

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0014

BETWEEN:

KENNETH M. KRYs
(as Liquidator of Fairfield Sentry Limited (in liquidation))

Applicant

and

FARNUM PLACE LLC

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Anthony Gonsalves

Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Westwood KC for the Applicant

Mr. Ben Woolgar, Mr. Richard Evans and Ms. Allana-J Joseph for the
Respondent

2022: October 7;
2023: August 23.

Motion for conditional leave to appeal to His Majesty in Council – Appeal as of right – Whether the decision of this Court dismissing the appeal is a final decision within the meaning of section 3(1)(a) of the 1967 Order so that the applicant may appeal as of right – Whether leave ought to be granted to the applicant to appeal to His Majesty in Council by virtue of the appeal involving a question of great general or public importance or otherwise – Delay in the delivery of judgment – Whether the decision of Bernstein J in the US Bankruptcy Court disapproving the sale of the SIPA claim to Farnum, Hellerstein J's affirmation of Bernstein J's decision and the SCCA's affirmation of Hellerstein J's decision were material events post-dating the hearing of the appeal which ought to have been considered by this Court in the appeal – Whether the delay in excess of 7 years between the hearing of the appeal and the handing down of the judgment is another consideration in favour of this Court granting leave to appeal to His Majesty in Council

The present application stems from an agreement (the "Trade Confirmation") whereby Fairfield Sentry Limited ("Sentry"), of which Mr. Kenneth KryS ("Mr. KryS") is a liquidator, agreed to sell to the respondent, Farnum Place LLC ("Farnum"), its claim in the liquidation of Bernard L Madoff Securities LLC under the United States Securities

Investors Protection Act at a rate of 32.125 cents on the dollar (“the SIPA claim”). Shortly after the agreement was made, the prevailing price of the SIPA claim rose sharply.

On 27th October 2011, Farnum issued an originating application for an order directing Mr. Krys to procure that Sentry carry out its obligation under the Trade Confirmation. On 27th March 2012 Bannister J approved the Trade Confirmation and assignment of the SIPA claim but directed that Mr. Krys take all necessary steps to bring before the US Bankruptcy Court an application for approval or non-approval by that Court of the Trade Confirmation. Mr. Krys made the necessary application to the US Bankruptcy Court for the Southern District of New York and after hearing the application Lifland J held that there was no basis for disapproval of the Trade Confirmation. On 18th January 2013, Mr. Krys applied to the BVI Court for its sanction to appeal Lifland J’s decision to the US District Court for the Southern District of New York. On 21st January 2013 Bannister J refused sanction, however he gave permission for Mr. Krys to appeal that refusal to this Court of Appeal and to file the notice required to preserve time for an appeal to the US District Court. By notice of appeal dated 24th January 2013, Mr. Krys appealed to this Court against Bannister J’s refusal of sanction.

On 25th February 2013, this Court allowed Mr. Krys’ appeal against Bannister J’s order dated 21st January 2013. The Court’s order did not however go as far as to grant sanction for Mr. Krys to pursue any further or other appeal in the US relating to Lifland J’s order. On 3rd July 2013, the US District Court (Hellerstein J) affirmed Lifland J’s decision. Thereafter, on 17th July 2013, Mr. Krys applied to the BVI Court for sanction to appeal Hellerstein J’s decision to the US Court of Appeals for the Second Circuit (“the SCCA”). By judgment dated 22nd July 2013, Bannister J declined sanction to appeal to the SCCA and refused permission to appeal his ruling. On 13th July 2013, Baptiste JA granted leave to appeal Bannister J’s order dated 22nd July 2013 and gave Mr. Krys interim sanction to preserve the appeal to the SCCA pending the resolution of the appeal against Bannister J’s decision. Following further instances where the Court of Appeal gave Mr. Krys sanction to take steps in the appeal to the SCCA which did not feature in the original interim sanction, the SCCA appeal was heard on 21st May 2014. The appeal against Bannister J’s 22nd July 2013 order was heard by this Court on 17th July 2014 and judgment was reserved.

On 26th September 2014, the SCCA vacated the District Court’s order affirming the order of Lifland J and sent the matter back to the District Court with instructions to remand to the Bankruptcy Court for review under Section 363 of the US Bankruptcy Code. On 13th October 2015 Bernstein J of the US Bankruptcy Court disapproved the sale of the SIPA claim to Farnum, on 2nd June 2016 Hellerstein J affirmed Bernstein J’s decision and on 22nd May 2017 the SCCA affirmed Hellerstein J’s decision. Thereafter, on 10th March 2022, this Court of Appeal dismissed the appeal against Bannister J’s order dated 22nd July 2013 and ordered costs of the appeal to be costs in the liquidation. This Court held that the question of sanction was one for the discretion of the first instance judge (Bannister J) and that it could not be said that he was plainly wrong in the way he had exercised that discretion.

Being dissatisfied, Mr. Krys sought leave to appeal to His Majesty in Council on three grounds. However, four main issues fell to be determined by this Court: (i) whether the

decision of this Court dismissing the applicant's appeal against the decision of Bannister J [Ag.] constitutes a 'final decision' within the meaning of The Virgin Islands (Appeals to Privy Council) Order 1967 ("the 1967 Order") so that the applicant may appeal as of right; (ii) if the aforementioned decision of this Court does not constitute a 'final decision', whether leave ought to be granted to the applicant to appeal to His Majesty in Council by virtue of the appeal involving a question which is of great general or public importance or otherwise; (iii) whether the decision of Bernstein J in the US Bankruptcy Court on 13th October 2015 disapproving the sale of the SIPA claim to Farnum, Hellerstein J's affirmation of Bernstein J's decision on 2nd June 2016 and the SCCA's affirmation of Hellerstein J's decision on 22nd May 2017 were material events post-dating the hearing of the appeal which ought to have been taken into consideration by this Court in the appeal; and (iv) whether the effect of a delay in excess of seven years between the hearing of the appeal and the handing down of the judgment is another consideration in favour of this Court granting leave to appeal to His Majesty in Council.

Held: granting the application for conditional leave to appeal to His Majesty in Council on the conditions set out in paragraph [53] below, that:

1. Once an order is made in an application which is a pre-requisite for commencing substantive proceedings or is made in relation to extant proceedings, such an order would be considered an interlocutory order. However, there may be orders which are sui generis, which emanate from stand-alone proceedings unrelated to any overarching substantive proceedings and would accordingly be regarded as a final order. As long as the order is made in proceedings connected to a larger substantive claim, it cannot be considered final unless the issues on the larger substantive claim are resolved by that order, regardless of the way in which the corresponding application is determined. In this case, Mr. Krys' application for sanction to take steps in the appeal to the SCCA and by extension his appeal against Bannister J's refusal of the application were made within the winding up proceedings against Sentry. The application and the appeal were not made independent of substantive or overarching proceedings and more pointedly, whichever way they were decided would not have resolved the issues or rights between the parties as it concerns the substantive liquidation proceedings. Accordingly, the order emanating from Mr. Krys' application for sanction to appeal to the SCCA and/or the order from the ensuing appeal must be considered interlocutory orders and he does not therefore have an appeal as of right to His Majesty in Council pursuant to section 3(1)(a) of the 1967 Order.

Rule 62.1(3)(b) of the **Civil Procedure Rules 2000** applied; **Nam Tai Electronics Inc v David Hague et al** BVIHCVAP2003/0012 (delivered 21st September 2004, unreported) followed; **Nigel Hamilton-Smith et al v Alexander Fundora** ANUHCVP2010/0031 (delivered 31st August 2010, unreported) followed; **Harvest Network Limited v CHC Investment Holdings Limited** BVIHCVAP2018/0007 (delivered 23rd November 2020, unreported) followed; **Becker v Marion Corporation** 1977 AC 271 distinguished; **BEC Limited v A2 et al** BVIHCVAP2022/0044 (delivered 9th September 2022, unreported) distinguished.

2. This Court's consistent approach to granting an application for conditional leave to appeal to the Privy Council under the 'or otherwise' limb involves circumstances where the Court considers that, outside of any matters involving great general or public importance which fail to arise on the intended appeal, there remain questions of law on which the Court could benefit from a definitive statement of law from the Privy Council or there is some doubt as to the correctness of the Court's decision. In the instant case, having regard to the findings of the Court of Appeal in assessing the trial judge's approach to the application for sanction it does not appear that the above includes any questions which require clarification, or questions which were not considered by the trial judge. This Court was cognisant that it was not an unawareness or confusion on legal principles which informed the trial judge's decision but the particular circumstances of the case which led him to exercise his discretion the way he did. This Court also appears to have been seized of the relevant legal principles and the factual circumstances which led it to agree with how Bannister J decided to exercise his discretion on the application for sanction. On this basis, it would not appear that there remains any question of great general or public importance which requires ventilation before the Privy Council and therefore leave to appeal ought not to be granted on this basis.

Olasemo v Barnett Ltd (1995) 51 WIR 191 applied; **Renaissance Ventures Ltd et al v Comodo Holdings Limited** BVIHCMAP2018/0005 & BVIHCMAP2018/0008 (delivered 8th October 2018, unreported) followed; **Flavio Maluf v Durant International Corp et al** BVIHCMAP2021/0025 (delivered 11th May 2022, unreported) followed.

3. Delay in the delivery of a judgment, however excessive, cannot on its own call into question the soundness of the court's judgment, and is not, in and of itself, an issue of great general or public importance or otherwise within the meaning of section 3(2)(a) of the 1967 Order. However, there may be cases where excessive delay is accompanied by circumstances which may have had a significant impact on the outcome of the appeal. In this case, the delay was accompanied by the fact that the SCCA judgment had not been considered at all by the Court and there may be some doubt as to the accuracy of the Court's judgment on appeal. This is so particularly where the applicant would have achieved what he intended in the SCCA appeal and the Court's judgment would in effect withdraw, ex post facto, the sanction which formed the basis on which he was able to pursue the SCCA appeal in the first instance to actual completion. Accordingly, given the unique factual matrix of this case, there is a sufficient basis on which the applicant may be granted conditional leave to appeal to the Privy Council under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order.

Byers and others v Chen Ningning [2021] UKPC 4 applied; **Joseph et al v Alicia Francios; Matty et al v Alicia Francios** SLUHCVAP2011/0025; SLUHCVAP2012/0037 (delivered 21st August 2012, unreported) followed;

JUDGMENT

- [1] **PRICE-FINDLAY JA:** This is an application for leave to appeal to His Majesty in Council from the decision of this Court dated 10th March 2022 dismissing the applicant's appeal against Bannister J's order dated 22nd July 2013, by which he refused the applicant's application for sanction to file an appeal in a foreign jurisdiction. This Court further ordered costs of the appeal to be costs in the liquidation.

Background

- [2] To set out the relevant background, the present application stems from the context of an agreement (the "Trade Confirmation") whereby Fairfield Sentry Limited ("Sentry"), of which Mr. Kenneth Krys ("Mr. Krys") is a liquidator, agreed to sell to the respondent, Farnum Place LLC ("Farnum"), its claim in the liquidation of Bernard L Madoff Securities LLC under the United States Securities Investors Protection Act at a rate of 32.125 cents on the dollar ("the SIPA claim"). Shortly after the agreement was made, the prevailing price of the SIPA claim rose sharply.
- [3] On 27th October 2011 Farnum issued an originating application for an order directing Mr. Krys to procure that Sentry carry out its obligation under the Trade Confirmation. On 27th March 2012 Bannister J approved the Trade Confirmation and assignment of the SIPA claim, but directed that Mr. Krys take all necessary steps to bring before the US Bankruptcy Court an application for approval or non-approval by that Court of the Trade Confirmation.
- [4] Mr. Krys made the necessary application to the US Bankruptcy Court for the Southern District of New York and after hearing the application Lifland J held that there was no basis for disapproval of the Trade Confirmation. On 18th January 2013, Mr. Krys applied to the BVI Court for its sanction to appeal Lifland J's decision to the US District Court for the Southern District of New York. On 21st

January 2013 Bannister J refused sanction, however he gave permission for Mr. Krys to appeal that refusal to this Court of Appeal and to file the notice required to preserve time for an appeal to the US District Court. By notice of appeal dated 24th January 2013, Mr. Krys appealed to this Court of Appeal against Bannister J's refusal of sanction.

- [5] On 25th February 2013, this Court of Appeal allowed Mr. Krys' appeal against Bannister J's order dated 21st January 2013. The Court of Appeal's order did not however go as far as to grant sanction for Mr. Krys to pursue any further or other appeal in the US relating to Lifland J's order. On 3rd July 2013, the US District Court (Hellerstein J) affirmed Lifland J's decision. Thereafter, on 17th July 2013, Mr. Krys applied to the BVI Court for sanction to appeal Hellerstein J's decision to the US Court of Appeals for the Second Circuit ("the SCCA"). By judgment dated 22nd July 2013, Bannister J declined sanction to appeal to the SCCA and refused permission to appeal his ruling. On 13th July 2013, Baptiste JA granted leave to appeal Bannister J's order dated 22nd July 2013 and gave Mr. Krys interim sanction to preserve the appeal to the SCCA pending the resolution of the appeal against Bannister J's decision.
- [6] Following further instances where the Court of Appeal gave Mr. Krys sanction to take steps in the appeal to the SCCA which did not feature in the original interim sanction, the SCCA appeal was heard on 21st May 2014. The appeal against Bannister J's order dated 22nd July 2013 was heard by this Court of Appeal on 17th July 2014 and judgment was reserved.
- [7] On 26th September 2014, the SCCA vacated the District Court's order affirming the order of Lifland J and sent the matter back to the District Court with instructions to remand to the Bankruptcy Court for review under Section 363 of the US Bankruptcy Code. On 13th October 2015 Bernstein J of the US Bankruptcy Court disapproved the sale of the SIPA claim to Farnum, on 2nd June 2016 Hellerstein J affirmed Bernstein J's decision and on 22nd May 2017 the SCCA affirmed Hellerstein J's decision.

- [8] Thereafter on 10th March 2022 this Court of Appeal dismissed the appeal against Bannister J's order dated 22nd July 2013 and ordered costs of the appeal to be costs in the liquidation. This Court held that the question of sanction was one for the discretion of the first instance judge (Bannister J) and that it could not be said that he was plainly wrong in the way he had exercised that discretion.

The application

- [9] Being dissatisfied with the decision of this Court delivered on 10th March 2022, Mr. Krys applied for leave to appeal that decision to His Majesty in Council. Mr. Krys' application bears 3 grounds including sub-grounds which raise four main issues for this Court's consideration:

- (i) Whether the decision of this Court dated 10th March 2022 dismissing the applicant's appeal against the decision of Bannister J [Ag.] dated 22nd July 2013, constitutes a 'final decision' within the meaning of **The Virgin Islands (Appeals to Privy Council) Order 1967**¹ ("the 1967 Order") so that the applicant may appeal as of right?
- (ii) If the aforementioned decision of this Court does not constitute a 'final decision', whether leave ought to be granted to the applicant to appeal to His Majesty in Council by virtue of the appeal involving a question which is of great general or public importance or otherwise?
- (iii) Whether the decision of Bernstein J in the US Bankruptcy Court on 13th October 2015 disapproving the sale of the SIPA claim to Farnum, Hellerstein J's affirmation of Bernstein J's decision on 2nd June 2016 and the SCCA's affirmation of Hellerstein J's decision on 22nd May 2017 were material events post-dating the hearing of the appeal which ought to have been taken into consideration by this Court in the appeal?
- (iv) Whether the effect of a delay in excess of seven years between the hearing of the appeal and the handing down of the judgment is

¹ S.I. No. 234 of 1967.

another consideration in favour of this Court granting leave to appeal to His Majesty in Council?

Appeal as of right - Whether the appeal is against a 'final decision' within the meaning of the 1967 Order

[10] By section 3(1) (a) of the 1967 Order an appeal lies as of right from a decision of the Court of Appeal to His Majesty in Council where:

(i) The matter in dispute is of the value of 300 pounds sterling or upwards or the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of 300 pounds sterling or upwards; and

(ii) The decision is a final one in civil proceedings.

[11] The parties are in agreement that the first limb under section 3(1)(a) of the 1967 Order is satisfied, therefore, the only issue which remains to be resolved under this ground of the application is whether the decision of this Court can be considered a final decision. The application test is used by this Court to determine whether a decision is final or interlocutory. The test is set out in rule 62.1(3)(b) of the **Civil Procedure Rules 2000** ("CPR"), which states that 'an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided'.

[12] The applicant's main argument as it relates to the matter of whether Bannister J's decision, and by extension this Court's decision, constitutes a final decision is that the issue of sanction, which was sought from the BVI Court to appeal Hellerstein J's decision to the SCCA, does not deal with rights as between Sentry in liquidation and Farnum. The applicant submits that the issue which arose before Bannister J dealt with the question of whether the Liquidator's application for sanction to pursue an appeal to the United States Court of Appeal for the Second Circuit ("SCCA") from the decision of Hellerstein J in the US District Court affirming the decision of Lifland J in the US Bankruptcy Court Southern District of New York ("USBC") ought to have been granted. In that regard, this Court's

decision focused on whether Bannister J erred in the exercise of his discretion to refuse the sanction to appeal to the SCCA.

[13] The applicant relied on the cases **Becker v Marion Corporation**² and **BEC Limited v A2 et al.**³ Counsel for the applicant argued that this Court cannot have regard to cases such as **Nam Tai Electronics Inc v David Hague et al.**,⁴ **Nigel Hamilton-Smith et al v Alexander Fundora**,⁵ and **Harvest Network Limited v CHC Investment Holdings Limited**,⁶ on which the respondent relies, in respect of determining whether the circumstance in the present case concerns a final decision.

[14] In the case of **Nam Tai**, this Court considered whether a summons seeking a number of orders and declarations filed by the liquidator was interlocutory or final and held the following at paragraph [8] in relation to whether the applicant in that case had an appeal as of right to the Privy Council:

“The then official liquidator, the present Applicant, filed a summons seeking a number of orders and declarations. **The summons was by its nature interlocutory in that what it sought would not have finally disposed of the winding up which was the substantive action, of which the summons formed only part...** [I]t 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 same result, namely that the judgment sought to be appealed from is not a final order.” (emphasis added)

[15] In **Hamilton-Smith**, Mr. Hamilton-Smith and Mr. Wastell had been removed by the Court as liquidators of Stanford International Bank and appealed that decision. When the respondents applied to strike out the appeal to this Court on the basis that the decision below was interlocutory and required leave, this Court stated at paragraph [16] as follows:

“By no stretch of the imagination does the removal of the appellants resolve the winding up of SIB within the larger liquidation proceedings. The rights of Mr. Fundora in the substantive winding up issue have not been disposed of as

² 1977 AC 271.

³ BVIHCVAP2022/0044 (delivered 9th September 2022, unreported).

⁴ BVIHCVAP2003/0012 (delivered 21st September 2004, unreported).

⁵ ANUHCVP2010/0031 (delivered 31st August 2010, unreported).

⁶ BVIHCVAP2018/0007 (delivered 23rd November 2020, unreported).

between SIB and its creditors. The order is not a final order where it has not brought to an end the issues between SIB and Mr. Fundora. Had the application been decided in favour of the appellants, such a decision would not be dispositive of the winding up proceedings in connection with SIB either.” (emphasis added)

- [16] In **Harvest Network Limited** this Court also held that an order giving or refusing leave for a company to commence a derivative action under section 184C (1) of the Business Companies Act 2004 is interlocutory rather than final. Smith JA explains in **Harvest Network**⁷ that:

“In the Eastern Caribbean, the century-old debate in the Commonwealth, over whether to apply the “order test” or the “application test” to determine whether an order is final or interlocutory, has ended. This Court has consistently stated that the application test is to be used to determine whether an order is interlocutory or final. It has also decided that, based on this 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. This is set out in rules 62.1(3) (a) and (b) of the Civil Procedure Rules 2000 (“CPR”).” (emphasis added)

- [17] The applicant however argues that the approach to the application test in **Nam Tai** and **Hamilton-Smith** is wrong as those cases did not refer to the Privy Council case of **Becker** in arriving at their decision. **Becker** concerned an appeal coming from the Supreme Court of South Australia. Ms. Becker had lodged a proposal plan for the subdivision of her land with the Director of Planning. On 14th December 1970, it was considered by a committee of the council which deferred further consideration pending the collation of further information. Thereafter the council made no decision and under the Control of Land Subdivision Regulations 1967 was deemed to have refused approval. The plaintiff appealed against the deemed refusal. The Full Court of the Supreme Court ordered that it still remained for the council to approve or refuse approval and on December 19, 1973, in pursuance of that order the plaintiff requested the council to make a decision. The council refused on the ground that it was precluded from accepting the plan by reason of the plan's non-compliance with the conditions set out in section 45b of the Planning and Development Act 1966. By originating summons Ms. Becker sought, first, a declaration that she was entitled to require the council

⁷ Ibid, at [4].

to examine the plan and make a decision, and two further declarations regarding her right to submit an outer boundary tracing and a final plan. On 29th August 1974, the Full Court refused the declaration, treated the other claims for declarations as being rendered inappropriate and, on 23rd December 1974, refused leave to appeal to the Judicial Committee. By special leave, the plaintiff appealed against the refusal of leave on the ground that she was entitled to appeal as of right.

- [18] The applicant argues that **Becker** is applicable for consideration as rule 2 of the Order in Council of February 15th 1909 which regulates appeals to the Board from the Supreme Court of South Australia is set out in substantially the same terms as section 3(1)(a) of the 1967 Order. The Board considered whether Ms. Becker indeed was entitled to appeal as of right and made the following pronouncements:

“The House of Lords has never had to consider the matter, the Supreme Court of Judicature (Consolidation) Act 1925, section 68 (2), providing that: ‘Any doubt which may arise as to what orders of judgments are final, and what are interlocutory, shall be determined by the Court of Appeal,’ and it is well appreciated that some of its decisions on the point are difficult to reconcile. This fact emerges from the exhaustive review of the relevant cases by Lord Evershed M.R. in *Hunt v. Allied Bakeries Ltd.* [1956] 1 W.L.R. 1326. A shorter review was conducted by Lord Kilbrandon in *Tampion v. Anderson* (1973) 48 A.L.J.R. 11 when giving the judgment of this Board that an order staying an action as being frivolous, vexatious and an abuse of the process of the court is an interlocutory judgment. But that decision does not solve the problem presented by the different facts of the instant case, and there remains the difficulty, referred to by Lord Kilbrandon, arising:

‘out of attempts to frame a definition of ‘final’ (or of ‘interlocutory’) which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made’: see *Tampion v. Anderson* (1973) 48 A.L.J.R. 11, 12.

Lacking any such definition, was the judgment of August 29, 1974, a ‘final judgment?’ Their Lordships hold that it was. Even though, for administrative reasons, further questions were put in the originating summons, the negative answer to the question raised by the prayer for the first declaration produced a state of finality. Hogarth J. was correct in saying in his judgment of December 23, 1974, 9 S.A.S.R. 560, 562:

‘for the purpose of these proceedings, I think that the order of the court was final. It finally determined the question whether or not the plaintiff was entitled to have her plan considered by [the

council]. That was the lis; and that was finally determined adversely to her. Whichever way the decision went, it was a final decision as between the parties. I think therefore that the judgment is a final judgment.'

The matter was slightly differently put by Mitchell J. who said in his judgment of December 23, 1974, 9 S.A.S.R. 560, 566:

'[Counsel for the plaintiff].. submitted that the only rights with which the court was concerned were the rights claimed in the originating summons; that whichever way the answer to question 1 had been given the rights of the parties on that point would have been finally determined; and that as far as questions 2 and 3 were concerned they were separate questions which could have been the subject of separate proceedings. In my view this argument is correct. Within its narrow confines the answer to that question, whichever way it went, necessarily determined the rights of the parties ought to be determined in paragraph 1 of the originating summons.'

Accepting these views, and bearing in mind that the refusal of the first declaration sought made it impossible for the second and third questions raised in the originating summons to be considered, their Lordships hold that the decision of August 29, 1974, was a 'final judgment.'"

- [19] In oral submissions, counsel for the applicant also relied on the pronouncements of Webster JA [Ag.] in **BEC Limited** to further highlight the approaches taken by this Court in deciding what constitutes a final or interlocutory decision. In particular, the applicant drew this Court's attention to paragraph [18] of **BEC Limited** where Webster JA [Ag.] states:

"[18] An application to set aside a statutory demand is not a claim in the true sense –it does not determine the rights or obligations of any of the parties to the claim and it does not contain an order that can be enforced."

- [20] The respondent argues that a decision on an application under section 168(3) of the **Insolvency Act** for sanction to pursue a particular course of action does not in fact give rise to a final decision, for two reasons. Firstly, Farnum submits, the substantive action which would finally have to be disposed of is not the particular application but the liquidation as a whole. The respondent argues that the decision is a decision within the liquidation proceedings, but it does not resolve the issues in the liquidation as a whole. In support of this assertion, Farnum relies on **Nam Tai** and **Hamilton-Smith**.

- [21] Farnum further argues that the very nature of the proceedings under section 168(3) of the **Insolvency Act** renders the judgments below interlocutory rather than final, as those proceedings are normally unopposed and are principally a matter between the liquidator and the court. For Farnum, it is hard to see how such proceedings could be considered final, as the question would loom – final as between whom?
- [22] Indeed, the stream of jurisprudence emanating from this Court has approached the determination of an order as being final from the standpoint that the said order must be determinative of the issues in litigation between the parties. This approach is well documented in numerous judgments of this Court including **Nam Tai, Hamilton-Smith, Maria Hughes v The Attorney General Antigua and Barbuda**,⁸ **Othneil Sylvester v Satrohan Singh**,⁹ **Pirate Cove Resorts Limited et al v Euphemia Stephens et al**,¹⁰ **Gregory Bowen et al v Dipcon Engineering Services Limited**¹¹ and several others.
- [23] At first blush, **Becker** and **BEC Limited** appear to deviate from the general approach taken by the court in determining whether an order is final or interlocutory. However, it is noteworthy that these two cases are distinguishable on their facts.
- [24] In **Becker**, the appeal against the deemed refusal of Ms. Becker's proposal for the subdivision of her land was its own stand-alone proceeding and the request for approval of her proposal was not a procedural first step to substantive proceedings. Neither was the proposal for subdivision of land, nor the appeal made in the context of any pre-existing wider proceedings. Likewise, in **BEC Limited**, the appeal arose from the refusal of an application to set aside a statutory demand which Webster JA [Ag.] clearly distinguished from orders that are a pre-requisite to filing substantive proceedings or cases dealing with interlocutory orders in ongoing proceedings.

⁸ Civil Appeal No. 33 of 2003 [2004] Antigua and Barbuda.

⁹ Civil Appeal No. 10 of 1992 [1995] St. Vincent and The Grenadines.

¹⁰ Civil Appeal No. 11 of 2002 [2003] St. Vincent & The Grenadines.

¹¹ Civil Appeal No. 22 of 2004 [2005] Grenada.

[25] Webster JA [Ag.] made the following observations:

“[21] The Respondents relied on the case of *Harvest Network Limited v CHC Investment Holdings Limited* as a part of their wider submission that the order on the Set Aside Application is an ‘intermediary question’ in the procedure to wind up the Company (and not a final step or order). In *Harvest Network* a member of a company applied under section 184C of the BVI Business Companies Act, 2004 for permission to bring a derivative action in the name and on behalf of a company. The trial judge granted permission to bring the action. The company appealed against the order without first obtaining leave. The member applied to strike out the appeal on the ground that it was an appeal against an interlocutory order and leave to appeal was required. The Court of Appeal applied the application test and found that the order granting permission to file the derivative claim was an interlocutory order. The company not having obtained leave, the Court struck out the appeal. The unanimous judgment of the Court was delivered by Smith JA [Ag.] who found that the substantive derivative claim could not be commenced without the leave of the court. He compared the leave requirement to the requirement in judicial review claims that the claimant must first obtain permission from the court before filing the substantive claim. He noted in paragraph 21 that:

‘[21] By parity of reasoning, derivative leave, by its very nature, should not be viewed as an independent, freestanding claim but rather as a procedural first step; a sine qua non for the institution of substantive derivative proceedings. On this view, it cannot be viewed as determinative of the issue between the parties whichever way the application is decided.’

[22] Smith JA [Ag.] also referred to the dictum of Carrington JA [Ag.] in *Marvin Roy Dey v The Attorney General*:

‘An application for leave to seek judicial review is made under Part 56.3 of the Civil Procedure Rules 2000 (CPR 2000) as the first step in an application for judicial review. By its very nature, it is a procedural first step that must be taken and overcome before the merits of a substantive claim can be determined by the High Court. An appeal against the decision of the High Court with respect to such an application therefore must be classified as a procedural appeal, which is defined in Part 62.1 of the CPR 2000 as an appeal from the decision of a judge, master or registrar which does not directly decide the substantive issues in a claim.’

[23] The difference between these two cases and the instant appeal is that the issuing of a statutory demand and/or a subsequent order not setting aside the statutory demand is not ‘a procedural first step; a sine qua non’ for a creditor seeking to wind up a company. The creditor can either issue the statutory demand and proceed to winding up proceedings regardless of the outcome of an application to set aside the demand, or it can proceed directly under section 162 of the Act and prove its case that the company

is insolvent based on any of the reasons set out in section 8 of the Act. An application to set aside a statutory demand is sui generis and is not governed by the principles relating to orders that are a pre-requisite to filing substantive proceedings as in cases like **Harvest Network**, or cases dealing with interlocutory orders in ongoing proceedings. The application to set aside a statutory demand has the effect of resolving the company's deemed insolvency based on the unpaid debt in question, and nothing more. It is, in my opinion, a final order and leave to appeal was not required." (emphasis added)

[26] It is pellucid that this Court has maintained that once an order is made in an application which is a pre-requisite for commencing substantive proceedings or is made in relation to extant proceedings, such an order would be considered an interlocutory order. However, there may be orders which are sui generis, as described in **BEC Limited**, which emanate from stand-alone proceedings unrelated to any overarching substantive proceedings and would accordingly be regarded as a final order. **Becker** does not disturb this consistently adopted approach as, like **BEC Limited**, it is distinguishable on its facts which reveal no extant substantive proceedings. Accordingly, **Becker** cannot be considered as authority which deviates from the application test as it has been consistently applied.

[27] It is important to reiterate that CPR 62.1(3) states that 'an order or judgment is final **if it would be determinative of the issues that arise on a claim**, whichever way the application could have been decided' (emphasis added). In my view, this provision in the CPR makes it clear that as long as the order is made in proceedings connected to a larger substantive claim, it cannot be considered final unless the issues on the larger substantive claim are resolved by that order, regardless of the way in which the corresponding application is determined. The factual matrices in **Becker** and **BEC Limited**, having not operated within the bounds of an existing claim, could not be considered in like manner as **Nam Tai** and **Hamilton-Smith**. Accordingly, I do not agree with the applicant's assertion that the approach to the application test in **Nam Tai** and **Hamilton-Smith** is wrong having not referred to **Becker** in arriving at their decision.

[28] Indeed, Mr. Krys' application for sanction to take steps in the appeal to the SCCA and by extension his appeal against Bannister J's refusal of the application were made within the winding up proceedings against Sentry. The application and the appeal were not made independent of substantive or overarching proceedings and more pointedly, whichever way they were decided would not have resolved the issues or rights between the parties as it concerns the substantive liquidation proceedings. Accordingly, taking into consideration the above authorities and principles which this Court espouses in determining whether an order is final, the order emanating from Mr. Krys' application for sanction to appeal to the SCCA and/or the order from the ensuing appeal must be considered interlocutory orders. Though not determinative, it would appear quite odd that this matter which was considered interlocutory by the applicants for the purpose of seeking leave to appeal to this Court, is now to be considered as final in relation to an appeal to His Majesty in Council.

[29] The applicant in its supplemental skeleton arguments further relies on an earlier case in the liquidation of Sentry, **Stichting Shell Pensioenfonds v Krys**, where this Court¹², having been referred to and considered **Nam Tai** and **Hamilton Smith**, as well as the earlier decision of the Privy Council in **Becker** held that its decision in that case was a final one within the meaning of the 1967 Order and, the other conditions being satisfied, an appeal lay as of right to the Privy Council. The applicant explained that the relevant application in **Shell** was an application by the liquidator for an anti-suit injunction to restrain certain proceedings by Shell in the Netherlands and that that application was not made by way of originating process but as an ordinary application brought within the liquidation proceedings generally. Additionally, the relief sought by virtue of the anti-suit injunction did not and, whichever way it was decided, never would finally dispose of, or resolve the winding up, of which the application formed part. All it resolved was the question raised by the particular application, which was whether the anti-suit injunction should be granted. Notwithstanding those matters submitted by the applicant, this Court held that the decision was a final one.

¹² Constituted by Pereira CJ, Mitchel JA and Michel JA.

[30] The Court has not had the benefit of receiving a transcript of the proceedings in **Shell**. In the absence thereof, it is difficult to determine exactly the basis for the decision in **Shell**. However, the Court's decision in **Shell** could very well be explained by virtue of section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**¹³ that establishes that leave to appeal to the Court of Appeal is not required in relation to orders granting or refusing injunctions and it is therefore quite possible that there was no, or no need for any, examination of the interlocutory/final order issue outside of that section. This Court could not speculate the reasoning as inferred by the applicant and therefore must follow the consistent stream of jurisprudence which has established the definition of a final order.

[31] In light of the above, I am of the view that the applicant does not have an appeal as of right to His Majesty in Council pursuant to section 3(1) (a) of the 1967 Order.

Does the appeal involve a question which is of great general or public importance or otherwise?

[32] In ground 2 of its notice of motion to appeal, the applicant contends that in the event they do not have an appeal as of right to His Majesty in Council, then leave ought to be granted by this Court to appeal to the Privy Council pursuant to section 3(2)(a) of the 1967 Order on the basis that the appeal involves a question which is of great general or public importance or otherwise.

[33] In consideration of the meaning of 'great general or public importance' and 'or otherwise', this Court in **Broad Idea International Ltd v Convoy Collateral Ltd**¹⁴ stated:

"The meaning of the expressions 'great general or public importance' and 'or otherwise' has been extensively litigated in the courts of the Commonwealth Caribbean. In terms of what amounts to a question that is of great general or public importance, reference is often made to *Martinus Francois v The Attorney General* where Saunders JA (now

¹³ Cap 80, Laws of the Territory of the Virgin Islands.

¹⁴ BVIHMAP2019/0026 (delivered 31st July 2020, unreported).

president of the Caribbean Court of Justice) said at paragraph 13 of his judgment, that:

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

The guidance from Carrington JA [Ag.] in *Pacific Wire & Cable Company Limited v Texan Management Limited & Others* is also helpful. At paragraph 11 of his judgment, the learned judge referred to the tests in section 3(2)(a) and stated:

'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 a 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.'" (emphasis added)

[34] In respect of this Court's approach to granting leave specifically under the 'or otherwise' limb. This Court has repeatedly adopted the approach set out by Wolfe JA in *Olasemo v Barnett Ltd*.¹⁵ In *Pacific Wire & Cable Company Limited v Texan Management Limited and others; Shareholders of all Dragon International Limited*¹⁶ Carrington JA [Ag.] affirmed the ruling in *Attorney General of Trinidad and Tobago v Lennox Phillip et al*,¹⁷ where Mendonca JA of the Trinidad and Tobago Court of Appeal approved the interpretation of 'or otherwise' in *Olasemo* and also added that there may be justification otherwise for granting leave to appeal to the Privy Council where the Court of Appeal has any reasonable doubt as to the accuracy of its decision.

[35] In *Renaissance Ventures Ltd et al v Comodo Holdings Limited*¹⁸ Mendes JA [Ag.] opined -

¹⁵ (1995) 51 WIR 191.

¹⁶ Territory of the Virgin Islands HCVAP2006/019 (delivered 6th October 2008, unreported).

¹⁷ TT 2007 CA 20.

¹⁸ BVIHCP2018/0005 & BVIHCP2018/0008 (delivered 8th October 2018, unreported).

“But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if satisfied that there are good grounds which would *otherwise* justify referral to Her Majesty in Council, as for example where there is some reasonable doubt as to the correctness of the decision of court.”¹⁹

[36] In **Flavio Maluf v Durant International Corp et al**,²⁰ Henry JA [Ag.] stated:

“As to the meaning of ‘or otherwise’ in section 3(2)(a) of the 1967 Order, this Court approved in *Pacific Wire* the interpretation ascribed to that term by Wolfe JA in a dissenting judgment in the Jamaican case of *Olasemo v Barnett Ltd*. His Lordship Justice of Appeal Wolfe opined that those words were inserted to enlarge the court’s discretion to grant conditional leave to appeal in cases which did not involve matters of great general and public importance. Into that ‘otherwise category’ would fall cases which the Court feels could benefit from a ‘definitive statement of the law’ from the Board in relation to questions of law, be they of an interlocutory nature or not. He was quite clear that not all interlocutory matters would qualify. That interpretation and application is re-affirmed for present purposes.”

[37] With the above authorities in mind, I reiterate that this Court’s consistent approach to granting an application for conditional leave to appeal to the Privy Council under the ‘or otherwise’ limb involves circumstances where the Court considers that, outside of any matters involving great general or public importance which fail to arise on the intended appeal, there remain a question or questions of law on which the Court could benefit from a definitive statement of law from the Privy Council or there is some doubt as to the correctness of the Court’s decision.

The issues to be considered on the appeal

[38] The applicant argues that leave to appeal ought to be granted in circumstances where the appeal involved questions concerning ‘the correct approach to be taken by the Court to an application by a liquidator for sanction to pursue legal proceedings on behalf of a company in liquidation’. The applicant also submits that it is important that the question be brought to the Privy Council of the weight

¹⁹ Ibid at paragraph [13].

²⁰ BVIHMAP2021/0025 (delivered 11th May 2022, unreported).

to be given by the Court to (i) the duty of the liquidator to augment the value of the assets of the company in liquidation, (ii) legal advice received by the liquidator as to the prospects of success of the intended proceedings, (iii) the views of the creditors of the company as to whether the intended proceedings should be pursued, and (iv) the likely net benefit from the intended proceedings, if successful, to the company's estate in liquidation.

[39] Having regard to the findings of the Court of Appeal in assessing the trial judge's approach to the application for sanction it does not appear that the above includes any questions which require clarification, or questions which were not considered by the trial judge. In the Court of Appeal judgment which is the subject of the applicant's motion to appeal to the Privy Council, the learned Justice of Appeal states as follows:

"[47] I agree with Ms. Prevezer that the correct approach for the BVI court to adopt in circumstances where it is exercising its discretion, is not that the Liquidator's wish to appeal should prevail unless it is satisfied that the Liquidator was not acting bona fide. As the court is exercising discretion, it is entitled to have regard to and give such weight as it considers appropriate to all the relevant circumstances and factors in exercising that discretion. In my judgment, Bannister J was quite cognisant of that, as his judgment illustrates. It is also well established that weight is a contextual evaluation for the judge; the weight to be given to specific factors is a matter for the trial judge and it is inappropriate for this Court to interfere with that evaluation unless it is perverse.

[48] Bannister J recognised that the question whether to sanction an appeal by the Liquidator is a matter to be determined by reference to BVI law. The learned judge's observation that it was irrelevant that, if he were sitting as a bankruptcy judge in the United States, different considerations may be taken into account or that the duties of a trustee in that court might be different from those of a liquidator appointed by the BVI court, is quite valid.

[49] Bannister J noted that when the BVI court approved the Trade Confirmation, it did so in the expectation that, subject to the approval of the Bankruptcy Court, it would be performed timeously. In that regard, the learned judge stated that the court was being asked, two and a half years later, to sanction a period of indeterminate further delay in the face of two failed attempts by Fairfield to undo the Trade Confirmation. Bannister J did not consider such a course to be appropriate.

[50] Bannister J was also concerned that any such appeal by Fairfield would be an attempt on its part to cause the contract to become

frustrated, in order that the Liquidator would no longer be bound by it. Therefore, it would not be right for the court to sanction the taking of steps designed to achieve such a result.

[51] The learned judge stated that the fact that the liquidation committee was in favour of an appeal had nothing to do with commercial judgment and everything to do with 'a human and understandable desire to receive a greatly inflated return in Fairfield's winding up.' Bannister J noted that the liquidators, as officers of the court, were expected to be straightforward in their dealings and must not rely on technicalities to defeat the rights of others. The learned judge also stated that the only object of the step the Liquidator wished the court now to sanction was to defeat accrued rights in order to obtain a windfall. He opined that when parties deal with a court appointed liquidator, they were entitled to expect that the court would not facilitate moves by its officer designed to frustrate proper bargains which it had formally approved."

- [40] The above makes clear that this Court was cognisant that it was not an unawareness or confusion on legal principle which informed the trial judge's decision but the particular circumstances of the case which led him to exercise his discretion the way he did. This Court appears to have been seized of the relevant legal principles and the factual circumstances which led it to agree with how Bannister J decided to exercise his discretion on the application for sanction. On this basis, it would not appear that there remains any question of great general or public importance which requires ventilation before the Privy Council and therefore leave to appeal ought not to be granted on this basis.

Delay & Material events post-dating judgment

- [41] The applicant submits that the effect of a delay in excess of seven years between the hearing of the appeal and the handing down of the judgment is another consideration in favour of this Court granting leave to appeal to the Privy Council. He also argues that the fact of the SCCA judgment and that on 13th October 2015 Bernstein J of the US Bankruptcy Court disapproved the sale of the SIPA claim to Farnum, on 2nd June 2016 Hellerstein J affirmed Bernstein J's decision and on 22nd May 2017 the SCCA affirmed Hellerstein J's decision was a material event post-dating the hearing of the appeal which ought to have been taken into consideration by this Court.

[42] In addressing the effect of delay in the delivery of a judgment, Chief Justice Periera stated as follows in the case of **Joseph et al v Alicia Francios; Matty et al v Alicia Francios**:²¹

“[29]... it is common ground that delay in and of itself does not automatically render a judgment or finding unsound. To warrant interference by an appellate court it must be shown that the delay resulted in the judge making significant consequential error in his reasoning and thus to the conclusions reached. In the recent decision of the Privy Council in *Monica Jane Ramnarine v Chandra Bose Ramnarine* where the delay was over four years, Lord Wilson quoted with approval a passage from the judgment of Lord Scott in the Privy Council’s earlier judgment in *Cobham v Frett* as follows:

‘... if excessive delay, and they agree that twelve months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.’

Lord Wilson then opined at paragraph 22 thus:

‘In the present case, gross though was the judge’s delay in its delivery, the Board fails to find significant consequential error in the reasoning of his judgment...’

[43] In **Byers and others v Chen Ningning**²² the Board of the Privy Council opined:

“... Nonetheless, excessive delay again amounts to a denial of justice to the winning party, undermines the loser’s confidence in the correctness of the decision and weakens confidence in the judicial process. What is more, the Board has no doubt that excessive delay by an appellate court in delivering its judgment does increase the risk of it being unreliable and this may justify its careful scrutiny on a further appeal...

42. Nevertheless, delay in the delivery of a judgment by a trial judge or by an appellate court, however excessive, does not of itself justify the intervention of an appellate court. In *Cobham v Frett* [2001] 1 WLR 1775, 1784, the Board explained that if excessive delay is to be relied upon as a ground of appeal against a judgment at first instance, a fair case must be shown for believing that the judgment contains errors that are probably or even possibly attributable to that delay. The appellate court must also be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.”²³

²¹ SLUHCVP2011/0025; SLUHCVP2012/0037 (delivered 21st August 2012, unreported).

²² [2021] UKPC 4.

²³ Ibid, paragraphs 41-42.

- [44] More recently, this Court, in **Emmerson International Corporation v Viktor Vekselberg et al**,²⁴ pronounced on the issue of the impact of the delay in delivering a judgment. The facts of **Emmerson** are particularly useful in the approach to be taken in the present case. On 6th February 2019 ABC Grandversus Limited applied for an order striking out certain claims against it by Emmerson on the ground that they did not fall within the scope of the permission to amend that had been granted previously in an order dated 31st December 2018. The judge decided that the claims did not fall within the scope of the permission to amend that had been granted by the 31st December 2018 order. By his order dated 9th May 2019 the learned judge ‘disallowed’ the claims against ABC, and effectively disallowed the said claims against the respondents Liwet, Tiwell, and Berdwick. Emmerson was granted leave to appeal against that order.
- [45] The judge also heard further applications between 27th – 30th May 2019 including one by Berdwick and Tiwell to discharge the freezing order made against them on 31st December 2018, to dispute the validity of the service of Emmerson’s claims upon them and to strike out the said claims on the ground that they exceeded the scope of the permission to amend granted under the 31st December 2018 order. On 19th June 2019, the judge granted the applications by discharging the freezing orders against Berdwick and Tiwell, but stayed the order pending the determination of Emmerson’s intended appeal to the Court of Appeal. Emmerson’s appeal was heard on 29th July 2019 and the Court reserved its judgment. In the meantime, Emmerson had appealed against the previous order dated 9th May 2019 in separate proceedings. This appeal was heard by the Court on 20th July 2020. By its judgment delivered on 30th September 2020, the Court allowed Emmerson’s appeal finding that the claims fell within the permission to amend granted by the 31st December 2018 order and reinstated those claims.
- [46] Following a delay of 3 ½ years, in February 2023, the Court delivered its decision in the appeal heard in July 2019 without reference to the judgment in the September 2020 appeal and the decision of the Court in that appeal to reinstate

²⁴ BVIHCP2019/0020 (delivered 27th July 2023, unreported).

the claims. The net result was that upon delivery of the judgment in the February 2023 appeal, there were two apparently conflicting decisions regarding the claims – the September 2020 appeal reinstated the claims and the February 2023 appeal upheld the disallowance of those claims.

[47] In delivering the decision of the Court in the application for conditional leave to appeal to the Privy Council, Webster JA made the following pronouncements at paragraphs 29-32 of his judgment:

“[29] I have reviewed this issue in detail and I am satisfied that there is a reasonable argument that the failure of the Court in the February 2023 Judgment to deal with the September 2020 judgment of the Court of Appeal that reinstated the Schedule 6 Claims can be attributed to the delay in the delivery of the February 2023 Judgment. As Mr. Weekes KC submitted, the Emmerson Appeal was heard in July 2019, and had the judgment been delivered before the ABC Appeal judgment was delivered in September 2020 it is unlikely that there would have been any inconsistency with the judgment in the ABC appeal which would have been delivered after judgment in the Emmerson Appeal. Mr. Weekes KC continued that the further delay of more than two years led to the February 2023 Judgment being produced without reference to the September 2020 Judgment and the fact that the Schedule 6 Claims had been reinstated.

[30] The Schedule 6 Claims is a common and central issue in both appeals and it is obvious that they were dealt with on different bases. The end result is that the Schedule 6 Claims are reinstated by the September 2020 Judgment and can be pursued, disallowed, and effectively struck out by the February 2023 Judgment. It goes without saying that this Court is functus and cannot revisit any of the two judgments to address the inconsistency.

[31] For myself, the inference can properly be drawn that the failure of the Court in the February 2023 Judgment to deal with the September 2020 Judgment and the reinstatement of the Schedule 6 Claims is attributable to the delay in the delivery of the judgment. As such it qualifies as the kind of delay that could make the orders in the February 2023 Judgment unsafe. The February 2023 Judgment could therefore benefit from careful consideration by the Privy Council to determine whether the inconsistency between the two judgments is attributable to delay in the delivery of the February 2023 Judgment.

[32] Based on my review of the authorities relating to the Court’s wide powers under the ‘or otherwise’ limb of section 3(2)(a) of the 1967 Order, I entertain a reasonable doubt as to the accuracy of the orders made in the February 2023 Judgment. This is sufficient to grant conditional leave to appeal to the Privy Council. This will give Emmerson the opportunity to challenge the other alleged errors listed

in its application for leave to appeal. I make no comment or findings on these alleged errors.”

[48] Returning to the present case, for context, it is important to note that prior to the hearing of the appeal, on 31st July 2013 this Court granted permission to the applicant to take such steps as are necessary to preserve an appeal of Hellerstein J’s decision pending the hearing of the appeal before this Court. Those steps included: (i) the filing of a notice of appeal in respect of the SCCA; (ii) the filing of Form C (Pre-Argument Statement) and Form D (Transcript Information Form); (iii) the filing of an Acknowledgement and Notice of Appearance form; (iv) assisting the District Court as necessary to enable it to provide the record to the SCCA; and (v) notifying the SCCA in writing of the date by which the applicant’s brief would be filed. On 23rd October 2013 this Court further ordered and directed that the applicant had sanction to file a written brief and appendix in the appeal to the SCCA in order to preserve that appeal and on 18th February 2014 the Court also granted the applicant’s application for sanction to file a written reply brief in the appeal to the SCCA in order to preserve the appeal.

[49] Undoubtedly, when the appeal before this Court was heard on 17th July 2014, it intended to deliver its judgment before any further steps, beyond those for which it granted sanction, would have occurred in the appeal to the SCCA. Nonetheless, the appeal to the SCCA progressed to the point of judgment being delivered on 26th September 2014. Furthermore, and regrettably so, the judgment in the appeal before the Court was not delivered until 10th March 2022.

[50] It cannot be refuted that the delay in the delivery of the Court’s judgment in the appeal was inordinate. I am mindful that **Alicia Francios** and **Byers** are instructive that delay, however excessive, cannot on its own call into question the soundness of the court’s judgment. However, I also consider that the excessive delay is accompanied by circumstances which may have had a significant impact on the outcome of the appeal.

[51] The applicant acknowledges in his skeleton arguments filed 17th August 2022 that '[t]his Court was informed of SCCA's decision and provided with a copy of its judgment under cover of an email from the Liquidator's legal representative dated 26th September 2014 (with attachments)'. Indeed, the manner in which the decision of the SCCA was brought before the Court for consideration could not be considered procedurally proper. However, I am of the view that given the applicant's success in the appeal to the SCCA coupled with the excessive delay in the delivery of judgment which itself allowed for the applicant's very success, it was open to the Court to invite the parties to make submissions (whether written or oral) on the impact of such a judgment on the BVI proceedings, specifically the appeal before the Court. It is not irrelevant that Bannister J's decision not to grant sanction was to some extent based on his perception of the enforceability of the Trade Confirmation under New York State contract law. This would have been particularly prudent where the applicant was granted interim sanction to secure the appeal to the SCCA pending the appeal to the Court of Appeal, and thereafter was awarded the very fruits he sought in pursuing the SCCA appeal to begin with.

[52] I am satisfied that the issue of delay in the delivery of judgments, being settled law, is not an issue of great general or public importance or otherwise within the meaning of section 3(2)(a) of the 1967 Order. However, in the particular circumstances where the delay is accompanied by the fact that the SCCA judgment had not been considered at all by the Court, I entertain some doubt as to the accuracy of the Court's judgment on appeal. This is so particularly where the applicant would have achieved what he intended in the SCCA appeal and the Court's judgment would in effect withdraw, ex post facto, the sanction which formed the basis on which he was able to pursue the SCCA appeal in the first instance to actual completion. Accordingly, given the unique factual matrix of this case, I would consider this a sufficient basis on which the applicant may be granted conditional leave to appeal to the Privy Council under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order.

Conclusion

[53] I would make the following orders:

- (1) The application for conditional leave to appeal to His Majesty in Council is granted upon the following conditions:
- a. the applicant within 90 days of the date hereof do enter into good and sufficient security in the sum of 500 pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the court office;
 - b. within 90 days of the date hereof, the applicant takes the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the solicitors for the Respondents to this application, and the certification of the record by the Registrar of the Court of Appeal;
 - c. the record shall be prepared in accordance with rules 18 to 20 of the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009** and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
- (2) The applicant shall make an application to the Court for final permission to appeal to His Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.

- (3) Costs of the application for leave to appeal to the Privy Council shall be costs in the appeal to the Privy Council.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Anthony Gonsalves
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar