

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0020

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Appellant

and

[1] VIKTOR VEKSELBERG
[2] RENOVA HOLDING LIMITED
[3] BERDWICK HOLDING LIMITED
[4] TIWELL HOLDING AG

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Paul Webster
The Hon. Mr. Eddy Ventose

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

Appearances:

Mr. Robert Weekes KC with him Mr. Iain Tucker and Mr. Daniel Burgess for
the Appellant
Ms. Arabella di Iorio and Ms. Jodi-Ann Stephenson for the Respondents

2023: May 24
July 27.

Motion for conditional leave to appeal to His Majesty in Council – Discharge of freezing orders – Section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 – Delay in delivery of judgment – Irreconcilable judgments – Whether the question involved in the proposed appeal is either of great general or public importance, or that is otherwise a matter that should be submitted to His Majesty in Council – Continuation of stay of execution

– Whether the stay of the discharge of the freezing orders ought to be continued pending the appeal to the Privy Council

The underlying dispute between the parties to the applications before the Court arose out of a failed business venture regarding the pooling of their assets in the energy industry in Russia. The fallout from the failed venture resulted in complex and multidimensional litigation involving the courts of the Virgin Islands at all levels starting in December 2013 and continuing.

On 29th October 2018, Wallbank J [Ag.] ordered Mr. Viktor Vekselberg and Renova Holding Limited (“Renova”) to disclose to Emmerson International Corporation (“Emmerson”) all documents (as defined in the order) relating to the transfer of shares in Liwet Holding AG (“Liwet”) to persons or entities associated with Renova made since 6th April 2018. Mr. Vekselberg and Renova did not comply with the order and on 19th November 2018 Wallbank J [Ag.] granted a freezing order against Renova. On 31st December 2018, Wallbank J [Ag.] granted two other freezing orders: the first against Mr. Vekselberg and the second against ABC Grandservus Limited (“ABC”), Tiwell Holding AG (“Tiwell”) and Berdwick Holding Limited (“Berdwick”) (“the 31st December 2018 Order”). For convenience, Mr. Vekselberg, Renova, , Liwet, Tiwell and Berdwick are referred to together in this judgment as “the Respondents” and the three freezing orders granted by Wallbank J [Ag.] as “the Freezing Orders”. The Freezing Orders restrained the Respondents from disposing of, dealing with, or diminishing the value of their assets up to a value of US\$893,470,360. The 31st December 2018 Order also permitted Emmerson to amend its pleadings to make further claims against the Respondents.

On 21st January 2019 Emmerson filed its amended claims (“the Schedule 6 Claims”) pursuant to the 31st December 2018 Order which included (i) claims for declaratory relief against the Respondents and (ii) personal claims against ABC, Liwet, and Berdwick alleging tortious liability for unlawful means conspiracy. On 6th February 2019 ABC applied for an order striking out the Schedule 6 Claims against ABC on the ground that they did not fall within the scope of the permission to amend that had been granted by the 31st December 2018 order. Jack J [Ag.] 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 Schedule 6 Claims against ABC, and effectively disallowed the said claims against Liwet, Tiwell, and Berdwick (“the ABC Order”). Emmerson was granted leave to appeal against the ABC Order.

Jack J [Ag.] also heard the following applications between 27th – 30th May 2019: (i) by Renova filed on 4th December 2018 to discharge the Freezing Orders against it); by Mr. Vekselberg on 8th February 2019 to discharge the freezing order made against him on 31st December 2018 by Wallbank J [Ag.]; and (iii) by Berdwick and Tiwell on the same date to discharge the freezing order made against them by Wallbank J [Ag.] on 31st December 2018, to dispute the validity of the service of the Schedule 6 Claims upon them and to strike out the said claims on the ground that they exceeded the scope of the permission to amend granted by the 31st December 2018 Order. By his order dated 19th June 2019 Jack J [Ag.] granted the applications by discharging the freezing orders against Mr. Vekselberg

,Berdwick and Tiwell, but stayed the order pending the determination of Emmerson's intended appeal to the Court of Appeal. Emmerson duly filed its notice of appeal (numbered BVIHCMAP2019/0020) and the appeal was heard on the 29th July 2019 ("the Emmerson Appeal"). The Court of Appeal reserved its judgment.

In the meantime, Emmerson had appealed against the ABC Order in appeal BVIHCMAP2019/0017 ("the ABC Appeal"). This appeal was heard by the Court of Appeal on 20th July 2020. By its judgment delivered on 30th September 2020 ("the September 2020 Judgment") the Court of Appeal allowed Emmerson's appeal finding that the Schedule 6 Claims fell within the permission to amend granted by 31st December 2018 Order and reinstated the Schedule 6 Claims.

The Court of Appeal, following a delay of 3 ½ years, delivered its decision in the Emmerson Appeal on 7th February 2023 without reference to the ABC Appeal and the decision of the Court of Appeal in that appeal to reinstate the Schedule 6 Claims. The net result is that upon delivery of the judgment in the Emmerson Appeal, there were two apparently conflicting decisions regarding the Schedule 6 Claims – the ABC Appeal reinstated the claims and the Emmerson Appeal upholding the disallowance of those claims.

Being dissatisfied, Emmerson applied, pursuant to section 3(2)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 ("the 1967 Order"), for conditional leave to appeal to the Privy Council against the judgment of this Court dismissing Emmerson's appeal against the 19th June 2019 Order. They also applied for a continuation of the stay of the discharge of the Freezing Orders. The issues before this Court for consideration are: (i) whether the question involved in the proposed appeal is either of great general or public importance, or that it is otherwise a matter that should be submitted to His Majesty in Council; and (ii) whether the stay of the discharge of the Freezing Orders ought to be continued pending the appeal to the Privy Council.

Held: allowing the application for conditional leave to appeal to His Majesty in Council; continuing the stay of the discharge of the Freezing Orders until the determination of the Emmerson's intended appeal to the Privy Council; and making the orders set out in paragraph 37 of this judgment, that:

1. To satisfy the requirements of section 3(2)(a) an applicant must show that the question involved in the proposed appeal is either of great general or public importance, or that it is otherwise a matter that should be submitted to His Majesty in Council. 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. To qualify under the 'or otherwise' limb of the rule, the matter in question must be one that could benefit from guidance by the Privy Council on the law. However, the regional cases have expanded the matters that can qualify under the 'or otherwise' limb to include matters that are not strictly on the law, for example where there is reasonable doubt as to the accuracy of the Court's decision. When 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. That is the function of the Privy Council.

The **Virgin Islands (Appeals to the Privy Council) Order 1967** S.I. No. 234 of 1967 applied; **Pacific Wire & Cable Company Limited v Texan Management Limited et al** Territory of the Virgin Islands HCVAP2006/019 (delivered 6th October 2008, unreported) considered; **Martinus Francois v The Attorney General** Saint Lucia Civil Appeal No 37 of 2003 (delivered 7th June 2004, unreported) considered; **Olasemo v Barnett Ltd** (1995) 51 WIR 191 considered; **Attorney General of Trinidad and Tobago v Lennox Phillip et al** Civil Appeal No. 155 of 2006 delivered 6th June 2007 considered; **Renaissance Ventures Ltd et al v Comodo Holdings Limited** BVIHMCAP2018/0005 & BVIHMCAP2018/0008 (delivered 8th October 2018, unreported) considered;

2. The issue of the delay in this case does not involve a serious issue of law. There is no constitutional provision in this case that has not been settled. There are numerous cases in the Commonwealth Caribbean dealing with a person's right to a fair trial within a reasonable time, and the law is settled. The issue in this application is not whether Emmerson's constitutional right has been breached, but whether the constitutional provision providing redress for that right is unsettled. Counsel for Emmerson has not brought to the Court's attention any authority that says or suggests that section 16(9) of the Virgin Islands Constitution Order 2007 or its equivalent in any other Caribbean jurisdiction is unsettled.
3. The area of law relating to delays in the delivery of judgments is not in dispute. The resolution of the issue of delays in the delivery of the judgments does not pose dire consequences for the public and the Court of Appeal's decision did not break new ground or create new law. It resolved private disputes between the parties to the appeal. Accordingly, the Court is satisfied that the issue of delay in the delivery of judgments is not an issue of great general or public importance within the meaning of section 3(2)(a) of the 1967 Order.

Cobham v Frett [2001] 1 WLR 1775 applied; **Al Sadik v Investcorp Bank BSC and others (Cayman Islands)** [2018] UKPC 15 applied; **Byers and others v Chen Ningning** [2021] UKPC 4 applied; **Michael Paul Chen-Young (Executor of the Estate of Paul Chen-Young (Deceased)) and others v Eagle Merchant Bank Jamaica Ltd and 3 others** 2022 UKPC 30 applied; Section 16(9) of the **Virgin Islands Constitution Order 2007** SI No. 1678 of 2007, Laws of the Virgin Islands considered; **Martinus Francois v The Attorney General** Saint Lucia Civil Appeal No 37 of 2003 (delivered 7th June 2004, unreported) applied

4. In the circumstances of this case, 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. Based on the Court's wide powers under the 'or otherwise' limb of section 3(2)(a) of the 1967 Order, the Court

entertains a reasonable doubt as to the accuracy of the orders made in the February 2023 Judgment. 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.

5. The Freezing Orders are substantial and were put in place initially by Wallbank J [Ag.] to preserve the Respondents' assets pending the determination of the claims against them. The orders were thereafter discharged by Jack J [Ag.] but he granted a stay of the discharge order pending the determination of Emmerson's appeal. Emmerson is now pursuing a further appeal to the Privy Council and, in the circumstances, it is appropriate to preserve the position by continuing the stay of the Freezing Orders pending the determination of that appeal.

Cukurova Finance International Limited et al v Alfa Telecom Turkey Limited) BVIHCVAP2010/018 & BVIHCVAP2010/014 (delivered 5th December 2011, unreported) applied; Rule 39(1) of the **Judicial Committee (Appellate Jurisdiction) Rules 2009** SI No. 224 of 2009 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an application by Emmerson International Corporation ("Emmerson") for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 7th February 2023 dismissing Emmerson's appeal against the order of the Honourable Mr. Justice Jack [Ag.] dated 19th June 2019 ("the 19th June 2019 Order") and for a continuation of the stay of the discharge of the freezing orders granted by paragraph 10 of the 19th June 2019 Order.

Background to the applications

- [2] The underlying dispute between the parties to these applications arose out of a failed business venture regarding the pooling of their assets in the energy industry in Russia. The fallout from the failed venture resulted in complex and multidimensional litigation involving the courts of the Virgin Islands at all levels starting in December 2013 and continuing. The lead parties in the litigation are Emmerson led by Mr. Victor Abyzov and the second respondent, Renova Holding Limited ("Renova") led by Mr. Viktor Vekselberg. The other parties that are involved in these proceedings are ABC

Grandservus Limited (“ABC”), Tiwell Holding AG (“Tiwell”), Liwet Holding AG (“Liwet”), and Berdwick Holding Limited (“Berdwick”).

- [3] On 29th October 2018, Wallbank J [Ag.] ordered Mr. Vekselberg and Renova to disclose to Emmerson all documents (as defined in the order) relating to the transfer of shares in Liwet to persons or entities associated with Renova made since 6th April 2018. Mr. Vekselberg and Renova did not comply with the order and on 19th November 2018 Wallbank J [Ag.] granted a freezing order against Renova. On 31st December 2018, Wallbank J [Ag.] granted two other freezing orders: the first against Mr. Vekselberg and the second against ABC, Tiwell, Liwet and Berdwick (“the 31st December 2018 Order”). For convenience, Mr. Vekelsberg, Renova, ABC, Tiwell, Liwet and Berdwick are referred to together in this judgment as “the Respondents” and the three freezing orders granted by Wallbank J [Ag.] as “the Freezing Orders”. The Freezing Orders restrained the Respondents from disposing of, dealing with, or diminishing the value of their assets up to a value of US\$893,470,360. The 31st December 2018 Order also permitted Emmerson to amend its pleadings to make further claims against the Respondents.
- [4] On 21st January 2019 Emmerson filed its amended claims pursuant to the 31st December 2018 Order which included (i) claims for declaratory relief against the Respondents and (ii) personal claims against ABC, Liwet, and Berdwick alleging tortious liability for unlawful means conspiracy. These claims are referred to in the filed documents and in this judgment as “the Schedule 6 Claims”.
- [5] On 6th February 2019 ABC applied for an order striking out the Schedule 6 Claims against ABC on the ground that they did not fall within the scope of the permission to amend that had been granted by the 31st December 2018 order. Jack J [Ag.] heard the application on 7th and 8th May 2019. He 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 Schedule 6 Claims against ABC, and effectively, disallowed the said claims against

Liwet, Tiwell, and Berdwick (“the ABC Order”). Emmerson was granted leave to appeal against the ABC order.

- [6] Jack J [Ag.] also heard the following applications between 27th – 30th May 2019: (i) by Renova filed on 4th December 2018 to discharge the Freezing Orders against it; (ii) by Mr. Vekselberg on 8th February 2019 to discharge the freezing order made against him on 31st December 2018 by Wallbank J [Ag.]; and (iii) by Berdwick and Tiwell on the same date to discharge the freezing order made against them by Wallbank J [Ag.] on 31st December 2018, to dispute the validity of the service of the Schedule 6 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.
- [7] By his order dated 19th June 2019, Jack J [Ag.] granted the applications by discharging the freezing orders against Mr. Vekselberg and Berdwick and Tiwell, but stayed the order pending the determination of Emmerson’s intended appeal to the Court of Appeal. Emmerson duly filed its notice of appeal (numbered **BVIHCMAP2019/0020**) and the appeal was heard on the 29th July 2019 (“the Emmerson Appeal”). The Court of Appeal reserved its judgment.
- [8] In the meantime, Emmerson had appealed against the ABC Order in appeal **BVIHCMAP2019/0017** (“the ABC Appeal ”). This appeal was heard by the Court of Appeal on 20th July 2020. By its judgment delivered on 30th September 2020, the Court of Appeal allowed Emmerson’s appeal finding that the Schedule 6 Claims fell within the permission to amend granted by 31st December 2018 Order and reinstated the Schedule 6 Claims.
- [9] The Court of Appeal, following a delay of 3 ½ years, delivered its decision in the Emmerson Appeal on 7th February 2023 without reference to the ABC Appeal and the decision of the Court of Appeal in that appeal to reinstate the Schedule 6 Claims. The net result is that upon delivery of the judgment in the Emmerson Appeal, there

were two apparently conflicting decisions regarding the Schedule 6 Claims – the ABC Appeal reinstated the claims and the Emmerson Appeal upholding the disallowance of those claims.

The application for conditional leave

- [10] Emmerson applied for conditional leave to appeal to the Privy Council against the judgment of this Court delivered on 7th February 2023 dismissing Emmerson’s appeal against the 19th June 2019 Order. The application is made under section 3 of the **Virgin Islands (Appeals to the Privy Council) Order 1967** (“the 1967 Order”).¹ The proposed appeal is against an interlocutory decision of the Court of Appeal and leave is required under section 3(2)(a). Section 3(2)(a) reads –

“Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases –

- (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by law for the time being in force in the Virgin Islands.”

- [11] To satisfy the requirements of section 3(2)(a) Emmerson must show that the question involved in the proposed appeal is either of great general or public importance, or that it is otherwise a matter that should be submitted to His Majesty in Council.

- [12] The meaning of the expressions ‘great general or public importance’ and ‘or otherwise’ have been extensively litigated in the courts of the Commonwealth Caribbean. Each expression 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 is summarised by Carrington JA [Ag.] in paragraph 11 of his judgment in **Pacific Wire & Cable Company Limited v Texan Management Limited et al** –²

¹ S.I. No. 234 of 1967.

² Territory of the Virgin Islands HCVAP2006/019 (delivered 6th October 2008, unreported).

“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**³ 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 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) usually starts with reference to the case of **Olasemo v Barnett Ltd**⁴ 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

³ Saint Lucia Civil Appeal No 37 of 2003 (delivered 7th June 2004, unreported).

⁴ (1995) 51 WIR 191 at 200.

Appeal can in effect refer a matter to the Privy Council for guidance on the law.”

- [16] The dicta from these cases suggest that to qualify under the ‘or otherwise’ limb of the rule the matter in question must be one that could benefit from guidance by the Privy Council on the law. However, the regional cases have expanded the matters that can qualify under the ‘or otherwise’ limb to include matters that are not strictly on the law. In the **Attorney General of Trinidad and Tobago v Lennox Phillip et al**⁵ Mendonça JA, writing for the Court of Appeal of Trinidad and Tobago referred to the equivalent provision in the Constitution of Trinidad and Tobago and continued –

“Under section 109(2)(a) the applicant may be granted leave even though the question involved in the appeal is not one of great general or public importance since the Court may be of the opinion that there is “otherwise” justification for submitting the question involved in the appeal to the Privy Council. One example where the Court may conclude that there is otherwise a justification for granting leave to appeal to the Privy Council is where the Court has any reasonable doubt as to the accuracy of its decision (see **Scottwood Charitable Trust RF v RF Family Trust**.”

- [17] In **Texan Management** Carrington JA [Ag.] referred to the dictum of Mendonça JA in **Lennox Phillip** with apparent approval⁶ and in **Renaissance Ventures Ltd et al v Comodo Holdings Limited**⁷ Mendes JA referred to the dictum of both Carrington JA [Ag.] and Mendonca JA and opined -

“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 the correctness of the decision of court.”⁸

- [18] The cases suggest that even where the leave application does not meet the standard of being a matter of great general or public importance the Court still has

⁵ Civil Appeal No. 155 of 2006 delivered 6th June 2007.

⁶ Per Carrington JA [Ag.] at paragraph 14.

⁷ BVIHMCAP2018/0005 & BVIHMCAP2018/0008 (delivered 8th October 2018, unreported).

⁸ Ibid at paragraph 13.

wide discretion to grant leave if it is satisfied that otherwise the appeal should be submitted to the Privy Council for guidance, for example where there is reasonable doubt as to the accuracy of its decision. However, when 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.

Application to the facts of this case

[19] Learned counsel for Emmerson, Mr. Robert Weekes KC, relied on four matters that he submitted individually or cumulatively constitute matters of great general or public importance, or otherwise, and ought to be submitted to the Privy Council for the Board's consideration and guidance. The four matters are:

- (i) the delay in the delivery of the Court of Appeal's judgment which caused procedural and substantive unfairness;
- (ii) irreconcilable judgments given in the same proceedings;
- (iii) the approach of the local court to judgment given in the same proceedings; and
- (iv) service of Chabra type freezing orders out of the jurisdiction.

Delay in the delivery of judgment

[20] Emmerson submitted that the delay in the delivery of the judgment rendered the decision unsafe because there are errors that are attributable to the delay. This resulted in Emmerson not getting a fair or effective hearing and disposition of its appeal to the Court of Appeal. Further, the delay deprived it of its constitutional right to a prompt and effective hearing and equal treatment before the law. Thus, the delay of itself was a matter of great general or public importance and was sufficient for Emmerson to be granted leave to appeal under section 3(2)(a) of the 1967 Order.

[21] There is no gainsaying that there was excessive delay in the delivery of the judgment in this appeal. The issue is whether the delay, by itself or coupled with errors attributable to the delay, is a matter of great general or public importance or otherwise for which leave should be granted to appeal to the Privy Council. There is no shortage of authorities dealing with the effect of delays in the delivery of judgments. Mr. Weekes KC relied on the following decisions.

[22] In **Cobham v Frett**,⁹ a case on appeal to the Privy Council from this Court, there was a delay of over one year in the delivery of the judgment of the High Court. Lord Scott said -

“It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge’s findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It will be important to consider the quality of the judge’s notes, not only of the evidence but also of the advocates’ submissions. In the present case the judge’s notes were comprehensive and of a high quality.”¹⁰

The appeal did not succeed on this point.

[23] **Al Sadik v Investcorp Bank BSC and others (Cayman Islands)**¹¹ is a decision of the Court of Appeal of the Cayman Islands which was delivered almost four years after the appeal was heard. Lord Briggs in delivering the opinion of the Board said of the delay: ‘[o]bjectively speaking the Board regards such a delay as truly exceptional and considers that it amounts, without more, to a real injustice to all the parties concerned’¹² and that such delay ‘increases the risk of unreliability’. ¹³

[24] Finally, **Byers and others v Chen Ningning**¹⁴ involved a delay of two and a half years. Lord Kitchin commented –

⁹ [2001] 1 WLR 1775.

¹⁰ Ibid at page 1783.

¹¹ [2018] UKPC 15.

¹² Ibid para 46.

¹³ Ibid para 47.

¹⁴ [2021] UKPC 4.

“... 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. We are satisfied that we should adopt the same approach on this second appeal.”¹⁵

[25] The dicta from these cases illustrate the settled principle that excessive delays in delivery of a judgment is unfair, undermines the public’s confidence in the judicial system and can lead to errors in the judgment. These principles are well known and understood and no further guidance is needed from the Privy Council on the effect of delays in delivery of a judgment. Applying, in turn, the principles in **Francois** set out in paragraph 13 above:

- (i) the issue of the delay in this case does not involve a serious issue of law. The issue of delays in the delivery of judgments is a serious one, but the issue of law is settled by the cases referred to above and other cases not mentioned.
- (ii) There is no constitutional provision in this case that has not been settled. There are numerous cases in the Commonwealth Caribbean dealing with a person’s right to a fair trial within a reasonable time, and the law is settled – see for example **Michael Paul Chen-Young (Executor of the Estate of Paul Chen-Young (Deceased))** and

¹⁵ Ibid paragraphs 41-42.

others v Eagle Merchant Bank Jamaica Ltd and 3 others¹⁶ dealing with section 16(2) of the Jamaican Constitution which is identical to section 16(9) of the **Virgin Islands Constitution Order 2007**.¹⁷ The issue in this application is not whether Emmerson’s constitutional right has been breached, but whether the constitutional provision providing redress for that right is unsettled. Counsel has not brought to the Court’s attention any authority that says or suggests that section 16(9) or its equivalent in any other Caribbean jurisdiction is unsettled.

- (iii) The area of law relating to delays in delivery of judgments is not in dispute.
- (iv) The resolution of the issue of delays in the delivery of the judgments does not pose dire consequences for the public. The Court of Appeal’s decision did not break new ground or create new law. It resolved private disputes between the parties to the appeal.

[26] I am satisfied that the issue of delay in the delivery of judgments is not an issue of great general or public importance within the meaning of section 3(2)(a) of the 1967 Order. But this is not the end of the matter. I will consider whether the application qualifies for leave under the ‘or otherwise’ limb of section 3(2)(a) in the next section of this judgment.

Irreconcilable judgments given in the same proceedings

[27] The background to Emmerson’s complaint that there are two irreconcilable judgments of the court is outlined in paragraphs 3 to 9 above. Briefly, it is that the 7th February 2023 judgment of the Court of Appeal which affirmed Jack J’s order of 19th June 2019 disallowing the Schedule 6 Claims (“the February 2023 Judgment”) is inconsistent with the 30th September 2020 judgment of the Court of Appeal (“the September 2020 Judgment”) which had reinstated the Schedule 6

¹⁶ 2022 UKPC 30.

¹⁷ SI No. 1678 of 2007, Laws of the Virgin Islands.

Claims. Emmerson relied on the inconsistency between the two judgments to show that there was a serious error in the February 2023 Judgment because it did not consider its own order made in September 2020 reinstated the Schedule 6 Claims. Further, that the error was caused by the delay in delivering the February 2023 Judgment and the error, combined with the delay, has caused unfairness to Emmerson. Only the Privy Council has the power to make things right. Leave to appeal should therefore be granted on the 'or otherwise' ground because this Court should entertain more than a reasonable doubt as to the accuracy of the February 2023 Judgment.

[28] Learned counsel for the 2nd to 4th respondents, Ms. Arabella di Iorio, countered by submitting that the Court in the February 2023 Judgment was correct in dismissing Emmerson's appeal against 19th June 2019 Order. In the February 2023 Judgment, the Court dealt fully with the main issues raised by Emmerson in the appeal of risk of dissipation, delay by the Respondents in applying to discharge the Order, and the allegations of breaches of duty of full and frank disclosure. The February 2023 Judgment is correct and safe, notwithstanding the delay in delivering the judgment. Learned counsel also referred to the allegations of other errors in the February 2023 Judgment and submitted that they represent Emmerson's dissatisfaction with the judgment and none of the alleged errors are attributable to delay in the February 2023 Judgment. Therefore, the application for conditional leave to appeal on the basis of delays and the alleged errors in the February 2023 Judgment are not matters of great general or public importance or otherwise, that should be submitted to the Privy Council for its consideration and guidance.

[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.

Continuation of the stay

- [33] In paragraph 7 above I referred to the order of Jack J [Ag.] made on 19th June 2019 which discharged the Freezing Orders previously made against Mr. Vekselberg, Berdwick and Tiwel, but stayed his order pending the outcome of Emmerson's intended appeal to this Court against the discharge of the Freezing Orders. When the judgment in the Emmerson Appeal was delivered on 7th February 2023, the Court, on the application of Emmerson, continued the Freezing Orders pending the determination of Emmerson's application for conditional leave to appeal to the Privy Council.
- [34] Emmerson's application for conditional leave is coupled with an application to continue the Freezing Orders. The application was pursued under the inherent jurisdiction of the Court, which is accepted by this Court, to grant a stay of execution in applications for leave to appeal to the Privy Council (**Cukurova Finance International Limited et al v Alfa Telecom Turkey Limited**).¹⁸ The application is also made under rule 39(1) of the **Judicial Committee (Appellate Jurisdiction) Rules 2009**.¹⁹ Rule 39(1) provides that '[a]ny appellant who wishes to obtain a stay of execution of the order appealed from or some conservatory order pending an appeal must seek it from the court below in the first instance'. The application is supported by the affidavit of Catherine Barbour. Ms. Barbour's affidavit discloses that the Freezing Orders restrain only some of the assets of the Respondents and they have the liberty to apply to the court for permission to deal with those assets. They have not applied for permission to deal with any of those assets in the four years since the orders were granted. Further, there is no evidence that the Respondents have been prejudiced by the Freezing Orders. The Respondents also have the benefit of Emmerson's cross-undertaking in damages and Emmerson's statement that it will pursue the appeal

¹⁸ BVIHCVAP2010/018 & BVIHCVAP2010/014 (delivered 5th December 2011, unreported) at paragraph 30.

¹⁹ SI No. 224 of 2009.

expeditiously if leave is granted. Finally, the intended appeal to the Privy Council will be rendered nugatory if the stay is not continued.

[35] The Respondents did not object to the short stay pending the determination of the leave application but took a different position on the application to continue of the stay pending the determination of the appeal to the Privy Council. They did not file evidence opposing the application but submitted that the very substantial Freezing Orders have been in place for four years, two courts have found that there is no real risk of dissipation, there has been breaches of Emmerson's duty of full and frank disclosure, and there is no evidence of any attempts by the Respondents to dissipate the assets.

[36] I observe that the Freezing Orders are indeed substantial and were put in place initially by Wallbank J [Ag.] in late 2018 to preserve the Respondents' assets pending the determination of the claims against them. The orders were discharged by Jack J [Ag.] in June 2019 but he granted a stay of the discharge order pending the determination of Emmerson's appeal. Emmerson's appeal to this Court was dismissed in February 2023 and Emmerson is now pursuing a further appeal to the Privy Council. In the circumstances, I think it is appropriate to preserve the position by continuing the stay of the Freezing Orders pending the determination of the appeal to the Privy Council.

Disposal

- [37] I would make the following orders on the two applications before the Court:
- (1) The application for conditional leave to appeal to Her 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) The stay of the discharge of the Freezing Orders that was imposed by Jack J [Ag.] by paragraph 10 of the 19th June 2019 Order shall be continued until the determination of Emmerson's intended appeal to the Privy Council.

- (4) Costs of the application for leave to appeal to the Privy Council and for a continuation of the stay of the order of Jack J [Ag.] dated 19th June 2019 discharging the Freezing Orders shall be costs in the appeal to the Privy Council.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Eddy Ventose
Justice of Appeal [Ag.]

By the Court

Chief Registrar