COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 119 of 2021

B E T W E E N

LUCRETIA ROLLE

Intended Appellant

AND

THE AIRPORT AUTHORITY

Intended Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Travette Pyfrom for the Intended Appellant**
Mrs. Lakeisha Hanna for the Intended Respondent

DATES: **18 October 2022; 8 March 2023**

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Civil Appeal – Application for Conditional leave to appeal – Section 23 Court of Appeal Act – Whether appeal as of right – Whether the Court should exercise its discretion to grant leave to appeal – Exercise of discretion – Whether the intended appeal raises arguable points of law or issues of general public importance requiring clarification by the Privy Council

In a written Judgment handed down on 25 July 2022, the Court of Appeal dismissed an appeal from an order of a Supreme Court Judge who had acceded to the Respondent's strike-out application and struck out the Appellant's Writ of Summons on the basis that it was statute-barred.

Following the dismissal of her appeal, the Applicant (hereinafter "the Intended Appellant") applied by Motion filed on 15 August 2022 under section 23 of the Court of Appeal Act seeking conditional leave to appeal the Court's decision to the Judicial Committee of His Majesty's Privy Council. The Motion was opposed by the Respondent. Following a contested hearing, the Court of Appeal reserved its decision.

Held: The application for conditional leave is refused. The Applicant shall pay the Respondent's costs to be taxed, if not agreed.

We are satisfied that the Intended Appellant has failed to meet the statutory threshold for leave to appeal to the Privy Council "as of right". That said, we are satisfied that the value of her claim, even at its lowest, will in all likelihood meet or exceed the statutory threshold of Four Thousand Dollars ($4,000.00). Based on the Board's guidance in *Zuliani*, this means that she has an appeal which though not "as of right", is *subject to* the exercise of the Court's discretion. In these circumstances, we must now exercise our discretion under section 23(1) of the Act and determine whether or not leave to appeal to the Privy Council should be granted.

In our view, none of the Intended Appellant's proposed grounds raise arguable points of law or have any bearing on the public interest transcending the narrow circumstances of the litigants in this case. Nor does the appeal raise points of law requiring clarification by the Board. In short, this is not a proper case to grant conditional leave to appeal to the Privy Council and the application should be refused.

Fund Haven Ltd and anor v. South American Investment Fund Limited, [2021] WLR 4223 *mentioned*
Hermanus Philipus Steyn v. Giovanni Gnecchi-Ruscone, [2013] Civil Application No. 4 of 2012*;* mentioned
Johnson v. Gore Wood & Co, [2002] 2 AC 1 mentioned
Ministry of Defence v AB & Others, [2012] UKSC 9; mentioned
Nash v Eli Lilly & Co; Berger v Eli Lilly & Co, [1993] 1 WLR 782*;* mentioned
Paul F. Major v FirstCaribbean International Bank, SCCivApp 77 of 2021; considered
Zuliani and others v. Viera, [1994] 2 LRC 705*;* applied

RULING ON APPLICATION FOR CONDITIONAL LEAVE

Delivered by The Hon. Madam Justice Crane-Scott, JA

Introduction

1. On 25 July 2022, this Court dismissed an appeal from the order of a Supreme Court Judge who had acceded to the Respondent's strike-out application and ordered the Intended Appellant's Writ of Summons struck out on the basis that it was statute-barred.

2. Following the dismissal of her appeal, the Applicant (hereinafter "the Intended Appellant") applied by Motion filed on 15 August 2022 seeking conditional leave to appeal to the Judicial Committee of His Majesty's Privy Council (hereinafter "the JCPC"). The Motion was supported by an affidavit of Claudine Mortimer also filed on 14 October 2022

3. The application for conditional leave was resisted by the Respondent; and after hearing oral arguments on 18 October 2022, the Court reserved its decision.

4. We have dismissed the application. Our reasons appear below.

5. The following background facts should provide the necessary context to the dispute.

Background to the Dispute

6. The Intended Appellant was employed by the Respondent as a surveillance supervisor at the Lynden Pindling International Airport (LPIA) for 7 years. On 6th January 2011 as she was reporting for duty she slipped and fell, sustaining injuries.

7. By Writ of Summons filed on 6 January 2016 she commenced an action in negligence and or breach of statutory duty against the Respondent (as the first defendant) and the Nassau Airport Development Company (NAD) (as the second defendant) jointly and severally seeking damages for personal injuries, interest and costs.

8. On 21 June 2017 the Respondent was granted leave to amend its Defence. At paragraph 4 of its Amended Defence the Respondent denied liability for the Intended Appellant's injuries and further averred, *inter alia,* that the area of the LPIA where she had fallen was under the control of NAD under and by virtue of a transfer agreement executed between the Respondent and NAD which came into effect on 1 April 2007.

9. On 20 June 2017 the Respondent filed a Summons seeking to have the Statement of Claim struck out as against the first defendant on the basis that the claim was **"scandalous, frivolous and vexations and otherwise an abuse of the process of the court."**

10. In its supporting affidavit, the Respondent's General Manager attached the Respondent's transfer agreement with NAD and asserted that the Agreement contained explicit terms upon which it had with effect from the hand-over date, (i.e. 1st April 2007) divested itself of certain property, responsibilities and liabilities; and by which NAD had from that date, taken

possession of the demised premises under a lease and had assumed any and all liabilities and obligations accruing thereafter and further agreed to indemnify and keep the Respondent harmless from any damages arising directly or indirectly out of (i) the assumed liabilities; and (ii) NAD's use, occupancy or operation of the demised premises after the hand-over date.

11. The strike-out application was heard on 23 November 2017. In an oral decision handed down on 15 March 2018, the judge dismissed the application with costs and gave directions for trial.

12. Thereafter, the proceedings appear to have fallen dormant until 2020 when, following a change of attorneys, the Respondent applied to the court and obtained leave to Re-amend its Defence. The Re-Amended Defence was filed on 9 December 2020; and for the first time the Respondent asserted that the action was statute-barred by reason of the claim having not been brought within the 3-year limitation period stipulated in the Limitation Act for personal injury claims.

13. In her Amended Reply to the Re-Amended Defence the Intended Appellant addressed the limitation point. She claimed that the action was not statute-barred, asserting, *inter alia,* that the Respondent had waived its right to raise the limitation defence since it had submitted to the court's jurisdiction upon entering an unconditional appearance to the action on 29 January 2016.

14. In the alternative, asserting that her action was not statute-barred, the Intended Appellant alleged that the Respondent had concealed from her the findings of its medical examiner who, in a letter dated 20 March 2014, had diagnosed her as permanently disabled because of the slip and fall. That letter she claimed was not disclosed until years later and in consequence, the 3-year limitation period did not apply as the date of knowledge for purposes of the Limitation Act would not begin to run until March 2014 at the earliest.

15. On 5 January 2021, the Respondent filed a second strike-out Summons "pursuant to **O. 18 r. 19(1) (b)** and **(d) RSC, 1978** and the inherent jurisdiction of the Court on the ground that the action was **"frivolous or vexatious or otherwise an abuse of the process of the Court."** This time the strike-out application was brought, *inter alia,* on the ground that the action was statute-barred and that the Intended Appellant's Statement of Claim *itself* had put the date of her knowledge of the seriousness of her injuries to June 2012 or the latest, October 2012.

16. After hearing the application on 26 January 2021, the learned judge reserved her decision and on 12 May 2021, dismissed the action on the basis that it was statute-barred.

17. On appeal to this Court, the Intended Appellant raised 12 grounds seeking to impugn the dismissal of the action in the court below. As indicated, her appeal was dismissed on 25 July

2022; and she now seeks conditional leave to appeal our decision to the Judicial Committee of the Privy Council ("JCPC").

The Application

18. In her Motion for conditional leave, the Intended Appellant asserts that her appeal is "as of right" as the value of the subject matter of the intended appeal exceeds the statutory threshold of Four thousand dollars ($4,000.00) located in section 23 of the Court of Appeal Act, Ch. 52.

19. She further asserts that the Court of Appeal erred and misdirected itself in law and in fact and identifies the following paragraphs of the Court's Judgment where she suggests the alleged errors are to be found. The impugned portions of the Judgment are said to be paragraphs 12, 14, 45, 51, 52, 55, 56, 58, 61, 62, 63, 64 66, 67 and 70.

20. The specific grounds for which conditional leave is sought are set out in the Motion as follows:

> **"1. The Court of Appeal as a matter of law, fact and procedure erred in treating the hearing in the Court below as a trial of the action.**
>
> **2. The Intended Appellant pleaded a later date of knowledge in the Amended Reply. The Court of Appeal erred in finding that the later date of knowledge ought to have been pleaded in the Statement of Claim.**
>
> **3. Issues of fact ought properly to be resolved at trial and not in chambers. The Court of Appeal ought to have found that the issue as to the identity of the proper Defendant was a matter for trial, requiring a review of the Transfer Agreement and cross examination.**
>
> **4. Whether a party is to be fixed with knowledge within the definition of the section 10 of the Limitation Act turns on the injury which is the subject of the Plaintiff's claim. The Court of Appeal ruling fails to mention an injury or the relevant injury in the claim which fixed the Intended Appellant's knowledge for limitation purposes.**
>
> **5. The action in the Court below was fixed for trial on several occasions prior to the second application to strike. The Intended Respondent ought to have raised limitation on the first application to strike. *Res judicata* applies. Having failed to raise**

limitation at the outset, and having defended on the merits, the principle of waiver applies. The Court of Appeal ought to have sent the matter back for trial.

6. Non delegation of duties prevents the Intended Respondent from transferring its obligations to provide a safe working environment for its employees.

7. The doctrine of privity of contract excludes enforcement by the Intended Appellant of an agreement to which she was not a party. The Intended Appellant had no standing in law to enforce the terms of the Transfer agreement.

8. The action in the court below proceeded before one judge. The Court of Appeal erred in finding that Affidavit evidence was required to prove that the Intended Respondent had failed, on the second application to strike, to produce any new evidence to justify a second strike out application.

9. Before the judge below, and on the hearing of the first strike out application, the Intended Appellant accepted that having read the Transfer Agreement, the issue of which of the two parties is responsible for the area where the injury occurred, ought to be proved by the Intended Respondent at trial. The Court of appeal erred in finding that the joint and several allegations pleaded in the Writ of Summons fixes knowledge in the face of the defence denying liability.

10. The Court of Appeal erred in awarding the Intended Respondent all of its costs when it was the Intended Respondent who without reasonable explanation delayed the amendment of its pleading to plead limitation."

21. We turn now to examine the parties' submissions for and against the application for conditional leave.

The Submissions

22. Counsel for the Intended Appellant, Ms. Travette Pyfrom, submitted that the value of the claim on the appeal exceeded the amount of $4,000.00 and accordingly, the application qualifies under section 23 of the Act as an appeal "as of right".

23. Ms. Pyfrom further says that the proposed appeal raises issues of law which in her view require clarification by the Privy Council specifically, the issue as to when time began to run on the Intended Appellant's claim. She cites the English Supreme Court decision of **Ministry of Defence v. AB & Others,** [2012] UKSC 9, where she notes that the Supreme Court was divided on the question whether it was possible for time not to begin to run against claimants who at the date of filing their claim, lacked knowledge of who was responsible for their injuries.

24. While acknowledging that the case shows that the majority of the Supreme Court considered the *minority* view to be a legal impossibility on two bases, Ms. Pyfrom nonetheless relies on the *minority* view which had expressed the opinion that: (i) that it is indeed possible for a claimant, when issuing a claim, to lack the requisite knowledge of attributability for an injury and if so, time will not have begun to run against him; and that (ii) irrespective of whether the subsequent acquisition of the information then led a claimant to acquire the requisite knowledge, the claimant lacked such knowledge when the claim was issued, with the result that the claimant could not be time-barred.

25. Ms. Pyfrom says that in the present case, the Intended Appellant had specifically pleaded that it was the Respondent who was responsible for her injuries, but that the Respondent had in its Defence denied liability and asserted that she had sued the wrong party. She says that the question of who is responsible for the Intended Appellant's injuries was never resolved since the issue was disposed of in chambers on an interlocutory application to strike-out. She relies on the case of **Nash & Others v. Eli Lilly & Co,** [1993] 1 WLR 782 and submits that issues of fact such as disputes involving the identity of the defendant or whether the Respondent was a proper party should not have been determined in chambers on a strike-out application, but ought to have gone to trial.

26. Ms. Pyfrom suggests that there is no direct authority from the Privy Council regarding the situation where a defendant pleads that the claimant lacked knowledge at the date of the filing of the claim but, the Court has for other reasons found knowledge proved. Citing the case of **Johnson v. Gore Wood & Co,** [2002] 2 AC 1. Ms. Pyfrom further suggests that the law on waiver in reference to the defence of limitation is not well settled, noting that in the case, the Court had refrained from closely examining the circumstances in which the principle would apply. She suggests that this is an issue that requires clarification from the Privy Council. She contends in the alternative that if the principle is well settled, the Court of Appeal was wrong to disapply it on the facts of the present case. In short, the Intended Appellant claims that the law in The Bahamas in cases where the defendant alleges that it is not the proper party to an action and the claimant pleads lack of knowledge for limitation purposes is unsettled and requires clarification.

27. Counsel for the Respondent, Mrs. Lakeisha Hanna submits that the Intended Appellant has not met the statutory threshold for an 'as of right' appeal because the claim is a personal injury claim involving a claim for unliquidated damages in which damages must be assessed.

28. Mrs. Hanna relies on decision of this Court (differently constituted) in **Paul F. Major v FirstCaribbean International Bank** SCCivApp 77 of 2021 which followed the Privy Council decision of **Zuliani and others v. Viera** [1994] 2 LRC 705. Writing the Court's decision in **Major**, Evans JA explained:

> **"25. The force of Mr. Bethell's submissions on this point is readily evident. A close reading of *Zuliani* is in my view instructive. Lord Nolan speaks of three (3) separate situations. Firstly, the automatic right of appeal should arise only where the matter in dispute is of the value of (or in excess of) the statutory threshold and is a precise figure. In that situation Lord Nolan says the Legislature has chosen not to include an award of unliquidated damages and this provision he says should be strictly construed. Secondly, Lord Nolan refers to a situation where it can be said as a matter of the utmost probability, or even of virtual certainty, that damages ultimately awarded will be in excess of $EC 5,000 (the statutory threshold). In such a case, Lord Nolan said, the Court of Appeal may very well think it right, as a general rule to grant leave in the exercise of discretion. The third and final situation is where the likely amount of damages is at or above the statutory threshold, but the cases are so lacking in merit that the Court of Appeal in its discretion would refuse leave.**
>
> **26. It is clear that the claim put forward by the Applicant herein is not one of which it can be said that the value of his claim relates to the precise figure. It requires an assessment by the Court as to the proper sum to be awarded. It follows that he has no automatic right of appeal in the sense envisaged by Lord Nolan. It can be said however, that his claim even at its lowest likely amount meets or exceeds the statutory threshold of Four Thousand Dollars ($4,000). It follows that he has a right which is subject to the exercise of the discretion of this Court. It is the ambit of that discretion which will govern the review of the remaining issues"** [Emphasis added]

29. Mrs. Hanna relies on **Zuliani** and urges us to follow this Court's decision in **Major**. She contends that the value of the claim in this appeal has yet to be assessed by the Court and is not a definite or precise figure. In the circumstances, she says, the Intended Appellant has no appeal "as of right".

30. Mrs. Hanna submits as the appeal is not as of right, but one which requires the exercise of the Court's discretion; this is not a case in which our discretion should be exercised as the proposed appeal discloses no issues of law of general public importance, nor issues of law requiring clarification by the Privy Council. Further, the intended appeal is an abuse of process as the issues which Mrs. Hanna identifies as requiring clarification were not identified as grounds of appeal when the appeal was heard.

31. In a nutshell, Mrs. Hanna's contention is that grounds 1-5 and 8-10 of the Applicant's proposed grounds of appeal raise "issues of fact" and not law. Issues of fact do not require clarification from the Privy Council, nor raise points of law of general public importance. Furthermore, grounds 6 and 7 were not argued before the Court of Appeal and ought not be brought before the Privy Council for the first time.

Discussion

32. *Is this an appeal "as of right"?* We have considered the respective submissions and based on the authorities of **Zuliani** and **Major** we are satisfied that the appeal is not an "as of right" appeal within section 23 of the Act since the amount sought to be recovered or the value of the Intended Appellant's claim was an unspecified claim for "damages for personal injuries." In short, the proposed appeal from the judgment of this Court is an appeal from the Supreme Court in a civil action in which the Intended Appellant made a claim for unliquidated damages yet to be assessed.

33. In **Zuliani**, the Privy Council suggests that the provision should be strictly construed. Writing the Board's decision, Lord Nolan explained:

> **"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." [Emphasis added]**

34. We are satisfied that the Intended Appellant has failed to meet the statutory threshold for leave to appeal to the Privy Council "as of right". That said, we are satisfied that the value of her claim, even at its lowest, will in all likelihood meet or exceed the statutory threshold of Four Thousand Dollars ($4,000.00). Based on the Board's guidance in **Zuliani**, this means that she has an appeal which though not "as of right", is *subject to* the exercise of the Court's discretion.

In these circumstances, we must now exercise our discretion under section 23(1) of the Act and determine whether or not leave to appeal to the Privy Council should be granted.

35. *Should leave be granted?* We have considered Ms. Pyfrom's submission that the Intended Appellant should be granted leave to proceed with her intended appeal to the Privy Council on the issue of time limitation in this case which, she claims, raises a point of general public importance. Relying, as she said, on the *minority opinion* in the **Ministry of Defence** case, Ms. Pyfrom says the Intended Appellant's lack of knowledge of the identity of the proper defendant when filing her statement of claim affected when time began to run under the Limitation Act. She complains that the dispute which arose on the pleadings and raises issues of fact about the identity of the claimant ought to have gone to trial and ought not to have been the subject of an interlocutory hearing in Chambers. She suggested that in its judgment, the Court of Appeal did not give full consideration to the matter which raises a point of law of general public importance and which now requires clarification by this country's final appellate Court.

36. We have given due consideration to the parties' submissions for and against the grant of conditional leave and are satisfied that this is not an appropriate case in which our discretion to grant such leave should be exercised.

37. Having examined the proposed grounds of appeal, we agree with counsel for the Respondent, Mrs. Hanna, that grounds 1-5 and 8-10 of the proposed grounds of appeal do not raise arguable points of law of general public importance or issues requiring clarification by the Privy Council at this time. For a discussion on what is meant by the expression "general public importance" see paras [41] and [42] of this Court's decision in **Paul F. Major v. FirstCaribbean International Bank** *(above)* in which the authorities of **Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone** [2013] Civil Application No. 4 of 2012 and **Fund Haven Ltd and anor v. Executive Director of the Securities Commission of The Bahamas** [2021] WLR 4223 were considered.

38. We are satisfied that Ms. Pyfrom's submissions in relation to the limitation grounds lack substance as they are deliberately constructed on what is the *minority opinion* in the **Ministry of Defence** case on which she relies. As we understand it, the law as it stands in relation to this issue is as declared by the majority decision of the United Kingdom Supreme Court. Accordingly, Ms. Pyfrom's attempt to raise arguable grounds of appeal on the limitation grounds based on the minority opinion appears to be an abuse of process which cannot be condoned.

39. Ms. Pyfrom further complains that in its written decision the Court of Appeal dedicated a mere two paragraphs to the limitation point and failed to give the issue full enough consideration as in her view it should have done. This is obviously not correct.

40. As our written Judgment will reveal, the limitation issue as framed and argued before us, was fully considered within the context of the specific grounds of appeal which were then before the Court. It now seems that the Intended Appellant wishes to raise new limitation arguments (based on the *minority* view in **Ministry of Defence)** which were not argued before us when the appeal was heard. This is simply impermissible. Having considered the matter, we do not believe that the proposed appeal raises any arguable point of law of general public importance or raises a matter of law requiring clarification by the Judicial Committee of the Privy Council at this time.

41. We are also satisfied that the law governing the *res judicata* issue raised in proposed ground 5 is well established and that the ground raises no arguable point of law of general public importance and further, requires no clarification by the Board.

42. So too is the proposed costs issue raised in intended ground 10. As the successful litigant on the appeal, the usual rule is that costs shall follow the event unless it appears to the Court in the exercise of its discretion that in the circumstances of the case some other order should be made as to the whole or any part of the costs. As is well known, an award of costs involves an exercise of the Court's discretion. In our view, the challenge to the costs order in intended ground 10 does not raise an arguable point of law of general public importance nor raise any point of law requiring clarification by the Privy Council.

43. In our view, none of the Intended Appellant's proposed grounds raise arguable points of law or have any bearing on the public interest transcending the narrow circumstances of the litigants in this case. Nor does the appeal raise points of law requiring clarification by the Board. In short, this is not a proper case to grant conditional leave to appeal to the Privy Council and the application should be refused.

Disposition and Order

44. For all the above reasons, the application for conditional leave is dismissed. The Intended Appellant shall pay the Respondent's costs of the application to be taxed, if not agreed.

The Hon. Madam Justice Crane-Scott, JA

The Hon. Mr. Justice Isaacs, JA

The Hon. Mr. Justice Evans, JA