

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 86 of 2022

B E T W E E N

RUBIS BAHAMAS LIMITED

Applicant/ Appellant

AND

LILLIAN ANTOINETTE RUSSELL

Respondent

BEFORE: **The Hon Sir Michael Barnett, President**
The Hon Madam Justice Crane-Scott, JA
The Hon Mr. Justice Evans, JA

APPEARANCES: **Mr. Audley Hanna, with Mr. Keith Major, Counsel for the Applicant/**
Appellant

Mrs. Krystal Rolle, KC, Counsel for the Respondent

DATE: **29 January, 2024; 27 February, 2024**

Civil Appeal- Supreme Court Appeal- Application for Conditional Leave to Appeal- Leave as of right- Court of Appeal Rules- Section 23 Court of Appeal Act- Discretion to Grant Leave to the Privy Council-- General Public Importance- Stay of Proceedings

The Respondent brought an action against the Applicant for negligence, trespass, and nuisance for damages to her property, as a result of two separate oil leaks that occurred in 1994 and around 2012/2013. Thompson J. awarded the Respondent damages in the amount of \$625, 825.14. The Applicant appealed the decision of the trial judge and on 19 October, 2023, the Court set aside the judgment in the sum of \$625,825.14, and it was substituted with an award of \$159,450.00. On 9 November, 2023, the Applicant filed a Notice of Motion for Leave to Appeal to the Judicial Committee of the Privy Council and Stay of Proceedings to appeal the decision of this Court.

Held: Application for Conditional Leave to appeal is dismissed. The Applicant shall pay the costs of the application, to be taxed if not agreed.

The Court has determined that the Applicant in this matter is not entitled to leave “as of right”. The Applicant can only be granted leave at the Court’s discretion. The onus is on the Applicant to identify the points of law of general public importance, and the Applicant has failed to do so. It is incumbent on the Applicant to provide the point of law of public importance, as it is not the responsibility of the Court to identify them on behalf of the Applicant. The Court is not satisfied that there are any points of law of public importance in which they can refer to the Privy Council for an Appeal from the decision of this Court.

With the dismissal of the Conditional Leave, the issue of a Stay of Proceedings no longer arises.

Lucretia Rolle v Airport Authority SCCiv App No 119 of 2021 applied
Callendars & Co. (a firm) The Comptroller of H.M. Customs SCCivApp. No. 63 of 2012 considered
Paul F Major and First Caribbean International Bank SCCivApp No. 77 of 2021 considered
Renaissance Ventures Ltd. v Comodo Holdings [2018] ECSC J1008-3 considered
Fund Haven Ltd. v. Executive Director of the Securities Commission of The Bahamas [2021]
UKPC 11 considered

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

INTRODUCTION

1. This is an application by Rubis Bahamas Limited (“Rubis”) for conditional leave to appeal to the Privy Council the judgment of this court delivered on the 19 October 2023.

2. By that judgment this Court allowed, in part, Rubis' appeal against the judgment of Thompson J in favour of Lillian Russell ("Russell"). In the judgment of Thompson J he awarded \$625,825.14 to Russell as damages a result of two oil leaks emanating from property owned by Rubis which affected Ms. Russell's neighbouring property. On Rubis' appeal this Court reduced the award from \$625,825.14 to \$159,450. Rubis remains dissatisfied and wishes to appeal the judgment to the Privy Council. The application raises two issues. Firstly, whether the appeal is as of right and secondly, if not, does the proposed appeal raise an issue of general public importance which the apex court should consider.

BACKGROUND

3. There were two spills from a gas station located at Robinson and Old Trail Road. They occurred in 1994 and in or about 2012/2013. The station is adjacent to two housing subdivisions called Marathon and Highbury Park, where Russell lived since 1979. The gas station was originally owned by Texaco Bahamas Limited ("Texaco") and was owned by Texaco in 1994 when the first leak occurred. In 2012, Rubis acquired the assets of Texaco, which included the gas station. Rubis then leased the property to Fiorente Management and Investment Limited ("Fiorente"). Under that lease agreement the equipment to store, handle and dispense motor fuels motor oil, kerosene and any other petroleum products or derivative including pumps, tanks, containers or receptacles belonged to Rubis and could only be maintained by Rubis. Russell claims that this 2012/2013 leak also impacted her property. There was no dispute as to the fact of that leak but it was disputed what impact that leak had on Russell's property.
4. In March 2015 Russell instituted an action against Rubis claiming damages in the torts of negligence, nuisance, trespass and Rylands & Fletcher for the damage to her property.
5. The trial judge awarded damages for both leaks which included the costs of remediation and loss of amenity value.
6. On appeal, this Court reduced the amount awarded by the trial judge. It held that any claim for damages in tort caused by the 1994 leak was barred by section 5 of the Limitation Act and reduced the amount of damages to the diminution in value of Russell's property caused by the 2012/2013 leak. It also reduced the amount for loss of amenity value.
7. Rubis wishes to appeal the decision to the Privy Council. Russell does not seek to appeal the decision.
8. Rubis claims that it can appeal the judgment as of right. In its Notice of Motion it says:

“... that the Appellant herein intends to seek leave to appeal that portion of the COA Judgment that denied the Notice of Appeal, in part, as of right to the Privy Council in accordance with the

provisions of the Court of Appeal Act, 1965 (the “Act”) and the Order on the following bases:

1. The COA Judgment is one from which an appeal to the Privy Council lies as of right within the meaning of Section 23 (1) of the Act, as the amount sought to be recovered and/or in dispute, is upward of the prescribed value of Four Thousand Dollars (\$4,000.00).

2. Further or alternatively, that the COA Judgment is one that ought rightly to be submitted to the Privy Council by reason of the following matters:

a. Having regard to the evidence, and the further matters referred to in the Grounds of Appeal below, this Honourable Court erred in its decision not to allow the Appeal in full, and in its decision to award any sum to the Respondent in the place of the award provided for by the SC Judgment which was rightly set aside by this Honourable Court of Appeal thereby having the effect of only allowing the appeal, in part; and

b. Given the environmental and widely reported nature of the incidents which underlie the dispute between the parties which has resulted in not only this litigation but also other litigation which remain to yet be resolved, the intended appeal raises issues of constitutional, statutory, and/or public importance.”
[Emphasis Added]

Is the appeal “as of right”?

9. Section 23 of the Court of Appeal Act provides:

“23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.”
[Emphasis Added]

10. That section provides three routes to an appeal to the Privy Council from a judgment of the Court of Appeal. Firstly, an appeal as of right exists where the appeal is from a civil action in the Supreme Court in which the amount sought to be recovered by any party is of the

amount of \$4,000 or upwards. Secondly, an appeal as of right also exists where the appeal is from a civil action in the Supreme Court where the value of the property in dispute is of the amount of \$4,000 or upwards. Thirdly, an appeal, not as of right but as a matter of discretion, exists where the appeal is from an action in the Supreme Court in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial Sides of the Supreme Court.

11. In this case, the action in the Supreme Court sought damages in tort. Although it particularized special damages in excess of \$4,000.00 it was still a claim for unliquidated damages as any claim in tort must be. It was not a claim in contract seeking a specified sum under some contractual right. In **Lucretia Rolle v Airport Authority** SCCivApp. No. 119 of 2021 this Court said:

“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.”

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.”

12. We are satisfied that this is a claim for unliquidated damages in tort and it is not an appeal “as of right”. It is not a claim for a liquidated sum to be recovered in excess of \$4,000. It

is not a dispute about property. Rubis concedes that as it simply says “**the amount sought to be recovered and/or in dispute, is upward of the prescribed value**”. They do not assert that the claim is about any property in dispute. They only refer to the amount sought to be recovered.

If the appeal is not “as of right”, should the Court’s section 23(1) discretion be exercised?

13. The issue is whether this Court should exercise its discretion under the third route to grant the application for conditional leave.
14. It is settled law that in the exercise of our discretion, leave should not be granted to appeal to the Privy Council unless it can be demonstrated that there is an arguable case to succeed on appeal and that the appeal involves a point of general or public legal importance.
15. The point was made by Conteh JA in **Callenders & Co (a firm) v The Comptroller of H. M. Customs** SCCivApp. No. 63 of 2012, where he said:

“20. The question therefore is: Does the applicant have an arguable case on the intended appeal, and does it raise an important issue of general and public importance on which the Privy Council ought to pronounce?”

16. The Court of Appeal of the British Virgin Islands in **Renaissance Ventures Ltd v Comodo Holdings** [2018] ECSC J1008-3 (decided on 8 October 2018) said:

“Where there is no dispute on the applicable principles of law underlying the question which the appellant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellant court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek guidance of their Lordships’ Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that

reason alone be a question of great general or public importance. [Emphasis Added]

There are many cases where this Court has reaffirmed this position. **Lucretia Rolle v Airport Authority** is but a recent example.

17. We have reviewed the Motion seeking conditional leave and the grounds of appeal set out in the Motion as well as the grounds of appeal on the appeal to this Court. We are not satisfied that the proposed appeal involves any issue of law much less an issue of law of general and public importance. The proposed appeal does not seek to challenge the finding in Rubis' favour that claims under the 1994 leak are statute barred. Whether Rubis or its lessee Fiorente was responsible for the 2012/2013 leak involves a construction of that lease agreement and raises no issue of law of public importance. Whether the 2012/2013 leak caused damage to Ms. Russell's property is an attempt to challenge concurrent findings of fact by both the trial judge and this Court. It is not an issue of law of general or public importance.
18. It is not without significance that the affidavit of Denise Newton sworn on the 9 November 2023 in support of the application for leave does not identify any point of law of public importance which the applicant suggests should be considered by the Privy Council. She simply says:

“Numerous findings (more particularly described in the Notice of Appeal filed herein on 13" June 2022 (the “Notice of Appeal”) were made by the Learned Justice. The Notice of Appeal sought, inter alia, to have the entirety of the SC Judgment set aside.

Upon the hearing and determination of the Notice of Appeal of the SC Judgment herein (the “Appeal”), on 19" October 2023, this Honourable Court of Appeal delivered the COA Judgment whereby it was adjudged inter alia that the Appeal be allowed, in part and a later date fixed to receive arguments in relation to the issue of costs. Both parties laid over and exchanged their written submissions on costs on 2" November 2023, the issue of costs remains extant at the time of the making of these applications.

Having reviewed the COA Judgment, the Appellant has determined to seek conditional leave to appeal the COA Judgment as of right to the Privy Council; and to apply for a stay of the instant proceedings pending the outcome of the aforesaid appeal.”

19. There is no mention of any point of law of general public importance. It may well be that this is because the applicant takes the position that it has an appeal as of right under section 23 of the Court of Appeal Act. In the case of **Paul F Major and First Caribbean International Bank** SCCivApp. No. 77 of 2021, this Court determined that the Applicant did not successfully identify any points of law of general public importance, and as such, this Court was unable to exercise its discretion to grant leave. In delivering his judgment Evans, JA intimated at paragraph 47 and 48:

“47. There is no denying that the Court on previous occasions has proceeded to exercise its discretion after having found that no appeal “as of right” existed. This however, ought not to be taken as forming some immovable practice. It ought to have occurred to Mrs. Rolle that with the number of grounds on which the Applicant sought to rely it would have been helpful to her case and to the Court to identify the point of law emanating from those grounds which she deemed to be of general public importance. It may be that if she were less adamant that she was right in taking the position that the Applicant had an appeal “as of right” she would have taken the precaution of setting out the alternative claim.

48. In her oral submissions Mrs. Rolle sought to rectify matters by identifying three core issues which she says are reflective of the grounds and which show that the proposed appeal has good prospects of success and is not abusive in any regard. It is noted again that the issue as to whether these raised points of law of general public importance was not a major consideration.”

He went on to say in paragraphs 67, 68 and 69:

“67. In the circumstances, as we have found that the Applicant does not have an appeal “as of right”, whether we grant leave is contingent upon the exercise of our discretion. We do not think that it is our responsibility to sift through the proposed grounds to find points of law of general public importance. The Applicant bears the responsibility on the application of identifying those points for our consideration. Mrs. Rolle has steadfastly clung to her position that in a case such as this, the role of this Court, save for the exercise of the inherent jurisdiction to avoid its process being abused, is limited to merely ensuring that the procedural pre-conditions as set out in Rules governing such appeals are observed.

68. In the final analysis, as submitted by Mr. Bethell, the Applicant has not sought to move this court in his Notice of

Motion application for the Court to exercise its general discretion on the basis that this matter involved some general point of public importance. Neither has the supporting affidavit of Mr. Wallace Rolle condescended to provide a basis for this Court to exercise its discretion.

69. We have given Mrs. Rolle the courtesy of listening to her oral submissions wherein she, to a limited extent, provided some details as to the points of law to be gleaned from the three ‘core issues’ she articulated. However, in the end, we are not satisfied that this is a matter in which we can say that the Application has identified points of law of general public importance which are fit to be referred to her Majesty in Council.”

20. Further, as the Privy Council said in *FundHaven Ltd v Executive Director of the Securities Commission of The Bahamas* [2021] UKPC 11:

“40 It is the view of the Board that a certificate purportedly issued under section 21(1) must identify and state what the point or points of law of general public importance are. The process of certification enables the point of law to be identified without the need for further inquiry.”

21. Although said in relation to a certification by a judge under section 21 of the Court of Appeal Act, in our view it is also applicable when an applicant asks this Court to exercise its discretion to grant leave to the Privy Council where the appeal is not “as of right”. The applicant must identify the points of law of general public importance which it asserts should be considered by the apex court. It has not done so.

22. We note that in the Notice of Motion for leave to appeal to the Privy Council Rubis refers to “Given the environmental and widely reported nature of the incidents which underlie the dispute between the parties which has resulted in not only this litigation but also other litigation which remain to yet be resolved, the intended appeal raises issues of constitutional, statutory, and/or public importance.” But again, there is nothing in the Motion which raises a constitutional issue. It is certainly not an action under Article 29 of The Constitution. There is no claim under any statute. The claims have all been brought in the common law torts. This a reference to public importance, but we apprehend that is simply a reference to the importance having these public disputes resolved quickly.

23. In our view this proposed appeal does not involve any point of law of general public importance.

24. In the circumstances, we refuse the application for conditional leave. As we refuse the application for conditional leave, the issue of a stay does not arise. The Applicant shall pay the costs of the application, to be taxed if not agreed.

The Honourable Sir. Michael Barnett, P

The Honourable Madam Justice Crane- Scott, JA

The Honourable Mr. Justice Evans, JA