is that an application that was filed before the abolition date of 9<sup>th</sup> March 2023 is deemed to be an appeal pending before His Majesty in Council and by subsection 5 the applications in this matter could be transferred to the Caribbean Court of Justice ‘with the consent of all parties’. These provisions were brought to the attention of counsel at the hearing of the applications in April and they were asked to report back to the Court with the parties’ positions. The Court has not been advised that the parties would like the applications to be transferred to the Caribbean Court of Justice and so they will be considered as applications for leave to appeal to His Majesty in Council under the unamended provisions of section 108 of the **Constitution**.

### **The DCA Application**

- [9] The application by the DCA does not state the provision in section 108 of the **Constitution** under which it was made. Instead, it states in paragraph 3(i) that it is an appeal against “a final decision in civil proceedings where the question involved in the appeal is one that, by reason of its great general or public importance, or

otherwise, ought to be submitted to His Majesty in Council.” Notwithstanding the reference to a “final decision in civil proceedings” the application was in fact made under section 108(2)(a) of the **Constitution**. The DCA’s reliance on section 108(2)(a) is made clear in paragraphs 3(b) and 6 of its skeleton argument filed in support of the application where section 108(2)(a) is specifically referred to and reliance is placed on the fact that the intended appeal raises matters of great general or public importance or otherwise which ought to be submitted to His Majesty in Council.

- [10] The meaning of the expressions ‘great general or public importance’ and ‘or otherwise’ have been extensively litigated and defined in the courts of the Commonwealth Caribbean and to capture the essence of their meanings I can do no better than to repeat what this Court said in **Emmerson International Corporation v Viktor Vekselberg et al**:<sup>3</sup>

“[12] ...Each expression [in section 108(2)(a)] creates an independent basis for getting conditional leave to appeal and the applicant can succeed on either or both bases. The general approach to applications under the section was summarised by Carrington JA [Ag.] in paragraph 11 of his judgment in **Pacific Wire & Cable Company Limited v Texan Management Limited et al**:<sup>4</sup>

‘The wording of these tests has been framed in wide terms so that this court has a broad discretion to deal with each application and to consider each question of the proposed appeal on its merits. However, this discretion must be exercised judicially and, in our view, this requires that this court should, as a general rule, strive to act consistently in applying the test to grant leave so that it is in accordance with its current practice and that of other courts of appeal whose discretion is exercised under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked.’

[13] In determining what amounts to a question which is of great general or public importance reference is often made to **Martinus Francois v The Attorney General**<sup>5</sup> where Saunders JA (now president of the Caribbean Court of Justice) said –

“In construing the phrase ‘great general or public importance’, the Court usually looks for matters that involve a serious issue of law; a constitutional

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<sup>3</sup> BVIHCVAP2019/0020 (delivered 27<sup>th</sup> July 2023, unreported).

<sup>4</sup> BVIHCVAP2006/0019 (delivered 6<sup>th</sup> October 2008, unreported).

<sup>5</sup> SLUHCVP2003/0037 (delivered 7<sup>th</sup> June 2004, unreported).



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.”

[14] Consideration of the meaning of the words ‘or otherwise’ in the second limb of the test in section 3(2)(a) [section 108(2)(a)] usually starts with reference to the case of **Olasemo v Barnett Ltd**<sup>6</sup> where Wolfe JA in a dissenting judgment opined:

“Clearly, the phrase ‘or otherwise’ was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase ‘or otherwise’ does not *per se* refer to interlocutory matters. The phrase ‘or otherwise’ is a means whereby the Court of Appeal can in effect refer a matter to their lordships’ Board for guidance on the law. The matter requiring the guidance of their lordships’ Board may be of an interlocutory nature, but it does not follow that every interlocutory matter will come within the rubric ‘or otherwise’.”

[15] In **Texan Management** Carrington JA [Ag.] commented on the dictum of Wolfe JA with approval -

“The Jamaican Court of Appeal in *Olasemo v. Barnett Ltd.* considered the circumstances in which leave to appeal may otherwise be given. Wolfe JA, in his dissenting judgment, indicated that this was meant to enlarge the discretion of the Court to include matters which in the opinion of the court might require some definite statement of the law from the highest judicial authority of the land. He regarded it as a means whereby the Court of Appeal can in effect refer a matter to the Privy Council for guidance on the law.”

- [11] Mr. Dexter Theodore KC who appeared for the DCA submitted that the intended appeal raises matters of great general or public importance or otherwise that should be submitted to the Privy Council because the Court of Appeal erred in finding that the decision-making process by the DCA was blatantly unfair, irrational and in breach of the rules of natural justice. He continued that in coming to this conclusion the Court of Appeal erred in finding that: (a) the DCA failed in its duty of fairness to consult the Landings which was within the sphere of influence of the Development; (b) that the environmental impact assessment studies identified certain adverse impacts on the Landings’ property; and (c) that the failure to consult was

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<sup>6</sup> (1995) 51 WIR 191 at 200.

compounded by the failure to permit the Landings access to the documents underlying the application as required by section 47 of the **Physical Planning and Development Act**<sup>7</sup> (the “PPDA”). He submitted that the finding by the Court of Appeal of a duty to consult persons who own land that is adjacent to and/or is adversely affected by a development raises a difficult question of law the resolution of which poses dire consequences for the public and the decision of the Court of Appeal will open the floodgates to challenges to decisions by the DCA approving development plans by persons adversely affected by approved developments.

- [12] I find that the position taken by the DCA is an overstatement of the effect of the decision of the Court of Appeal. The essence of the decision is that in the absence of a statutory duty to consult adjacent owners, the duty to consult may arise at common law where there is a legitimate expectation to be consulted, or where a failure to consult would amount to a breach of the rules of natural justice. The Court of Appeal found, on the facts, that there was no promise to consult the Landings nor an established practice that there would be consultation, and the Landings had not established that there was a legitimate expectation that they should have been consulted. However, fairness and the rules of natural justice require that there should be consultation where the failure to consult leads to conspicuous unfairness and an abuse of process. On the facts, the DCA breached this latter duty by not consulting the Landings and allowing them access to the Development plans. The judgment of the Court of Appeal was pellucid in its finding that the common law duty to consult is not absolute and depends on the facts and circumstances of each application. In this regard Farara JA [Ag.], writing for the Court, stated at paragraph 83:

“Absent a statutory requirement for consultation or an existing practice or policy of consultation, there is no general duty to consult. Moreover, the question of whether a duty to consult arises at common law is a fact sensitive one. Even if established, while consultation must be ‘proper’, the degree or extent of the consultation will necessarily vary from application to application and may be satisfied in different ways depending on the particular circumstances of the application for development before the DCA.

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<sup>7</sup> Chap. 5:12 of the Revised Laws of Saint Lucia 2020.

The character and extent of consultation will also vary based upon the DCA's own judgment as to the extent of the consultation necessary in relation to a particular application, and the method or means of effecting such consultation in order to properly discharge its statutory duty and power to determine applications for planning approval fairly."

[13] There is nothing remarkable or groundbreaking about this decision. The Court of Appeal simply declared the common law position relating to the duty of a planning authority to consult persons adversely affected by a proposed development. It is a fact sensitive exercise and the Court found on the facts that the DCA was under a duty to consult the Landings and its failure to do so was conspicuously unfair and an abuse of the process. The decision will not open the proverbial floodgates as suggested by Mr. Theodore KC. The ability of an affected landowner to challenge a decision of the DCA approving development plans was always present in the law and the decision did not create a new right. In any case, the ability to make a successful challenge is circumscribed by the matters mentioned in the judgment of Farara JA [Ag.]. The fact that this is the first time that a successful challenge has been made does not *per se* make it a matter of great general or public importance.

[14] The DCA also relied on the principle in the decisions of this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd et al**<sup>8</sup> and **Texan Management**<sup>9</sup> that the Court can grant leave to appeal under the "or otherwise" limb of the test in section 108(2)(a) when it entertains a reasonable doubt as to the accuracy of the Court of Appeal's decision. However, this Court also cautioned in **Emmerson** that:

"[W]hen considering the accuracy of the decision of the Court of Appeal the discretion should be exercised sparingly and with great care. It is not the function of the Court of Appeal to determine the correctness of the matters sought to be appealed. This is the function of the Privy Council."<sup>10</sup>

In this case, I do not entertain a reasonable doubt as to the accuracy of the decision of the Court of Appeal. I also note that the facts and circumstances in **Emmerson** were very different – the decision being challenged was irreconcilable with and did

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<sup>8</sup> BVIHCP2018/0005 BVIHCP2018/0008 (delivered 8<sup>th</sup> October 2018, unreported).

<sup>9</sup> *Supra* n. 4.

<sup>10</sup> *Supra* n. 3 at para. 18.

not mention a previous decision of the Court involving the same parties delivered two and a half years earlier.

[15] Finally, the DCA raised in its written submissions that the appeal involves ‘a genuinely disputable issue’ within the meaning of that phrase in **Learie Alleyne-Forte v Attorney General of Trinidad and Tobago and another**,<sup>11</sup> a decision of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago. However, Mr. Theodore KC, wisely, did not pursue this point in his oral submissions. The principle in **Alleyne-Forte** is that the genuinely disputable issue must relate to whether the proposed appeal is within the category of cases where the applicant claims the right to appeal as of right and the only issue is whether the appeal is truly as of right within the meaning of section 108(1). The principle does not apply to applications under section 108(2) and it has no application to the merits of the appeal. This was settled by this Court in **Khouly Construction & Engineering Ltd v Edmond Monsoor**.<sup>12</sup> No further comment is necessary on this point.

[16] Applying the principles in **Martinus Francois** I am satisfied that the decision of the Court of Appeal does not involve a serious issue of law or an area of law that is in dispute, nor does it raise a legal question the resolution of which poses dire consequences for the public, and I do not entertain a reasonable doubt as to the accuracy of the Court’s decision. The decision does not raise matters of great general or public importance or otherwise and I would dismiss the application by the DCA for leave to appeal to his Majesty in Council.

#### **The Two Seas’ application**

[17] The application by Two Seas is made under subsections (1) and (2) of section 108 of the **Constitution**. It claims under subsection (1) that the decision of the Court of Appeal has prevented it from proceeding with the proposed development of its property and it now has to await the reconsideration of the Development application

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<sup>11</sup> [1997] UKPC 49.

<sup>12</sup> ANUHCVP2020/0023 (formerly ANUHCVP2019/0009) (delivered 18<sup>th</sup> October 2022, unreported).

by the DCA. It wishes to challenge the decision of the Court of Appeal that the DCA had to consult the Landings and allow access to the Development plans before granting permission to develop its own property. The proposed appeal therefore involved directly or indirectly a question respecting its property within the meaning of subsection 108(1) and it was entitled to appeal as of right.

- [18] Alternatively, the decision that the DCA should have consulted the adjoining landowner (the Landings) breaks new ground and will open the floodgates for every person who owns property in close proximity to a proposed development to be consulted by the DCA and, if requested, be provided with copies of the plans for the proposed development. This is a question of great general or public importance or otherwise that ought to be submitted to the Privy Council under subsection 108(2).

#### **The section 108(1) application - standing to apply**

- [19] The proceedings in the court below were commenced by the Landings by fixed date claim form against the DCA. On 3<sup>rd</sup> July 2018, the Landings was granted leave to apply for judicial review with a view to quashing the decision of the DCA. On 22<sup>nd</sup> October 2018, Two Seas applied under Part 19.3 of the **Civil Procedure Rules 2000** ("the CPR")<sup>13</sup> to be added as an interested party on the ground that it would be directly affected by the decision of the DCA. The Landings objected to the application.
- [20] CPR Part 19 dealt with the addition or substitution of parties after proceedings had been commenced. The effect of an order under this rule was to make the added or substituted party a party to the proceedings with the right to file pleadings and participate fully in the proceedings. A more limited right to intervene in judicial review proceedings was conferred by CPR Part 56.11 which allowed a person who had a sufficient interest in the claim to apply to be heard and/or make submissions on the claim. The persons who could apply included any person who had been adversely affected by the decision that was the subject matter of the claim.

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<sup>13</sup> The Civil Procedure Rules 2000 were repealed on 31<sup>st</sup> July 2023 and replaced by the Civil Procedure Rules (Revised Edition) 2023.

- [21] The learned judge heard the contested application and ordered that Two Seas be added as an interested party under CPR Part 56, and not under CPR Part 19. Two Seas' application to file and rely on evidence was also rejected but it was allowed to make submissions. Two Seas did not appeal against the learned judge's order. It participated in the proceedings in the lower court and in the appeal by making submissions as an interested party.
- [22] Learned counsel for the Landings, Mr. Richard Harwood KC, submitted that Two Seas does not have standing to apply for leave to appeal to the Privy Council because it was not a party in the proceedings in the lower courts. This is the effect of the trial judge's dismissal of Two Seas' application to be joined as a party and limiting its role in the proceedings to that of an interested party who could make submissions but not file evidence. He distinguished the cases of **Cage (St. Lucia) Limited v Treasure Bay (St. Lucia) Limited et al**<sup>14</sup> and **Quorum Island (BVI) Limited v Virgin Islands Environmental Council et al**.<sup>15</sup> In both cases the Court of Appeal heard appeals by interested parties. Mr. Harwood KC pointed out that the appellants in these cases, although interested parties, were made parties in the court below by orders under CPR Part 19. Therefore, the cases do not assist Two Seas whose application to be joined as a defendant under CPR Part 19 was refused and it remained throughout an interested party with its rights limited to making submissions. Mr. Harwood KC also relied on the decision of this Court in **Tsoi Tin v Tan Haihong et al**.<sup>16</sup> The parties were husband and wife and were involved in a matrimonial dispute in the People's Republic of China. The husband was a shareholder in a BVI company which owned 70% of the matrimonial assets. The company gave notice to the wife of a proposal to transfer the shares held by the husband to a third party. She applied for and obtained an injunction restraining the company from transferring the shares. The husband was given notice of the claim but he did not apply to be a party to the proceedings in the lower court, although he gave evidence objecting to the

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<sup>14</sup> SLUHCVP2011/0045 delivered 23<sup>rd</sup> January 2012, unreported).

<sup>15</sup> BVIHCVP2009/0021 (delivered 12<sup>th</sup> August 2011, unreported).

<sup>16</sup> BVIHCP2013/0023 (delivered 5<sup>th</sup> February 2014, unreported).

injunction. The husband appealed against the judge's order granting the injunction. The Court of Appeal held that the husband was not an appellant within the meaning of the Civil Procedure Rules 2000 Part 62.1(2)<sup>17</sup> and he did not have standing to bring the appeal. His appeal was dismissed.

[23] Mr. Harwood KC also referred to the English Court of Appeal decision in **George Wimpey UK Ltd v Tewkesbury Borough Council (MA Holdings Ltd intervening)**<sup>18</sup> on which Two Seas placed heavy reliance. The claimant, George Wimpey UK Ltd, brought a public law challenge to the decision by the Tewkesbury Borough Council (the "Council") to designate certain properties, including MA Holdings Ltd's property, as residential. MA Holdings Ltd was served with the proceedings but did not participate in the proceedings other than by attending and observing, leaving the Council to defend its own decision. The claimant's challenge succeeded and the trial judge set aside the decision of the Council. The Council did not appeal the judge's decision. On becoming aware of this MA Holdings Ltd applied for leave to appeal on the ground that the decision adversely affected its property, the Council was not appealing, and it was therefore stuck with the decision. The Court of Appeal granted leave to appeal finding, inter alia, that the definition of "appellant" in English CPR rule 52.1(3)(d) as 'a person who brings or seeks to bring an appeal' was wide enough to embrace a person who was not party to the proceedings below, but who was adversely affected by the outcome of the proceedings. MA Holdings Ltd was adversely affected by the judge's ruling and therefore fell within the wide definition of an appellant in rule 52.1(3)(d) and permission to appeal to the Court of Appeal was granted.

[24] Mr. Harwood KC distinguished **George Wimpey** by submitting that MA Holdings Ltd was allowed to appeal because the Council opted not to appeal and the judge's decision would have gone unchallenged if MA Holdings Ltd was not given permission to appeal. In the instant appeal the substantive defendant, the DCA, is

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<sup>17</sup> The 2000 CPR Part 62.1(2) dealt with definitions under Part 62, which included the definition of "appellant".

<sup>18</sup> [2008] 1 WLR 1649.

seeking leave to appeal and therefore the wide powers granted to the Court of Appeal in **George Wimpey** do not assist Two Seas.

- [25] Mr. Harwood KC also relied on the fact that Two Seas did not appeal against the judge's ruling dismissing its application to be joined as a party and limiting its role in the proceedings in the court below to making submissions. Further, that Two Seas stated in its written submissions on costs following the delivery of this Court's judgment in November 2022 that Two Seas was not a party in the proceedings and a "non-party" costs order should not be made against it.
- [26] In the circumstances, Mr. Harwood KC submitted that Two Seas does not have standing to apply for leave to appeal to the Privy Council.
- [27] Learned counsel for Two Seas, Mr. Garth Patterson KC, did not dispute that Two Seas was not a party to the proceedings in the lower courts. His submission in this regard is that Two Seas participated fully in the appeal and under the rules in the CPR relating to appeals its participation had to be either as an appellant or a respondent. It was clearly not an appellant and therefore was a respondent and was entitled to be heard on the appeal to the Court of Appeal.
- [28] Mr. Patterson's more attractive submission on the leave to appeal application is that Two Seas has an interest in the DCA's decision, the sufficiency of that interest is not disputed, and it does not have to be a party in the lower courts to apply for leave to appeal to the Privy Council. It has a constitutional right to appeal under section 108(1)(a) because it is seeking to appeal against a final decision in a civil proceeding where the matter in dispute exceeds the prescribed value and the appeal involves directly or indirectly a claim to or question respecting property of the prescribed value or upwards.<sup>19</sup> He submitted that Two Seas' application satisfies the criteria in section 108 (1)(a) and there is no requirement in the section that a person applying for permission to appeal must have been a party in the proceedings in the lower

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<sup>19</sup> Section 108(1) is set out in para. 7 above.



courts. He reminded the Court that the procedure for applying for leave to appeal to the Privy Council is governed by section 108 of the **Constitution** governing the substantive right to appeal and the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009**<sup>20</sup> governing the procedure for appealing (the “**PC Rules 2009**”). The CPR, he said, ‘has no role to play in regulating the practice and procedure for appeals to the Privy Council.’<sup>21</sup> This is an obvious point and if authority is needed to support it Mr. Patterson SC relied on the decision of the Privy Council on appeal from this Court sitting in Saint Kitts in **E. Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited**<sup>22</sup> where Lord Mance opined:

“11. The Privy Council sits as the final court of appeal of any jurisdiction from which it hears appeals. But appeals to the Privy Council are regulated by a combination of provisions with different legal bases. Here, the Constitution prescribes the cases in which an appeal is open to the Privy Council; the Privy Council Appeals Order 1967 continues to provide powers and procedures covering applications to the Court of Appeal for leave to appeal in circumstances where the appeal is as of right; and the 2009 Order covers the powers of and procedures before the Privy Council itself.”<sup>23</sup>

[29] The non-applicability of the CPR to applications for leave to appeal to the Privy Council is important. It means that cases such as **Tsoi Tin v Tan Haihong et al** referred to above,<sup>24</sup> which interpreted CPR Part 62.1 and decided that a person who was not a party to the proceedings in the lower court could not apply for leave to appeal to the Court of Appeal, should not be used to determine who is entitled to apply for leave to appeal to the Privy Council. Similarly, the decision in **George Wimpey**, although favourable to Two Seas in that permission to appeal was granted to MA Holdings Ltd which was not a party in the proceedings in the lower court, has limited application to this case because it turned on the interpretation of the provisions in the English CPR relating to appeals to the Court of Appeal. However, the views expressed by Lord Dyson who delivered the court’s unanimous judgment,

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<sup>20</sup> UK SI 2009/224.

<sup>21</sup> See further submissions in respect of standing filed on 10<sup>th</sup> May 2023 at para. 18.

<sup>22</sup> [2010] UKPC 28.

<sup>23</sup> Ibid at par. 11.

<sup>24</sup> Supra n. 16.

are helpful in considering how a court should exercise discretion when considering an application for leave to appeal by a person who was not a party in the proceedings in the court below. For example, in paragraph 9 he stated:

“It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success.”

But for the reference to the English CPR this passage would have been apposite to the current application. It shows that persons who have a real interest in the outcome of a decision should be allowed to appeal if the losing party chooses not to appeal. This wide discretion is, however, subject to any restrictions in the enabling legislation or the rules of court as in CPR 62.1(2).

- [30] Regarding applications for permission to appeal to the Privy Council, the Court was directed to two cases where a non-party in the Court of Appeal was granted permission to appeal to the Privy Council. In **Attorney General of the Gambia v Pierre Sarr N’Jie**<sup>25</sup> the Attorney General of the Gambia filed disciplinary proceedings against a practising barrister. The deputy judge who heard the application made an order disbarring the barrister who appealed to the West African Court of Appeal. As a matter of law, the Attorney General was not a party to the appeal. However, he appeared as *amicus curiae*. The Court of Appeal set aside the deputy judge’s decision on the ground that he had no jurisdiction to hear the complaint. The Attorney General applied for special leave to appeal to the Privy Council under section 31 of the West African (Appeal to the Privy Council) Order 1948 which limits the persons who can appeal to “persons aggrieved” by a decision of the Court of Appeal. Their Lordships found that the Attorney General, representing the Crown as guardian of the public interest, was a person aggrieved

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<sup>25</sup> [1961] A.C. 617.

by the decision of the Court of Appeal and granted leave to appeal. Lord Denning noted that:

“The words “person aggrieved” are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.”<sup>26</sup>

The case is distinguishable because the words “person aggrieved” do not appear in section 108(1) of the **Constitution** or the **PC Rules 2009** and the person applying was the Attorney General as guardian of the public interest. But the effect of the decision and the guidance from Lord Denning show that restrictions should not be placed on the right to appeal unless the enabling legislation calls for such restrictions as with CPR Part 62.1.

- [31] **N’Jie** was cited with approval in **Attorney General of the Cayman Islands v James Cleaver and Co (as liquidators of Liberty Capital Limited and Sun Holding Limited) and another**,<sup>27</sup> a decision of the Privy Council on appeal from the Court of Appeal of the Cayman Islands. The proceedings in the lower courts concerned an application to the Grand Court by the official liquidators of four Caymanian companies to fix their remuneration for acting as the liquidators of the companies. The Attorney General was dissatisfied with the decision of the Court of Appeal that the remuneration of liquidators should be determined in accordance with the English Insolvency Rules 1986. He sought leave to intervene and to appeal to the Privy Council. The application was refused by the Court of Appeal, but the Board granted the Attorney General special leave to intervene and to prosecute the appeal. The Board found that the Attorney General had a sufficient interest in the proceedings as the guardian of the public interest and there was an issue of general public importance going to the jurisdiction of the courts to do justice according to the law. As in **N’Jie** the facts and circumstances of this case are very different from the Two Seas application, but the case illustrates the point that in the absence of

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<sup>26</sup> Supra n. 25 at page 634.

<sup>27</sup> [2006] UKPC 28.

restrictions in the enabling legislation the Court of Appeal and the Privy Council have a wide discretion in granting leave to appeal to the Privy Council.

[32] I turn next to the provisions of the enabling legislation to see whether they contain restrictions on the persons who can apply for leave to appeal to the Privy Council. The primary legislation which is the source of the court's jurisdiction is section 108(1) of the **Constitution** which is set out in paragraph 7 above. The section states that 'an appeal shall lie ...as of right' against final decisions in any civil proceeding where the matter in dispute is of the prescribed value and the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards. There is nothing in this section that restricts the persons who can appeal to the parties to the proceedings in the lower courts.

[33] Similarly, rule 2(1) of the **PC Rules 2009** defines an appellant as "a person who files an application for permission to appeal or files a notice of appeal" with no restriction in this rule or any other rule on the persons who can apply for permission to appeal.

[34] I should mention that rule 27 which empowers the Privy Council to grant permission to a person with an interest in the appeal (such as Two Seas) to intervene in the appeal if the Board grants leave to appeal or after a notice of appeal has been filed. Neither situation applies in this case. The application by the DCA for leave to appeal is refused<sup>28</sup> and no other person has filed an appeal against the decision of the Court of Appeal. The rule could be used by Two Seas as an interested party if the DCA, having been refused permission to appeal by this Court, applies directly to the Privy Council for special leave to appeal and is granted leave. In that situation Two Seas could apply to be heard as an interested party. But this is not the situation that is before the Court and it is not for me to speculate on this possibility.

[35] My conclusion on the issue of standing is that the cases like **N'Jie** and **Attorney General of the Cayman Islands v James Cleaver and Co**, though distinguishable

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<sup>28</sup> See para. 16 above.

based on the legislation and the facts that they were dealing with, show that in appropriate cases the Privy Council has a wide discretion to allow a person who was not a party in the proceedings in the courts below to pursue an appeal to the Board. Denying a non-party, or in this case an interested party, would require this Court to read into section 108(1) of the **Constitution** a restriction against non-parties applying for permission to appeal. Adopting the language of Mr. Patterson SC in paragraph 35 of his further submissions on standing filed on 10<sup>th</sup> May 2023 ‘there is no basis for construing [section 108] narrowly so as to exclude from its broad ambit an ‘interested party’ or any person who was not a party to the proceedings in the Court of Appeal.’

- [36] I would not read a restriction into section 108 that has the effect of debarring a person who is directly affected by the decision of the Court of Appeal from applying for permission to appeal. In this case, Two Seas is directly affected by the decision of the Court of Appeal and considering that the DCA does not have a competent appeal, Two Seas has standing to apply for permission to appeal to the Privy Council, and I so find. Having satisfied myself that Two Seas has standing to apply for leave to appeal I will now consider whether the application meets the requirements of section 108(1)(a) and/or section 108(2)(a) of the **Constitution**.

#### **The section 108(1)(a) application by Two Seas**

- [37] Section 108(1)(a) is set out in paragraph 7 above. There is no dispute that the intended appeal is from a final decision in civil proceedings and that the property which was the subject of the DCA’s approval exceeds the value threshold of \$1,500.00. But this is not sufficient to get the application through the gateway in section 108(1)(a). In this case Two Seas has to prove that the intended appeal involves, directly or indirectly, a claim to or a question respecting property or a right up to or more than the prescribed value.
- [38] The Landings’ position on the application under section 108(1)(a) is that the intended appeal does not involve directly or indirectly a claim to or question

respecting property or a right, and it does not qualify for leave to appeal as of right. It is concerned with the lawfulness of the grant of regulatory consent to carry out the Development. It does not affect the ownership of property or the existence of property rights, and it does not have a monetary value.

[39] Two Seas' position is that the effect of the decision of the Court of Appeal is that they are no longer able to proceed with the development of their property in accordance with the Development plans and this is a matter that directly or indirectly affects the use of the property, resulting in huge financial losses. They relied on the decision of this court in **The Cabinet of Antigua and Barbuda et al v HMB Holdings Limited**<sup>29</sup> which concerns judicial review proceedings challenging a decision of the Cabinet of Antigua and Barbuda to acquire HMB's land by compulsory acquisition. The High Court Judge granted declarations that the acquisition was unlawful and quashed the decision to acquire the property. The Court of Appeal allowed the Government's appeal, set aside the trial judge's decision and restored the acquisition of the property. HMB applied to the Court of Appeal for leave to appeal to the Privy Council. The Court of Appeal held that the proposed appeal 'may, just may...' involve indirectly a claim to or question respecting property and granted leave to appeal to the Privy Council.<sup>30</sup> The Court of Appeal did not elaborate on the reasons for coming to its conclusion but it is obvious from the facts and circumstances of the case that the Court was satisfied that the acquisition of the property by the Government concerned directly or indirectly HMB's interest in the property.

[40] Both Two Seas and the Landings referred to the case of **Gladys Sarah Becker v The Corporation of the City of Marion and another**,<sup>31</sup> an appeal to the Privy Council from the Supreme Court of South Australia. The appellant was the owner of 67 acres of land that she wanted to subdivide and sell as individual residential

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<sup>29</sup> ANUHCVP2002/0016 (delivered 28<sup>th</sup> January 2003, unreported).

<sup>30</sup> Supra n. 29 at paras. 14 and 15.

<sup>31</sup> [1976] UKPC 6.

lots. The lots could not be sold without subdivision approval. She applied for subdivision approval, but the respondent refused the application thereby preventing the intended sales of the lots. The appellant appealed to the Full Court. The Full Court dismissed the appeal and refused leave to appeal to the Privy Council. The appellant applied for special leave under rule 2 of the Order in Council of 1909, which is substantially the same as section 108(1) of the St Lucia **Constitution**. The Board granted permission to appeal the finding that the value threshold in the rule was to be determined by reference to the value of the property and not the value of the claim or question in issue.

[41] Mr. Patterson SC submitted that **Becker** assists Two Seas because it shows the right to subdivide and sell land is an incidence of ownership that directly or indirectly affects the property. This is similar to applying for development approval and then developing land. Mr. Harwood KC's response was that the case is distinguishable and has no application to the Two Seas application. The right to subdivide and sell one's land (as in **Becker**) is an act of ownership and an interest in the land because it involved the right of an owner to dispose of her property by sale. But this is different from the procedure for obtaining permission to develop land which is the issue in this application. Two Seas' application for development approval engaged the regulatory process for getting permission to develop land – it did not affect the property, directly or indirectly, and it did not have a monetary value.

[42] Counsels' submissions must be viewed in the context of the issue to be resolved on this application. The issue is whether Two Seas' proposed appeal involves directly or indirectly a claim to or question respecting property, or a right, of the prescribed value or more. Is it the underlying property on which the Development will be carried out or is it the approval process of the plans for the Development that will be engaged by the appeal? In **HMB** the issue in question was the HMB's ownership rights in the land that had been compulsorily acquired by the Government. This in my opinion is a case of an appeal that directly or indirectly affected the interest of the applicant in the subject property. The issue in **Becker**

falls into the same category. The appellant was losing her right to dispose of her property by the refusal of subdivision approval, and the intended appeal was to reverse this decision by the respondent. In the words of Lord Diplock who delivered the advice of the Board:

“Thus proceeding, it is clear that the first question raised in the originating summons directly affected the plaintiff’s chances of being permitted to subdivide for the purpose of sale of her 67 acres of land in the Hills Free Zone ...[T]he judgment sought to be appealed from involves the plaintiff’s proprietary rights in her 67 acres and is therefore one ‘respecting property’ of the designated value.”<sup>32</sup> (Emphasis added)

The same may be said of **HMB** – the appellant’s proprietary interest was affected by the compulsory acquisition of its property by the Government.

[43] **Becker** was considered by the Privy Council in **Jackpot Ltd v Gambling Regulatory Authority**,<sup>33</sup> a 2018 appeal from the Supreme Court of Mauritius. The respondent suspended and later revoked the gambling licence of the appellant. The appellant applied for judicial review of the respondent’s decision to revoke its licence. The courts in Mauritius refused the application and the appellant applied to the Privy Council for special leave to appeal. In dismissing the application, the Board took the opportunity to deal with what is “property” for the purposes of section 81(1)(b) of the Constitution of Mauritius which is substantially the same as section 108(1) of the **Constitution** of Saint Lucia. The advice of the Board was delivered by Lord Sumption who noted that the application was for a gambling licence and the entitlement to a gambling licence was not property or a right – it was a permission granted by the Gambling Authority in its discretion.<sup>34</sup>

[44] Lord Sumption, after referring to **Becker** and the well-known Privy Council decision from Mauritius of **Meghiji Lakhamshi & Brothers v Furniture Workshop**,<sup>35</sup> opined that:

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<sup>32</sup> Supra n. 31 at page 284 per Lord Diplock.

<sup>33</sup> [2018] UKPC 16.

<sup>34</sup> Supra n. 33 at para. 15.

<sup>35</sup> [1954] AC 80.



“These decisions are authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and (ii) that where an appeal will determine the existence of a proprietary right or a proprietor’s right of disposal over the property, there is an appeal as of right if the property’s value exceeds the threshold.”<sup>36</sup>

The second part of this terse statement confirms that the intended appeal must determine the existence of a “proprietary right or a proprietor’s right of disposal over the property.” In **Becker** it was the refusal of subdivision approval that prohibited the right of disposal that was the subject of the intended appeal. The application by Two Seas, while it relates to property, does not involve or concern a proprietary interest in the property and it does not determine ownership or occupation rights or the manner of disposing of the property. The proprietorship or other rights of Two Seas were not affected because it does not have a right to a favourable decision by the DCA – only a right to a fair consideration of the application and a decision granting or refusing the application at the discretion of the DCA.

[45] In conclusion, I find that the matter in dispute in the intended appeal concerns the lawfulness of the DCA’s decision to grant regulatory consent to carry out the Development. This issue does not have a monetary value and it does not concern, directly or indirectly, property or a right within the meaning of section 108(1) of the **Constitution**. Two Seas has not satisfied the requirements of section 108(1) for leave to appeal as of right and I would dismiss the application for conditional leave to appeal under this section.

#### **Two Seas’ application under section 108(2)**

[46] I set out in paragraphs 9-16 above my reasons for dismissing the DCA application which was made under section 108(2) of the **Constitution**. The application by Two Seas under this section raises the same issues and for the same reasons I would also dismiss the application by Two Seas under section 108(2) for conditional leave to appeal.

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<sup>36</sup> Supra n. 33 at para. 13.

## **Disposal**

[47] I would make the following orders on the two applications before the Court:

- (1) The application by the DCA under section 108(2) of the **Constitution** for conditional leave to appeal to His Majesty in Council is dismissed with costs to the Landings.
- (2) The application by Two Seas under sections 108(1) and 108(2) of the **Constitution** of Saint Lucia for conditional leave to appeal to His Majesty in Council is dismissed with costs to the Landings.
- (3) All costs to be assessed by the court below, unless agreed within 28 days.

[48] Finally, I acknowledge the very helpful written and oral submissions of lead counsel and those assisting them and apologise for the delay in the delivery of this judgment due in large part to the demands on judicial time.

I concur.  
**Mario Michel**  
Justice of Appeal

I concur.  
**Vicki Ann Ellis**  
Justice of Appeal

**By the Court**

**Chief Registrar**