

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

ANTIGUA AND BARBUDA

ANUHCVP2020/0023

BETWEEN:

KHOULY CONSTRUCTION & ENGINEERING LIMITED

Applicant/Appellant

and

EDMOND MANSOOR

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Gerard St.C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan SC with him Mr. Loy Weste for the Applicant/Appellant

Dr. David Dorsett for the Respondent

2022: October 18.

Application for final leave to appeal to the Privy Council- Appeals as of right- Section 122 (1)(a) of the Antigua and Barbuda Constitution Order- Jurisdiction of appellate court to grant final leave to appeal from an award of unliquidated damages- Whether parties can confer a jurisdiction on the Court by consent - Merits of the appeal- Whether appeal unmeritorious such that final leave to appeal should be refused- Approach of appellate court to appeals which raise a genuinely disputable issue - Whether appellate court in ensuring that there is a genuine disputable issue must look at the merits of the appeal

REASONS FOR DECISION

- [1] **THOM JA:** On 18th October 2022, we dismissed the respondent's opposition to the application for final leave and granted the applicant/appellant ("the applicant") final leave to appeal to His Majesty in Council. We promised to give reasons for our decision. We do so now.
- [2] On 20th October 2021, this Court (differently constituted) granted conditional leave to the applicant to appeal to His Majesty in Council from the decision of this Court dated 15th April 2021.
- [3] The applicant now applies for final leave to appeal to His Majesty in Council.

Issue 1: Jurisdiction of appellate court to grant final leave to appeal from an award of unliquidated damages

- [4] The respondent filed an opposition to the grant of final leave. It is not disputed that the applicant has complied with all of the conditions set by the Court in its order granting conditional leave. The respondent contends that the Court has no jurisdiction to grant final leave since the applicant has no right of appeal to His Majesty in Council pursuant to section 122(1)(a) of the **Antigua and Barbuda Constitution Order, 1981** ("the Constitution").¹ The conditional leave order was made pursuant to section 122(1)(a), the Court being satisfied that the applicant had met the requirements of section 122(1)(a).
- [5] It is appropriate at this juncture to outline the provisions of section 122(1)(a). The section reads as follows:
- “(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-
- (a) final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly

¹ Cap 23 of the Laws of Antigua and Barbuda.

a claim to or question respecting property or a right of the prescribed value or upwards”

- [6] In order to pursue an appeal as of right to His Majesty in Council pursuant to section 122(1)(a), an applicant must satisfy two requirements: firstly, that the decision is a final decision in civil proceedings and secondly, that either the matter in dispute is of the prescribed value or more (the prescribed value being EC\$1,500.00) or the appeal involves directly or indirectly a claim to or a question respecting property or a right of the prescribed value.
- [7] It is not disputed that the first condition is met. The decision is a final decision in civil proceedings. Learned counsel for the respondent, Dr. Dorsett, contends however that the second requirement has not been met. The matter in dispute being unliquidated damages, there is no right of appeal under section 122(1)(a) from an award of unliquidated damages. Learned counsel further submits that the concession made at the leave stage that the second requirement was met was made in error and in any event, parties cannot by consent confer a jurisdiction on the Court which it does not possess. Learned counsel relies on **Stratchan v The Gleaner Company Ltd and another**.² Similarly, a party cannot by concession confer a jurisdiction on the Court of Appeal which the Constitution says it does not possess. I agree. It is well settled law that where a court does not have jurisdiction parties by consent cannot confer jurisdiction on a court and any such decision of the court in circumstances where it does not have jurisdiction is a nullity.
- [8] Learned counsel further submits that the issue being one of jurisdiction of the Court to grant leave, the concession made at the conditional leave stage is of no moment since it is never too late to raise the issue of jurisdiction as is demonstrated in **Chief Kwame Asante v Chief Kwame Tawia**³ where Lord Simonds in delivering the decision of the Board stated:

² [2005] UKPC 33.

³ [1949] UKPC 5.

“If it appears to an appellate court that an order against which an appeal is brought has been made without jurisdiction it can never be too late to admit and give effect to the plea that the order is a nullity”

[9] Dr. Dorsett further submitted that the value requirement was not met since the appeal is an appeal against unliquidated damages. Section 122(1)(a) of the Constitution makes no provision for an appeal against unliquidated damages. He relies on the decision of the Privy Council in **Alceo Zuliani and others v Vernon S. Veira**,⁴ a decision of this Court. In **Zuliani**, on an action by a solicitor to recover fees where section 69(1) of the **UK Solicitors Act 1974** was not complied with, the learned judge ordered that the solicitor deliver individual bills to the defendants so that the solicitor could recover the sums found to be due to him on taxation. This Court upheld the judge’s decision and found further that pursuant to section 20 of the **Eastern Caribbean Supreme Court Order (Saint Christopher and Nevis) Act 1975** the judge was empowered to make the order. This Court refused to grant leave to appeal to the Privy Council to the appellants in **Zuliani** on the basis that they did not fall within section 99(1) of the **Constitution of Saint Christopher and Nevis** which is in the same terms as the provision in section 122(1)(a) of the Constitution. The only difference in the requirement is the value requirement. In Antigua and Barbuda, the sum prescribed is EC \$1,500.00 while in Saint Christopher and Nevis, it is EC\$5,000.00.

[10] In **Zuliani**, the appellants were granted special leave to appeal by the Privy Council. The Privy Council however dismissed the appeal and in so doing held among other things:⁵

“(2) That an appeal as of right under section 99(1)(a) of the Constitution lay only where the matter in dispute was of the prescribed value or more but did not lie against an award of unliquidated damages, and since the precise sums payable by the defendants to the plaintiff pursuant to the judge’s order remained to be quantified on taxation the defendants were not entitled to appeal as of right from the dismissal by the Court of Appeal of their appeal

⁴ [1994] 1 W.L.R 1149.

⁵ Ibid at pages 1150-1151.

from the judge's decision; and that accordingly, the Court of Appeal had correctly dismissed the defendants' application for leave to appeal."

[11] Dr. Dorsett submits that likewise this Court should dismiss the application for final leave since the decision which is sought to be appealed relates to an award of unliquidated damages. Dr. Dorsett also referred the Court to the following passage in the judgment which outlined the reasons for the decision as follows:

"... the appeal against the second decision of the Court of Appeal is of no practical significance but it raises a question of general importance. Again, in agreement with the Court of Appeal, their Lordships would answer the question in favour of the plaintiff. In providing that the automatic right of appeal should arise only where the matter in dispute was of the value of (or in excess of) a precise figure the legislature has chosen not to include an award of unliquidated damages. In the view of their Lordships this provision should be strictly construed."⁶

[12] Dr. Dorsett submits that this Court is required to construe section 122(1)(a) strictly and since no provision is made for an appeal from an award of unliquidated damages, the appellant has no right of appeal against the award of the lower court which is an award of unliquidated damages.

[13] Mr. Astaphan, SC for the applicant in response submits that the appeal is not solely in relation to unliquidated damages. Learned Senior Counsel referred to the pleaded counterclaim of the respondent in which the respondent claimed general and special damages. The special damages were particularised in paragraph 42 for a total of \$3,077,466.50. The High Court and the Court of Appeal ordered the applicant to pay a range of percentages of the specific sum claimed as special damages. This award was upheld by this Court. These sums learned senior counsel submits are calculable and/or not of an unliquidated value.

[14] Mr. Astaphan, SC further submits that in any event, in some circumstances the court may grant an appeal as of right even where the matter relates to unliquidated damages. Learned Senior Counsel relied on **Zuliani** and referred the Court to the

⁶ Supra, n.4 at page 1155.

entire paragraph from which the passage relied on by Dr. Dorsett was taken. For ease of reference, I will outline the entire paragraph. It reads as follows:

“In the circumstances, the appeal against the second decision of the Court of Appeal is of no practical significance, but it raises a question of general importance. Again, in agreement with the Court of Appeal, their Lordships would answer, the question in favour of the plaintiff. In providing that the automatic right of appeal should arise only where the matter in dispute was of the value of (or in excess of) a precise figure the legislature has chosen not to include an award of unliquidated damages. In the view of their Lordships this provision should be strictly construed. No doubt there will be many cases, of which the present is one, where it can be said as a matter of utmost probability, or even of virtual certainty, that the damages ultimately awarded will be in excess of E.C.\$5,000, and in such cases the Court of Appeal may very well think it right, as [a] general rule, to grant leave in the exercise of its discretion. Equally, however, there may be cases - and again the present case may serve as an example - where the likely amount of damages is at or above the statutory threshold, but which are so lacking in merit that the Court of Appeal in its discretion would refuse leave.”⁷

[15] Mr. Astaphan, SC submits that when the Court considers the special damages claimed and the percentages awarded by the lower court and upheld by this Court the damages would exceed \$1,500.00.

[16] I agree that section 122(1)(a) of the Constitution permits leave to the Privy Council as of right where the appeal relates to liquidated damages but no provision is made for an appeal relating to unliquidated damages. This is made clear by the Privy Council decision in **Zuliani**, but as Mr. Astaphan, SC points out and I agree, the Board in **Zuliani** did express the view that there may be cases where the court will be certain or there is an utmost probability that the damages would be of the prescribed value or in excess.

[17] The respondent in his amended counterclaim, claimed damages for breach of contract both general and special. In paragraph 42 of the amended counterclaim the respondent pleaded as follows:

“ SPECIAL DAMAGES

⁷ [1994] 1 W.L.R 1149 at 1155.

- | | |
|--|-------------------|
| (1) Value of remedial work on defective construction including provisional costs for remedial work on sinking garage floor, defective large retaining wall, water leaks and cracks in roof and structural inadequacy of roof | - \$1,560,980.00 |
| (2) Value of work, for which defendant has been over-charged as valued by BCQS | - \$1,220,144.00 |
| (3) Estimated professional services and consulting fees to date in respect of: | |
| a. Associated Engineers | |
| b. B.C.Q.S | |
| c. Chris Conway | |
| d. David Hart | |
| e. Addison Workman | |
| f. Trevor Gonsalves | |
| g. Debbie Antonis | - \$201,047.00 |
| (4) Costs inclusive of professional services, travel, accommodation and meals for: | |
| a. Junie Davis | EC\$5,840.00 |
| b. Phillip Sobers (US\$20,729.00) | EC\$55,986.30 |
| c. Hugh Schamber (US\$12,396.00) | EC\$33,469.20 |
| Total Special Damages | EC \$3,077,466.50 |

AND THE DEFENDANT COUNTERCLAIMS

- (1) General damages
- (2) Special damages as indicated above (and continuing)
- (3) Interest pursuant to s. 27 of the Eastern Caribbean Supreme Court Act Cap.147
- (4) Costs
- (5) Further or other relief."

[18] In the lower court the learned judge at paragraph 127 of her judgment applied various percentages of the fees claimed to be paid by the applicant and in paragraph 128 ordered the cost of the remedial work to be assessed if not agreed within 30 days.

[19] While the learned judge ordered the cost of the remedial work to be assessed, there was no order for the professional fees to be assessed. The applicant was simply required to pay 60 percent of the professional fees. The 60 percent awarded to each expert is in excess of \$1,500.00. By way of example, the fees for Oliver Davis of

Davis Engineering Services (also known as Junie Davis) which was the lowest fee was \$5,840.00 with 60 percent being \$3,504.00. This amounts to more than twice the prescribed value. Further, having regard to the opinion of the Board in **Zuliani** which was relied on by both sides, their Lordships emphasised the importance of the requirements of the Constitutional provision that the value of the matter must be \$1,500.00 or exceed this sum must be construed strictly. However, their Lordships also acknowledge that there may be cases where while the sum is not specific, at the end of the day the sum awarded would be in excess of the prescribed value. In these circumstances the Court may grant leave to appeal. In this case, there was no order for the professional fees to be assessed. In my view, it is of utmost probability and indeed I am certain that if the damages were assessed, bearing in mind the sum claimed was approximately \$2.9 million, 60 percent of the assessed sum would be in excess of \$1500. I am therefore of the view that the applicant has met the second requirement.

Issue 2: Merit of the Appeal

[20] Dr. Dorsett, relying on the decision in **Zuliani**, submits that the proposed grounds of appeal are so lacking in merit that this Court should exercise its discretion and refuse leave to appeal. Dr. Dorsett submits that the grounds of appeal are mainly against concurrent finding of facts of the lower court and this Court. The Privy Council has on numerous occasions opined that it will not lightly interfere with concurrent findings of fact by the lower courts. The appeal therefore is lacking in merit and this Court should, applying the principle in **Meyer v Baynes**⁸ and **Dass v Marchand and others**,⁹ exercise its discretion and refuse leave to appeal.

[21] Mr. Astaphan, SC in response referred the Court to the written judgment of this Court (differently constituted) in granting conditional leave to the applicant. Learned

⁸ [2019] UKPC 3.

⁹ [2021] 1 WLR 1788.

Senior Counsel submits that the issue of the proposed appeal being unmeritorious was canvassed at the leave stage and rejected by this Court.

[22] I turn therefore to the written judgment of this Court granting conditional leave dated 20th October 2021.¹⁰ At paragraph 3 of the judgment the learned Chief Justice stated:

“(3) We granted Conditional leave to the applicant pursuant to section 122(1)(a) of the **Constitution** on the usual conditions applying the procedural provisions contained in the **Antigua and Barbuda (Appeals to the Privy Council) Order 1967**. We promised to reduce our reasons to writing so as to address the question as to whether the dictum in **Meyer v Baynes** was to be understood as expounding any broader principle than previously understood as it relates to there being in respect of a proposed appeal ‘a genuinely disputable issue within the category of cases which are given to leave to appeal as of right’. We do so now.”

[23] Having outlined the requests of section 122, the learned Chief Justice explained the statement of the Privy Council in **Meyer v Baynes** in view of the opinion of the Board in **R.S. Lopes v N.K.V. Valliappa Chettiar**;¹¹ **Learie Alleyne-Forte v Attorney General of Trinidad and Tobago**;¹² **Crawford and Ors v Financial Institutions Services Ltd**;¹³ and the following passage from the judgment of this Court in **William Martin v Ursil Peters**¹⁴ where Rawlins JA delivering the judgment of the Court stated:

“The essence of the foregoing statement by the Privy Council in **Alleyne-Forte** is that where an applicant for conditional leave states that he is entitled to leave as of right on the ground that the appeal raises a genuinely disputable issue that involves a question of constitutional interpretation, a court of appeal should ensure that the appeal really raises such a question so that it genuinely falls under a section 109(1)(c) type provision. To this end, the words of their lordships in the final paragraph of the judgment in **Alleyne-Forte** quite neatly illustrate the manner in which the principle is to be applied. Their Lordships stated:

¹⁰ ANUHCVP2020/0023 (delivered 20th October 2021, unreported).

¹¹ [1968] 3 WLR 92.

¹² [1998] 1 WLR 68.

¹³ [2003] UKPC 49.

¹⁴ ANUHCVP2004/0036 (delivered 17th September 2007, unreported) at paragraph 26.

‘An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case...’”

[24] The Court expressed the opinion, having examined the decision in **Meyer v Baynes** where the Board affirmed the reasoning in **A v R (Guernsey)**¹⁵ which adopted the approach in **Alleyne-Forte** as correct, that **Meyer** did not require a “broader approach” than stated in **Alleyne-Forte**. In other words, the Court was not to delve into the merits of the appeal and determine whether there was a reasonable prospect of success.

[25] In paragraph 18 the learned Chief Justice stated:

“From the foregoing we are accordingly of the view that the approach of the Court of Appeal as distilled by Rawlins JA in **Ursil Peter[s]** is still sound and represents the current law consistent with **Meyer** which, when read in context, simply emphasises the well-settled approach rather than advocate or signal the adoption by the Court of Appeal of some wider approach which may have the potential of the Court of Appeal trespassing on the domain of the Privy Council or indeed giving the court a power to restrict or fetter the right given by the Constitution to appeal to the Privy Council as of right. To adopt such an approach, the Court of Appeal would be arrogating to itself a power which the Privy Council has made plain in **Crawford** and like cases the Court of Appeal does not have.”

[26] In effect the respondent is seeking to have this Court consider the merit of the proposed appeal.

[27] In **Dass v Marchand**, the Practice Note states in part: “It is the practice of the Judicial Committee of the Privy Council not to go behind concurrent findings of fact of two lower courts, save for rare exceptions.” In other words, there is no principle of law that an appeal from a finding of fact to the Privy Council is bound to fail or in

¹⁵ [2018] UKPC 4.

the words of the Privy Council in **Lopes**, will receive “short shrift” from the Privy Council.

[28] The Court of Appeal is not required to determine whether an appeal is likely to receive short shrift from the Privy Council because it is from the concurrent findings of fact from the lower courts. The Court of Appeal is only required at this stage to consider whether the proposed appeal raises a genuinely disputable issue in the prescribed category of case.

[29] The submissions of Dr. Dorsett on the approach the Court should take were rejected at the conditional leave stage and we are also of the same view, that the submissions have no merit. The law in this area on the approach to be taken by the Court of Appeal is well settled in a long line of cases including **Martin v Peters**. For the reasons stated above we dismissed the opposition to the application for final leave and granted the applicant final leave to appeal to His Majesty in Council.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Gerard St.C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar