

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

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCMAP2020/0024**

**BETWEEN:**

**INDERJIT KAUR CHHINA**

Appellant/ Applicant

and

**[1] MUHAMMAD NAZIR MUHAMMAD ISMAIL  
[2] MOHAMMED NAZIM**

Respondents

**Before:**

|                                      |                         |
|--------------------------------------|-------------------------|
| The Hon. Mde. Gertel Thom            | Justice of Appeal       |
| The Hon. Mde. Margaret Price-Findlay | Justice of Appeal       |
| The Hon. Mr. Paul Webster            | Justice of Appeal [Ag.] |

**Appearances**

Mr. Adrian Davies for the Applicant/Appellant  
No appearance by the Respondents

---

2023: February 9;  
March 23.

---

*Application for leave to appeal to His Majesty in Council – Sections 3(1) and 3(2) of Virgin Islands (Appeals to the Privy Council) Order 1967 – Application test – Whether the decision being appealed is a final or interlocutory order – Whether the question involved in the proposed appeal is a matter of great general or public importance, or otherwise, that should be submitted to His Majesty in Council*

Inderjit Kaumar Chhina (“the Applicant”) filed an action in the Commercial Court claiming ownership of the shares of a Territory of the Virgin Islands (“BVI”) company that owned property in London, England. The claim was dismissed and on 12<sup>th</sup> November 2020 the Applicant appealed against the

decision of the Commercial Court. The Applicant did not take any further steps in pursuing the appeal and on 18<sup>th</sup> March 2022 the respondents applied to strike out the appeal for want of prosecution. The Applicant's response was to apply for an extension of time to file the record of appeal. Both applications came up for hearing by the Court of Appeal on 10<sup>th</sup> May 2022. On 22<sup>nd</sup> July 2022, the Court delivered its written judgment making the orders dismissing the Applicant's application for an extension of time to file and serve the record of appeal and striking out the notice of appeal for want of prosecution, with costs to the respondents.

Being dissatisfied with the decision of the Court of Appeal, the Applicant applied for conditional leave to appeal to the Privy Council under the provisions of sections 3(1) and 3(2) of the Virgin Islands (Appeals to the Privy Council) Order 1967 ("the 1967 Order"). The issues to be considered on the application are: (i) whether the decision being appealed is a final or interlocutory order; and (ii) whether the question involved in the proposed appeal is a matter of great general or public importance, or otherwise, that should be submitted to His Majesty in Council.

**Held:** dismissing the application for conditional leave to appeal to the Privy Council, that:

1. To succeed under section 3(1) the 1967 Order the applicant must prove that the intended appeal to the His Majesty in Council is an appeal from a final decision of the Court of Appeal. It is settled law in the Eastern Caribbean that the test to be applied in determining whether an order is final or interlocutory is a procedural matter to be decided by the local courts, and the application test is to be used in making that determination. Under the application test, an order is interlocutory if the claim, or the subject matter of the application, will come to an end if the application is determined one way, but will continue if it is determined the other way. Applying the same test, an order is final if it was made on an application that would have determined the matter in litigation for whichever side the decision is made.

Rule 62.1(3) of the **Civil Procedure Rules 2000** applied; **Othniel Sylvester v Satrohan Singh** Saint Vincent & the Grenadines Civil Appeal No. 10 of 1992 (delivered 18<sup>th</sup> September 1995, unreported) followed; **Nam Tai Electronics, Inc v David Hague et al** Territory of the Virgin Islands Civil Appeal No 12 of 2003 (delivered 21<sup>st</sup> September 2004, unreported) followed; **Thamboo Ratnam v Thamboo Cumarasamy and another** [1965] 1 WLR 8 distinguished; **R. S. Lopes v N.K.V Valliappa Chettiar** [1968] AC 887 distinguished; **Haron bin Mohd Zaid v Central Securities (Holdings) Bhd** [1982] 2 All ER 481 considered; **Durity v The**

**Judicial and Legal Services Commission and another** [1996] 2 LRC 451 considered; **Pentium (BVI) Limited et al v The Bank of Bermuda** Territory of the Virgin Islands Civil Appeal No. 14 of 2003 (delivered 12<sup>th</sup> January 2005, unreported) followed; **Lux Locations Limited v Yida Zhang (Antigua and Barbuda)** [2023] UKPC 3 considered.

2. The decision whether to apply the application test or the order test is a procedural issue and the courts of the Eastern Caribbean are not bound to follow the decisions of the Privy Council that apply the order test. The order of the Court of Appeal striking out the notice of appeal was an interlocutory order and leave to appeal to the Privy Council is required.

Section 3(1) of the **Virgin Islands (Appeals to the Privy Council) Order 1967** S.I. No. 234 of 1967 applied.

3. The reasons advanced by the Applicant for saying that her intended appeal to the Privy Council under section 3(2) of the Privy Council Order involves matters of great general and public importance do not qualify as matters of great general and public importance. Neither are there any points of law that could benefit from guidance by the Board. The Applicant's complaints are issues in a private dispute between the parties, the resolution of which has no impact on other persons. They are not matters of public importance. The application for leave to appeal under section 3(2) also fails

Section 3(2)(a) of the **Virgin Islands (Appeals to the Privy Council) Order 1967** S.I. No. 234 of 1967 applied; **Martinus Francois v The Attorney General** Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7<sup>th</sup> June 2004, unreported) followed.

## JUDGMENT

- [1] **WEBSTER JA [AG]:** This is an application by Inderjit Kaumar Chhina ("the Applicant") for conditional leave to appeal to His Majesty in Council against the decision of the Court of Appeal delivered on 22<sup>nd</sup> July 2022, dismissing her application for an extension of time to file and serve the record of appeal and striking out the notice of appeal for want of prosecution, with costs to the respondents.

[2] The relevant background to this application is that the Applicant filed an action in the Commercial Court claiming ownership of the shares of a Territory of the Virgin Islands (“BVI”) company that owned property in London, England. The claim was dismissed and on 12<sup>th</sup> November 2020 the Applicant appealed against the decision of the Commercial Court. The Applicant did not take any further steps in pursuing the appeal and on 18<sup>th</sup> March 2022 the respondents applied to strike out the appeal for want of prosecution. The Applicant’s response was to apply on 25<sup>th</sup> April 2022 for an extension of time to file the record of appeal. Both applications came up for hearing by the Court of Appeal on 10<sup>th</sup> May 2022. On 22<sup>nd</sup> July 2022 the Court delivered its written judgment making the orders referred to in the preceding paragraph.

[3] The Applicant applied for conditional leave to appeal to the Privy Council against the orders of the Court of Appeal. The application was made under the provisions of section 3 of the **Virgin Islands (Appeals to the Privy Council) Order 1967**<sup>1</sup> (“the 1967 Order”). The relevant parts of section 3 are -

**Sub-section 3(1):**

“(1) Subject to provisions of this Order, an appeal shall lie as of right from decisions of the Court to [His] Majesty in Council in the following cases –

- (a) Where the matter in dispute on the appeal to [His] Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards, final decisions in any civil proceedings;  
...

**Sub-section 3(2):**

---

<sup>1</sup> S.I. No. 234 of 1967.

“(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to [His] 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 [His] Majesty in Council, decisions in any civil proceedings; ...”

- [4] The application in this case was made under sub-sections (1) and (2).

**The application under sub-section 3(1)**

- [5] The Applicant posited that her application falls under sub-section 3(1) because she is seeking leave to appeal against a final decision in a civil proceeding and the subject matter of the dispute exceeds the threshold of £300. It is common ground that the value of the dispute far exceeds the £300 threshold. The issue is whether the decision being appealed is a final or interlocutory order. If it is a final order the intended appeal to the Privy Council is as of right and, subject to complying with the requirements of sub-section 3(1), the Court of Appeal is obliged to grant conditional leave to appeal. Mr. Adrian Davies says that the order being appealed is final because it had the effect of disposing of the appeal in the Court of Appeal.

- [6] It is settled law in the Eastern Caribbean that the court applies the application test to determine whether an order is final or interlocutory. This was settled by this Court on 18<sup>th</sup> September 1995 in **Othniel Sylvester v Satrohan Singh**.<sup>2</sup> The trial judge had struck out the claimant’s claim and he appealed against the striking out without getting leave to appeal. Sir Dennis Byron JA (as he then

---

<sup>2</sup> Saint Vincent & the Grenadines Civil Appeal No. 10 of 1992 (delivered 18<sup>th</sup> September 1995, unreported).

was) analysed and compared the application test and the order test and concluded that the application test applied in the Eastern Caribbean. At paragraph [11] of the judgment he summarised the application test –

“Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J. would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.”<sup>3</sup>

The essence of the application test resulting in an interlocutory order is that the claim, or the subject matter of the application, will come to an end if the application is determined one way, but will continue if it is determined the other way. This is illustrated by the example given by Byron JA – the application to strike out the writ succeeded and the strike out order brought the claim to an end. On the other hand, if the application had failed the claim would have continued.

[7] On the other hand, if the result of the application is that the resulting order would determine the matter in litigation for whichever side the decision is given, it is a final order (using the application test). This type of order is usually made at the end of a trial – it disposes of the claim whichever way it is decided. This is a final order and its essence is captured in the first sentence in the dictum of Sir Dennis Byron JA in **Sylvester v Singh** cited in paragraph [6] above.

[8] The application test is now codified in the **Civil Procedure Rules 2000** (“CPR”) Part 62.1(3) which states simply that ‘In this Part – (a)

---

<sup>3</sup> Ibid paragraph [11].

a determination whether an order or judgment is final or interlocutory is made on the ‘application test’.

[9] The test has been followed in numerous decisions of this Court since then. In **Nam Tai Electronics, Inc v David Hague et al**<sup>4</sup> Gordon JA stated that ‘it is well established in this jurisdiction that in determining whether a matter is procedural (interlocutory) or final the Court will apply the application test rather than the order test...’<sup>5</sup>

[10] Learned counsel for the Applicant, Mr. Davies, did not dispute that the practice in the BVI is to apply the application test. His position is that the test applies to applications for leave to appeal from decisions of the lower courts to the Court of Appeal. A different procedure applies to applications for leave to appeal to the Privy Council. This procedure is governed by decisions of the Privy Council which have applied the order test. He referred to **Thamboo Ratnam v Thamboo Cumarasamy and another**<sup>6</sup> and **R. S. Lopes v N.K.V Valliappa Chettiar**.<sup>7</sup> Both decisions are appeals from the Federal Court of Malaysia. He submitted that these decisions are binding on this Court and the Court must apply the order test when dealing with applications for leave to appeal to the Privy Council.

[11] I have reviewed the judgments in both decisions. They applied the order test to applications for leave to appeal to the Privy Council, but in neither case was the issue of which test to apply considered and analysed. Both cases proceeded on the assumption that the decisions being appealed were final decisions and therefore the appeals lay as of right. The facts of **Cumarasamy** are similar to

---

<sup>4</sup> Territory of the Virgin Islands Civil Appeal No 12 of 2003 (delivered 21<sup>st</sup> September 2004, unreported).

<sup>5</sup> Ibid paragraph [8].

<sup>6</sup> [1965] 1 WLR 8.

<sup>7</sup> [1968] AC 887.

this application. The applicant's appeal was struck out by the Federal Court for failure to file the record of appeal on time. On appeal to the Privy Council the Board did not deal with the issue of whether the order being appealed was final or interlocutory. The Board dismissed the appeal on the ground that the applicant did not provide the Federal Court with material that that Court could have used to exercise its discretion in his favour by granting the extension. The Board declined to interfere with the Federal Court's decision and dismissed the appeal. The case is not directly relevant to the application before this Court.

- [12] In **Lopes v Chettiar**, the petitioner claimed specific performance of an oral agreement for the sale of land worth more than the threshold amount of \$5,000.00. The High Court dismissed the claim and the Federal Court dismissed the petitioner's appeal against the decision of the High Court. The Federal Court also dismissed the petitioner's application for leave to appeal to the Privy Council on the ground that it had a discretion to refuse leave (although the order being appealed was clearly final), and the case was not one fit for appeal. The petitioner applied for special leave to appeal to the Privy Council contending that his appeal lay as of right, the Federal Court was wrong, and the Board should restore his right of appeal by granting special leave. The Board noted that the petitioner's appeal lay as of right and that the Federal Court did not have a discretion to refuse leave. However, an application for special leave is always discretionary (even where the appeal lay as of right) and this was not a fit case to grant special leave. The Board did not grapple with whether the order being appealed was final or interlocutory.



[13] A case that is directly on point is **Haron bin Mohd Zaid v Central Securities (Holdings) Bhd**,<sup>8</sup> which is also an appeal to the Privy Council from the Federal Court of Malaysia. The relevant facts are that the trial judge made orders in chambers including an order giving leave to the plaintiff to sign final judgment against the defendant. The Federal Court found that the orders were final and leave to appeal was not required. On further appeal to the Privy Council, the Board analysed the application test and the order test and decided that -

“The appropriate test for determining whether an order was final or interlocutory was whether the judgment or order, as made, finally disposed of the rights of the parties. If it did, it was a final order, but if it did not, it was an interlocutory order. Since the Federal Court had applied that test and since it had not been shown that the court had misconstrued the law of Malaysia, the Federal Court had been entitled to hold that the orders made by the High Court of Malaya were final orders and that leave was not required to bring an appeal against them...”<sup>9</sup>

[14] This is a clear finding that the Privy Council considered the relevant authorities and applied the order test in an application for leave to appeal to the Privy Council in appeals from the Federal Court of Malaysia. However, this is not the end of the matter. Their Lordships expressed the view that the test to be applied is a procedural issue and it would be wrong to interfere with the unanimous decision of the lower court on what was a matter of procedure. The Board noted that ‘the points raised are purely procedural and ought to be resolved by the Federal Court’.<sup>10</sup>

---

<sup>8</sup> [1982] 2 All ER 481.

<sup>9</sup> Ibid at page 482, Held number 1.

<sup>10</sup> Ibid page 487.

- [15] The decision in **Haron bin Mohd Zaid** was considered and distinguished by the Court of Appeal of Trinidad and Tobago in **Durity v The Judicial and Legal Services Commission and another**.<sup>11</sup> The Court's opinion was expressed by Gopeesingh JA

—

“In *Haron bin Mohammed Zaid v Central Securities (Holdings) Bhd* ... the Judicial Committee of the Privy Council did apply the 'order approach' test laid down by Lord Alverstone CJ in *Bozson*'s case, but it is pertinent to observe that, in agreeing with the Federal Court of Malaysia that the 'order approach' test was the appropriate one, the Judicial Committee took into account that the court in Malaysia had established over the years a settled practice of applying that test. That being a matter of practice and procedure, in accordance with its well-established practice not to overrule a decision on a matter of procedure, as distinct from substantive law, unless it can be clearly shown that the particular court had misconstrued the statute law, the Judicial Committee found it necessary to uphold the decision of the Malaysian court to apply Lord Alverstone CJ's test. The Judicial Committee was not attempting to lay down a general rule of universal application. In the circumstances, therefore, I do not consider that this court is bound to adopt that test as the appropriate test in this jurisdiction.”

The Court of Appeal applied the application test and found that the application under review was for leave to appeal against an interlocutory order. The Court dismissed the application.

- [16] This finding by the Court of Appeal of Trinidad and Tobago encapsulates the obvious view held by the courts of the Eastern Caribbean that the test to be applied in determining whether an order is final or interlocutory is a procedural matter to be decided by the local courts, and the application test is to be used in making that determination. This Court adopted this stance in **Pentium (BVI)**

---

<sup>11</sup> [1996] 2 LRC 451.

**Limited et al v The Bank of Bermuda**<sup>12</sup> where Alleyne JA referred to **Haron bin Mohd Zaid** and noted that it is a decision of the Privy Council which-

“[D]ecided that a question of whether an order was final or interlocutory was a matter for the Federal Court to decide in accordance with its own practice and procedure, and accordingly affirmed the Federal Court’s application of the order test...”

Having noted the stance of the Privy Council on matters of procedure, Alleyne JA went on to consider the Bank of Bermuda’s application for leave to appeal to the Privy Council. He applied the application test and found that the order of the High Court was interlocutory and therefore the leave application did not fall under sub-section 3(1) of the 1967 Order.

[17] Finally on this point, there is the recent decision of the Privy Council in **Lux Locations Limited v Yida Zhang (Antigua and Barbuda)**,<sup>13</sup> on appeal from this Court, where the Board noted that

-

“[M]atters of procedure are often best left to be decided by the courts of the jurisdiction from which an appeal is brought, which will naturally have greater knowledge than the Board of the conditions and norms of civil litigation in which the rules of procedure have effect...”

[18] With the utmost respect to Mr. Davies and his attempt to persuade this Court to apply the order test to applications for leave to appeal to the Privy Council, I find that this is a procedural issue and the courts of the Eastern Caribbean are not bound to follow the decisions of the Privy Council that applied the order test. The application test has been firmly established in the Eastern Caribbean both by numerous decisions of this Court and by CPR

---

<sup>12</sup> Territory of the Virgin Islands Civil Appeal No. 14 of 2003 (delivered 12<sup>th</sup> January 2005, unreported).

<sup>13</sup> [2023] UKPC 3 paragraph 31.

62.1(3)(a). The application test was also applied in Trinidad and Tobago in **Durity v JLSC**. The order of the Court of Appeal striking out the notice of appeal was an interlocutory order and leave to appeal to the Privy Council is required.

[19] For completeness, I also dismiss Mr. Davies' submission that **Lopes v Chettiar**, interpreting the Board's decision in **Ratnam**, obliges this Court to treat an order that bars an appellant from appealing as a final order. This observation by the Board does not accord with the application test.

[20] This takes me to a consideration of the application under sub-section 3(2)(a) of the 1967 Order.

#### **The application under sub-section 3(2)**

[21] The Applicant submitted that if leave to appeal is required, the Court should grant leave under sub-section 3(2)(a) of the 1967 Order.<sup>14</sup> To satisfy the requirements of sub-section 3(2)(a), the Applicant must show that the question involved in the proposed appeal is a matter of great general or public importance, or otherwise, that should be submitted to His Majesty in Council.

[22] The test of what amounts to a matter of great general or public importance or otherwise was authoritatively described by Saunders JA (as he then was) in **Martinus Francois v The Attorney General**<sup>15</sup> at paragraph [13] of the judgment of the Court of Appeal

-

“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

---

<sup>14</sup> Section 3(2)(a) is set out in paragraph [3] above.

<sup>15</sup> Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7<sup>th</sup> June 2004, unreported).

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.”

[23] I have reviewed the reasons advanced by the Applicant in her application for saying that there are issues of great general and public importance in her appeal and I am not satisfied that any of them amounts to a matter of great general and public importance. Neither are there any points of law that could benefit from guidance by the Board. The Applicant’s complaints are that she is not on an equal footing with the respondents and her limited resources contributed to the delay in filing the record of appeal; the respondents stole a march on her by applying to strike out the notice of appeal and the Court of Appeal imposed the ultimate sanction of striking out the appeal; the Court of Appeal should not have drawn adverse inferences against her without cross-examination; and the subject matter of the appeal is an apartment in London that has been taken away from her and is now occupied by the second respondent rent-free. These are issues in a private dispute between the parties, the resolution of which has no impact on other persons. They are not matters of public importance. The Applicant is obviously dissatisfied with the decision of the Court of Appeal, but that is not a reason to grant leave to appeal to the final court of appeal. The application fails under this ground as well.

**Order**

[24] I would dismiss the application for conditional leave to appeal to the Privy Council.

I concur.  
**Gertel Thom**  
Justice of Appeal

I concur.  
**Margaret Price-Findlay**  
Justice of Appeal

**By the Court**

**Chief Registrar**