

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

ANTIGUA AND BARBUDA

ANUHCVP2020/0023

BETWEEN:

KHOULY CONSTRUCTION &ENGINEERING LTD

Appellant

and

EDMUND MANSOOR

Respondent

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Anthony Astaphan SC together with him, Mr. Kendrickson Kentish instructed by
Mr. Loy Weste on behalf of the Applicant
Dr. David Dorsett on behalf of the Respondent

2021: October 20.

Application for conditional leave to appeal to Her Majesty in Council as of right – Section 122(1)(a) of the Antigua and Barbuda Constitution Order 1981 – Whether proposed appeal raises a genuinely disputable issue in prescribed category of case - Appellate court's role in determining applications for leave to appeal to Her Majesty in Council as of right – Whether Meyer v Baynes requires appellate court to undertake broader inquiry by evaluating the merits of proposed appeal in determining whether it raises a genuinely disputable issue

REASONS FOR DECISION

- [1] **PEREIRA CJ:** On 20th October 2021 we heard an application by way of Motion on behalf of the appellant for conditional leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal delivered on 15th April 2021. The application for conditional leave was made pursuant to section 122(1)(a) of the **Antigua and Barbuda Constitution Order, 1981**¹ (“the Constitution”) which provides 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 a claim to or question respecting property or a right of the prescribed value or upwards;

...”

- [2] The Motion was opposed by the respondent who, though accepting that the applicant had satisfied the threshold contained in section 122(1)(a) in showing that the decision being appealed was a final decision in a civil claim and had met the value threshold (\$1,500.00) in respect of the property in dispute, mounted a serious argument in reliance on the Privy Council’s dictum in the decision in **Meyer v Baynes**,² an appeal from the Eastern Caribbean Supreme Court, Antigua and Barbuda, as to whether the proposed appeal raised ‘a genuinely disputable issue’ as to the applicant’s liability to pay various sums in damages to the respondent. The respondent strenuously argued that it did not and relied heavily on the Privy Council’s Practice Note in **Dass v Marchand**.³

- [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

¹ Cap. 23 of the Laws of Antigua and Barbuda.

² [2019] UKPC 3.

³ [2021] UKPC 2.

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 now do so.

The starting point – the constitutional gateways for leave to appeal to the Privy Council.

[4] The Constitution like almost every post-independence Constitution in the Commonwealth Caribbean, aside from the provision of special leave to be granted by the Privy Council itself in any civil or criminal matter, provides for certain categories of cases in which or gateways through which appeals lie either as of right or with the leave of the Court of Appeal to Her Majesty in Council.⁴ They are:

- (1) *final* decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value⁵ or upwards;
- (2) *final* decisions in proceedings for dissolution or nullity of marriage;
- (3) *final* decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and
- (4) such other cases as may be prescribed by Parliament.

[5] The other two gateways do not allow an appeal as of right but only with the leave of the Court of Appeal in the following cases:

- (5) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its

⁴ Where not contained in the Constitutions the similar provisions are contained in the various Appeals to the Privy Council Orders 1967 by way of a UK Statutory Instrument.

⁵ The prescribed value under the Antigua and Barbuda Constitution is \$1,500.00.

great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and

(6) such other cases as may be prescribed by Parliament.

The cases

[6] In order to gain an appreciation of what is meant by the statement of a proposed appeal, raising or there being 'a genuinely disputable issue...' and for the purpose of considering whether **Meyer v Baynes** signalled some broader or more generous application of this statement thereby providing a warrant to the Court of Appeal to examine an applicant's likely success before the Privy Council on an appeal thereto as of right given under the Constitution and like enactments, a brief historical trek through some of the relevant cases is warranted.

[7] The case of **R. S. Lopes v. NKV Valliappa Chettiar**⁶ emanated from the Federal Court of Malaysia in respect of sections 74(1)(a)(i) and (ii) and section 75 of their Courts of Judicature Acts, 1964, which in large measure is in *pari materia* to section 122(1) (a) of the **Constitution**. The Federal Court had refused leave to appeal to the Privy Council, on the ground that it had a discretion to refuse leave on the basis that the case was not a fit one for appeal. The Board held that the Federal Court had no discretion to refuse leave to appeal to the Privy Council where an appeal lay as of right in cases which came within section 74(1)(a)(i) and (ii) provided that the petitioner complied with any order made under section 75 or in relation to security for costs. Indeed, the Board held *per curiam*, that"

"It is for the legislature to decide whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within section 74 (1)(a) (i) and (ii) in order to protect respondents from having to incur heavy expense and suffer inconvenience when the appeal appears likely to receive short shrift in the Privy Council."

⁶ [1968] 3 WLR 92.

[8] In 1997, the Privy Council returned to this issue in the case of **Learie Alleyne-Forte v The Attorney General of Trinidad and Tobago**⁷ an appeal coming from the Court of Appeal of Trinidad and Tobago. There, the Board took the liberty of addressing the issue of an appeal to the Privy Council as of right, not in respect of the corresponding provisions of section 122(1)(a) of the **Antigua and Barbuda Constitution** in the Trinidad and Tobago Constitution but in respect of section 109(c) of that Constitution which is on all fours with section 122(1)(c) of the **Antigua and Barbuda Constitution**. The Privy Council confirmed that final decisions of the Court of Appeal 'in any civil, criminal or other proceedings which involve a question as to **the interpretation of this Constitution**' provided for an appeal as of right to the Privy Council. (emphasis mine) The Attorney General had submitted in their written case before the Board in respect of the appeal that 'there was no genuinely disputable question of interpretation of the Constitution, as distinct from its application to a particular set of facts, and that the applicant was not entitled to appeal as of right'. He relied on the Board's decision in **Frater v the Queen (Note)**,⁸ which in turn approved a passage from the decision of the Board in **Harrikissoon v Attorney General of Trinidad and Tobago**⁹ in which the Board expressed the view, that in the same way that the courts must be vigilant to ensure that the value of the right to apply to the High Court for redress for contravention of one's fundamental rights and freedoms is not debased by disposing 'summarily of applications that are plainly frivolous or vexatious or otherwise an abuse of the court',¹⁰ the courts must observe similar vigilance 'to see that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) [here, section 122(1)(c)] are not granted unless they do involve a genuinely disputable question of the *interpretation* of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right'. The Privy Council went on to emphasise *per curiam* that: '[w]here an appeal lies as

⁷ [1998] 1 WLR 68.

⁸ [1981] 1 W.L.R. 1468.

⁹ [1980] AC 265.

¹⁰ As observed in *Frater v The Queen (Note)* reciting a passage from *Harrikissoon v Attorney General of T&T* [1980] 1 AC.

of right from a decision of the local Court of Appeal to the Judicial Committee, on an application for leave to appeal, the Court of Appeal has no discretion to exercise **but it is required to see** that the proposed appeal raises **a genuinely disputable issue in the prescribed category of case.**' (emphasis mine)

- [9] In 2003, the Privy Council in **Crawford and Ors v Financial Services Institutions Ltd**¹¹ returned to the question of the discretion of the Court of Appeal in respect of appeal as of right to the Privy Council though arising from different considerations. There, the Court of Appeal of Jamaica though recognising that the appeal laid as of right to the Privy Council, considered that it had the power to impose a condition on the exercise of that right by ordering the grant of leave to be conditional, among others, on the payment by the petitioners of the respondents' outstanding costs of the hearing and appeal. The petitioners having failed to pay such costs, the Court of Appeal rescinded the grant of leave to appeal. The Privy Council held that:

“...where an appellant has an appeal as of right to the Privy Council under section 110(1)(a) [here section 122(1)(a)] of the Constitution, the Court of Appeal of Jamaica had no power, when formally granting leave, to restrict or to impose conditions on the exercise of that right additional to those falling within section 4(a) or (b) of the *Jamaica (Procedure in Appeals to the Privy Council) Order 1962*,¹² that the court's power under section 5 of that Order to make such order or directions as the interests of justice or circumstances of the case required was only to be used to **give effect to and not to restrict** (emphasis mine) the right of appeal given by section 110(1)(a) of the Constitution; that the Court of Appeal was not entitled either under the 1962 Order or under its inherent jurisdiction to impose a condition that the petitioners first pay the respondents' outstanding costs...”

Discussion

- [10] From the above cases, what is pellucid is that where a Constitution or other enactment provides for an appeal as of right to Her Majesty in Council, the Court of Appeal has no power whatsoever to fetter the exercise of that right by an applicant once he/she satisfies the requirement laid down in the provision giving that right. The policing task of the Court of Appeal is to see to it that the proposed appeal

¹¹ [2003] UKPC 49.

¹² The equivalent for Antigua and Barbuda would be the Antigua and Barbuda (Appeals to the Privy Council) Order 1967.

genuinely satisfies the gateway provision in respect of the class or category of appeal being advanced. It does not invest the Court of Appeal with a discretion.

- [11] The Eastern Caribbean Court of Appeal sought to make this plain in its 2007 decision in **William Martin v Ursil Peters**.¹³ There, Rawlins JA (as he then was) in delivering the judgment of the Court, after considering the decisions of the Privy Council in such cases as **Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd**,¹⁴ **Ebanks v Borden** and **Kwasi Bekoe v Broomes**¹⁵ observed at paragraph 22 as follows:

“It is noteworthy that there are no statements in *Ebanks* that confer discretion upon a court of appeal to refuse to grant conditional leave to appeal to an applicant who is entitled to appeal as of right to the Privy Council. It is clear from *Kwasi Bekoe* that this court has no purview to deny conditional leave to such an applicant, because of concurrent fact-finding judgments in favour of a respondent. The principles which the Privy Council enunciated in *Devi v Roy*, and reiterated in *Ebanks* and *Kwasi Bekoe*, are to guide the Privy Council, and no doubt appellants, in such cases. It is for the Privy Council to determine, for example, whether the appellant has made a case for exemption from the practice stated in these cases by the Privy Council by establishing special circumstances. These are not matters for the assessment or determination of a Court of Appeal.”

We will return to this observation later.

A genuinely disputable issue

- [12] Later in the judgment Rawlins JA discussed the matter of ‘a genuinely disputable issue’ by reference to the Privy Council’s decision in **Alleyne-Forte** and at paragraph 26 had this to say:

“The essence of the foregoing statements 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 way the principle is

¹³ [2007] ECSCJ No. 130 (delivered September 17th 2007).

¹⁴ A case raising a similar issue to that raised in *Crawford*.

¹⁵ The *Ebanks* and *Bekoe* cases dealing with concurrent findings of fact.

to be applied. Their lordships stated:¹⁹ ‘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:...**’ (emphasis mine)

- [13] To this we would add that the same holds true in respect of an appeal as of right under section 122(1)(a) of the constitution. In short, the Court of Appeal’s policing function is to ensure that the proposed appeal is really one (a) from a final decision in any civil proceeding; and (b) that the matter in dispute on the appeal is of the prescribed value or upwards or that it involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards. For example, if the matter in dispute or right in question has no monetary value but is dressed up to appear as one meeting the monetary value threshold, then it could not be said to be an appeal where there is a genuinely disputable issue in that category of case. The case of **Daryl Sands v Bank Crozier**¹⁶ comes to mind in which the Court of Appeal held that the issue in the appeal did not relate to a “value” but rather the existence of a right to indemnity and as such did not fall within the purview of section 104(1)(a) [here section 122(1)(a)] of the Constitution of Grenada. The appeal did not therefore satisfy the section 104(1) (a) gateway allowing an appeal as of right to the Privy Council. To like effect is the decision of the Court of Appeal in **Alceo Zuliani and Ors v Vernon S. Veira**¹⁷ in which it was held, in relation to an application to appeal to the Privy Council pursuant to section 99(1)(a) of the **Constitution of Saint Kitts and Nevis** (in similar terms to section 122(1)(a) of Antigua and Barbuda) and in reliance on two Privy Council decisions namely **Allan v Pratt**¹⁸ and **Meghji Lakhamski & Brothers v Furniture Workshop**,¹⁹ that the amount of the judgment or liability thereunder not having yet been determined, it could not:

“...be asserted with certitude that the value of the matter in dispute on appeal – ‘looked at from the point of view of the appellants’ - is of the prescribed value to render the appellate judgment appealable by the

¹⁶ [2008] ECSCJ No. 80 (delivered 16th September 2008).

¹⁷ [1992] ECSCJ No. 74 (delivered 2nd October 1992).

¹⁸ (1888) 13 App. Cases 780.

¹⁹ (1954) 1 AER 273.

appellants under section 19 (99 sic) (1) of the Constitution of Saint Christopher and Nevis.”

The application for leave to appeal to the Privy Council was accordingly dismissed.

The Privy Council decision in Meyer v Baynes – Does it advocate a broader application of the principle of ‘a genuinely disputable issue’?

[14] The brings us to the question which was strenuously argued before us earlier referenced in paragraph 2 above. The respondent vigorously argued that the 2019 Privy Council decision in **Meyer** has in essence shifted the goalposts requiring the Court of Appeal to undertake a broader inquiry when considering the question as to whether an applicant has satisfied the gateway for an appeal as of right under section 122(1)(a) of the **Constitution**. He urged, that in keeping with the Privy Council’s Practice Note in **Dass v Marchand and others** that this Court ought to find that there was no genuinely disputable issue to be appealed to the Privy Council because, as counsel Dr. Dorsett for the respondent put it, there was no genuinely disputable issue regarding the applicant’s liability to pay damages to the respondent having regard to the concurrent findings of fact by the High Court and this Court on the Appeal. He relied on the Privy Council Practice Note in **Dass** which states as follows:

“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. This practice imposes a super-added constraint on the Board which goes beyond the standard constraints on an appeal court and adds an additional hurdle for an appellant to overcome when appealing to the Privy Council. This is for two main reasons. First, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court -the third court looking at the facts - is more likely to be correct about the facts than the two courts below. Secondly, the Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes, especially, for example, local customs, attitudes, and conditions, and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.”

[15] Counsel Dr Dorsett urged that this is the approach now to be taken by the Court of Appeal having regard to the dictum of Lord Kitchin delivering the judgment of the Privy Council in **Meyer**. In short, that the approach so clearly set out by Rawlins JA in **Ursil Peter** ought to be eschewed or, at the very least, modified in light of **Meyer**. This requires an analysis of **Meyer** to determine whether the statement or principle that an appeal must raise a genuinely disputable issue has signalled some change in the approach to be taken by the Court of Appeal in considering whether an applicant has met the requirements of an appeal as of right under section 122(1)(a) of the **Constitution** and like sections in other constitutions and enactments. Does **Meyer** suggest that the Court of Appeal, in considering whether there is in a proposed appeal to the Privy Council, a genuinely disputable issue in the prescribed category of case, allow the Court of Appeal to consider that question by reference to the merits or demerits of an appeal as of right by this Court applying the Privy Council's practice and approach to such appeals before them?

[16] In **Meyer**, the Court of Appeal, on an application for leave to appeal to the Privy Council brought pursuant to section 122(1)(a) [an appeal as of right] and 122(2)(a) [an appeal with leave, as being of great general or public importance] refused leave having held that the applicant had not satisfied the requirements for leave to appeal as of right under section 122(1)(a) in that the decision was not a final decision. Leave to appeal was also refused under section 122(2) (a) as not raising, in the opinion of the Court, any matter of great general or public importance. On appeal to the Privy Council, one of the questions to be decided was whether the applicant had an appeal to the Board as of right under section 122(1)(a) and the Court of Appeal had erred in refusing leave. As to that question, the Privy Council recorded this at paragraph 21: '...Both parties accept that the decision of the Court of Appeal was final and that the threshold requirement was met. The question, therefore, is whether the Court of Appeal retained any control over a further appeal.' What the Board's judgment sets out thereafter in paragraphs 22 to 23 warrants recital in toto:

"22. This issue has arisen in a number of appeals to the Board from Courts of Appeal in different jurisdictions, but for present purposes it is only necessary to refer to the recent decision of the Board in *A v R (Guernsey)*

[2018] UKPC 4, in an appeal from the Court of Appeal of Guernsey. Lord Hodge, giving the judgment of the Board, explained that an appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. He continued (para 8):

'Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. **More generally, a court has power to make sure there is a genuinely disputable issue within the category of cases which are given leave to appeal as of right.** Thus in *Alleyne-Forte v A-G* [1997] 4 LRC 338 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (at 343):

'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 ...**'

23. The Board considers **that this reasoning** is also applicable to appeals from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda). Mr. Meyer made an entirely proper application to the Court of Appeal by notice of motion for leave to appeal. But the Court of Appeal **has a right to police applications of this kind and to consider whether any proposed appeal raises a genuinely disputable issue.** In this case the Court of Appeal exercised that right, refused leave to appeal and dismissed the application. In so doing, it did not exceed its jurisdiction, and it made no error in approaching the application in the way that it did." (emphasis mine)

- [17] We were satisfied that all that the Board was in effect doing in **Meyer** was applying its earlier reasoning in the earlier decisions of **A v R (Guernsey)** and **Alleyne-Forte** which are well settled and merely reiterating that where an appeal lies as of right to the Privy Council under the Constitution, the Court of Appeal has no discretion to impose any conditions fettering that right let alone engage in a merits evaluation of the proposed appeal, but the Court of Appeal does have the right to police such applications to ensure the appeal raises a genuinely disputable issue in the prescribed category of case - in short, that it is 'not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right'. This in our view captures the essence of what is truly meant by the

statement that the proposed appeal must raise ‘a genuinely disputable issue in the prescribed category of case’. The fact that Lord Kitchin did not add the words ‘in the prescribed category of case’ does not give licence to read his statement in paragraph 23 of the judgment out of context and attach to it some wider free standing general statement when it was expressly stated that the Board was applying the same reasoning as in **A v R (Guernsey)** and **Alleyne-Forte** which the Board was there expressly adopting. In our view, the simple point being distilled by Lord Kitchin on behalf of the Board, albeit in shorthand, is that while a party or indeed the parties may hold the view that the requirements have been met, it is still the function of the Court of Appeal to be satisfied that they have in reality been so met in respect of the category of case being advanced. The Board accordingly did not, in our view, advocate or put forward the adoption of a wider approach in addressing this question.

[18] 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** 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.

[19] Further, it would be quite a stretch to hold that a constitutional right of appeal can be whittled down in such a manner or restrictions placed on that right- in essence *sub silentio*. We can do no better than adopt, suitably modified, the statements of the Privy Council in **R. S. Lopes** that ‘it is for the Parliament to decide whether or not it is desirable that the Court of Appeal should be given a discretion to refuse leave to appeal in cases which come within section 122(1)(a) in order to protect

respondents from having to incur heavy expense and suffer inconvenience when the appeal appears likely to receive short shrift in the Privy Council.’ The Privy Council’s Practice Note in **Dass** is to guide its approach and is not a direction to the Court of Appeal for its consideration in deciding whether an applicant has met the threshold contained in a provision in the constitution providing for an appeal as of right.

- [20] Finally, we also fully endorse and apply the reasoning of the Court of Appeal in **Ursil Peter** and in particular paragraphs 22 and 26 recited above. **Meyer** has neither qualified nor brought into doubt the reasoning of the Court contained therein and the correctness of the approach to be applied by the Court of Appeal.

Conclusion

- [21] For the foregoing reasons conditional leave was granted to the applicant/appellant to appeal to Her Majesty in Council pursuant to section 122(1)(a) of the **Constitution**. We also granted a stay of the Court’s judgment having considered that in all the circumstances of the case it was just to do so.
- [22] The Court records its appreciation to the counsel on both sides for their helpful submissions and skilfully presented oral arguments.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar