COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 130 of 2020

B E T W E E N

FREEPORT CONTAINER PORT
Applicant / Intended Appellant

AND

JERMAINE CAMPBELL
Intended Respondent

BEORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Metta McMillan-Hughes with Mr. McFalloughn Bowleg, Counsel for the Applicant / Intended Appellant**

Mr. Wayne Munroe, QC with Mr. Brian Hanna, Counsel for the Intended Respondent

DATES: **27 July 2021; 5 October 2021**

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Civil appeal – Application for conditional leave to appeal to the Privy Council –Appeal to the Privy Council as of right – Appeal to the Privy Council in any other proceedings - Section 23 of the Court of Appeal Act - Sections 3 & 4 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964

On 30 March 2021 the Court dismissed the intended appellant's appeal and ordered it to pay the intended respondent's costs, to be taxed if not agreed. The intended appellant now seeks conditional leave to appeal the Court's decision to the Privy Council pursuant to section 23 of the Court of Appeal Act and sections 3 and 4 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964.

Held: application for leave dismissed. Costs to the intended respondent, to be taxed if not agreed.

per Evans, JA: Conditional leave to appeal to the Privy Council may be granted as of right where, inter alia, "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" or may require the leave of the Court in any

other proceedings. The application in this case is not made as of right as it does not meet the financial threshold and, therefore, requires the leave of the Court. As the proposed appeal does not raise an arguable issue, as it does not raise a point of public importance and as there is no area of law which requires clarification by the Privy Council the application for leave is dismissed.

AWH Fund Limited (In Compulsory Liquidation) v. ZCM Asset Holding Company (Bermuda) Limited [2014] 2 BHS J. No. 53 considered
Levine v. Barnett and others [2013] 1 BHS J. No. 137 considered
Lockhart and another v. Mitsui Sumitomo Insurance (London Management) Ltd and others SCCivApp. & CAIS Nos. 110 and 114 of 2010 considered
Philomen Dean v Chanka Bhim [2019] UKPC 10 considered
Standard Chartered Bank (Switzerland) SA v. UBS (Bahamas) Ltd. [2014] 1 BHS J. No. 81 considered
Strathmore Group Ltd v Fraser [1992] 3 NZLR 385 considered

per Barnett, P: The proposed appeal raises no point of public importance that needs to be considered by the Privy Council. Further, the intended appeal does not raise an arguable point of law as the law is not in dispute.

Butters and another v Hayes [2021] EWCA Civ 252 considered
Renaissance Ventures Ltd. v Comodo Holdings [2018] ECSC J1008-3 applied
Responsible Development for Abaco (RDA) Ltd. v The Rt. Hon. Perry Chistie et. al. SCCivApp. No. 248 of 2017 mentioned

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Evans, JA:

1. This is an application by the intended appellant pursuant to section 23 of the Court of Appeal Act and sections 3 and 4 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964 for leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal dated 30 March 2021 whereby it was adjudged that:

> **1. The intended appellant's appeal be dismissed**
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> **2. The intended appellant shall pay to the intended respondent its costs of the appeal, such costs to be taxed if not agreed.**

2. Sections 3 and 4 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964 are in the following terms:

"Application for leave to appeal

3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

Conditional leave to appeal

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only—

(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding one thousand pounds sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

3. Section 23 of the Court of Appeal Act provides as follows:

"Appeals to the Privy Council.

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.

(2) Save as is provided in this section the decision of the court in any civil proceedings brought before it on appeal shall be final.

(3) Nothing in this section contained shall be deemed to restrict or derogate from the right of Her Majesty in Council in any case to grant special leave to appeal from the decision of the court in any cause or matter."

4. The Notice of Motion which was filed on 20 April 2021 set out the proposed grounds of appeal as follows:

"1. The learned Court of Appeal erred in law and fact in failing, during its deliberations, and its reliance on the reasoning of various English authorities (which had not been raised before them) to give due weight to, and/or to pay sufficient regard to, the differences in the facts of those cases; the differences between the Rules of the Supreme Court of the Bahamas and the English Civil Procedure Rules; and/or the superior weight to be given to the Bahamian RSC O 1 r 8 insofar as such Rules of Court govern the practice and procedure in the Supreme Court unlike the Fee Orders made in England which, not being made by the Civil Procedure Rules Committee, are not Rules of Court and cannot be described as regulating the practice and procedure of the Court.

2. The learned Court of Appeal erred in law and failed to observe the rule of natural justice expressed in the maxim "audi alteram partem" by failing to allow the Intended Appellant an opportunity to address and to respond to the authorities independently researched and ultimately relied upon in its Judgment and, to the extent that the learned Court was of the view that something that did not form a part of either parties' case was material, the learned Court should have taken care to bring such authorities to the attention of the parties at the earliest possible stage, which the learned Court of Appeal failed to do.

3. The learned Court of Appeal erred in law and fact in failing to pay sufficient or any regard to the mandatory prescription of RSC O. 1 r 8 setting forth the fees of the Court to be payable at the commencement of any cause, matter or proceeding brought under the divisions of the Court and the recognised procedure for the issuance of a Writ as expressed by the learned Judge at paragraph 17 of her Judgment and unchallenged by the Intended Respondent.

4. The learned Court of Appeal erred in law and in fact in its failure to give due or any weight to the unrefuted evidence of the officers of the Registry of the Supreme Court and relied upon by the Intended Appellant as to the actual procedure and requirements for filing a Writ of Summons and as to the procedure for the issue of the Writ following the completion of that filing process (which evidence was addressed in the submissions of the Intended Appellant lodged on 19 March, 2021 and in reply on 25 March, 2021 by reference to the transcript of the proceedings) and at paragraph 36 of its Judgment misconstrued and/or mischaracterised the evidence of the Registry officers who, contrary to the view expressed in the Judgment, did not state that:

> **(i) it was "a normal occurrence for receipts to be written up the next day after filing" rather the evidence was that persons seeking to file had presented with an incorrect amount and had had to return with correct payment and the reason for a receipt being written up the next day was because the correct payment was not presented until the next day, similarly the evidence of the filing process was that it did not complete until after the receipt was taken by the party filing to the Registry officer who would write the number of the receipt into the filing stamp and then give the receipt back to the party filing; nor did they state that**
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> **(ii) there was "confusion as to when and where receipts were to be issued". The clear unrefuted evidence was that receipts were written up at the time of payment of the correct payment and that, in order to complete the filing process, the party seeking to file their Writ had to return with it and**

the original receipt to the registry clerk who would enter the receipt number in the filing stamp on the face of the Writ.

5. The Court of Appeal erred in law and fact and consequently misdirected itself when it stated at paragraph 20 of its judgment that "There is no dispute that the Writ was sealed by an officer of the Registry on 6 May 2015 when the Intended Appellant's position, supported by the evidence, was that the Writ was not sealed and issued until after the Court filing fee was paid on 7 May, 2015 and the Receipt entered into the face of the file stamp whereupon it would be sent to the "Writer" who would write it up and would be guided by the date of the filing stamp when entering the date of issue.

6. The learned Court of Appeal erred in law and fact by failing to find that the Intended Respondent had to establish, on the balance of probabilities, that he had done all that was required of him to bring his action by a date that would prevent his action being statute barred. The Intended Respondent had presented no such evidence.

7. The learned Court of Appeal erred in law and fact in holding at paragraph 21 of its Judgment that "The payment of filing fees is not a prerequisite for the effectiveness of a Writ which has been sealed by an officer of the Registry" since the effect of RSC O 1 r 8 makes mandatory the payment of a Court fee in order to commence any action, and the unrefuted evidence was that the filing fee was required to have been paid and the receipt number written into the filing stamp before the Writ would be issued and sealed.

8. The learned Court of Appeal erred in law and fact in holding at paragraph 23 of its Judgment that "#he payment of necessary fees is a matter between the Registry and the Treasurer" and/or that "once the officer of the Registry seals the Writ it has been effectively issued whether or not the fees are actually paid" and paid little or no regard to the mandatory requirement pursuant to RSC O 1 8 as to payment of the stipulated fee in order to commence an action in the Supreme Court and/or the unrefuted evidence of the procedure in the Registry of the Supreme Court, namely that that the Writ would not be issued and sealed until after the party filing had

presented his receipt and its number had been written into the filing stamp.

9. The learned Court of Appeal erred in fact and in law by failing to find that the evidence presented on behalf of the Intended Appellant, namely that the filing fee had not been paid by the Respondent/Plaintiff until the 7 May, 2015 and thus that the Writ had not been filed until 7 May, 2015, rebutted the presumption raised by the file stamp of 6 May, 2015 that it had been filed on the 6 May, 2015 and/or that it had been issued and sealed on the 6 May, 2015.

10. The learned Court of Appeal erred in fact and in law by failing to find that no evidence had been tendered by the Intended Respondent to rebut the presumption from all the evidence presented by the Intended Appellant that the original receipt issued to the Intended Respondent on 7 May 2015 for payment of the Court filing fee had been duly issued on the same date that payment of the filing fee was made, that consequently the Writ had not been filed until the 7 May, 2015, thus the action had not been commenced until 7 May, 2015 and that consequently, and in fact, the Writ would not have been and was not sealed and issued until 7 May, 2015 notwithstanding, for the reason explained in the evidence, the date of 6 May, 2015 having been entered.

11. The learned Court of Appeal erred in law and in fact in dismissing the approach adopted in Hortenberry v Palmer 992 NE 2d (Ind. App. 2013) on the basis that the Court was "considering a specific rule under Indiana law" when its terms were akin to RSC O.1 r 8 and in failing to acknowledge that the Supreme Court in Boostrom v Bach 622 N.E. 2d 174(Ind. 1993)cert. denied (1994) had also held that an action was not commenced until the filing fee was paid, which in both cases the Court had noted it was, as in the instant case, wholly within the Plaintiff's hands to pay within the limitation period.

12. The learned Court of Appeal erred in law and fact in that it failed to give sufficient weight to the grounds of Appeal set out in the Intended Appellant's Notice of Appeal filed 2 November, 2020, the evidence relied upon by the Intended Appellant and the fact of the lack of any evidence presented by the Intended Respondent to rebut

that evidence and the conclusions to be drawn therefrom."

5. The intended appellant filed two affidavits in support of its application but of most relevance was the affidavit of Valdere J Murphy filed on 20 April 2021. In that affidavit Mr. Murphy stated as follows:

> **"4. This Judgment against which the Appellant seeks leave to appeal is in respect of a Judgment given in interlocutory proceedings and I verily believe, based on the grounds of Appeal, that the Appellant has a good arguable case and/or a real prospect of success and that the matter is one which the Privy Council has yet to pronounce authoritatively.**
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> **5. The matter to be determined pertains to the criteria for commencing an action in the Supreme Court and for determining when it will be deemed to have been 'brought' for the purposes of the Limitation Act, Chapter 83 in the context of the law and various factual matters relative to the payment of the Court fees. These are legal issues which have not been authoritatively determined under the Bahamian Rules and Legislation and which in this case could, if decided in the Appellant's favour, be dispositive of the entire action against it. It is the Appellant's case that the filing fee, payable at the commencement of the action, was not actually paid until the day after the expiry of the Limitation Period, and thus the action was not brought or commenced within the limitation period and should therefore be struck out. It appears from the Judgment that I have read, that this is also a matter of interest for the Treasury given the view expressed in the Judgment that the failure to pay the court fees to commence the action does not affect the validity of the Writ if it is nevertheless issued without the payment of those fees or any part of those fees.**
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> **6. In accordance with section 23 of the Court of Appeal Act, I hereby confirm that the amount sought to be recovered by the Respondent from the Appellant exceeds the sum of $4,000. However, the Respondent has not specifically pleaded any special damages in his Statement of Claim filed in the Supreme Court on 8 January 2019".**

6. Appeals to the Privy Council are recognized as falling into two categories i.e. appeals as of right and appeals which require the leave of the Court. Appeals as of right are considered to be those where the value of the property in dispute is of the amount of four thousand dollars or upwards. All other proceedings, save for claims emanating from the Court's Constitutional jurisdiction require the leave of the Court. This point was dealt with by this Court in a number of decisions and significantly in the cases of **Standard Chartered Bank (Switzerland) SA v. UBS (Bahamas) Ltd.** [2014] 1 BHS J. No. 81 and **Levine v. Barnett and others** [2013] 1 BHS J. No. 137.

7. In **Standard Chartered Bank** Allen, P., writing for the Court, observed as follows:

> **"13 We maintain that this matter was not a proper case for a strike-out. In the premises, the parties now have an opportunity to fully put before the Court the facts on which they rely for a determination to be made on those facts. In the event of an appeal, this Court would then have the benefit of the judge's decision after a full airing of the facts and a consideration of the applicable law. Moreover, in the event a further appeal is launched, the JCPC would have the benefit of the decisions and reasoning of both local courts.**
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> **14 This approach is in keeping with the view expressed in Chief Justice of the Cayman Islands (Appellant) v The Governor (Respondent) [2012] UKPC 38 that the JCPC should not be used as a court of "first and last resort". That case, although a special case and not at all similar to this case on its facts, we believe that the view espoused by the JCPC therein is applicable generally and may be applied to the determination of this application.**
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> **15 The Cayman Islands case involved the presentation of a petition directly to the JCPC under section 4 of the Judicial Committee Act 1933 questioning the constitutionality of certain provisions of the Judicial Code of Conduct of the Cayman Islands. The JCPC found that although the jurisdiction existed, that in the absence of special factors, such a petition ought not to be brought where the issues in dispute could be properly determined by the Grand Court of the Cayman Islands.**
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> **16 We find Lord Neuberger's reasoning at paragraphs 33 -- 34 instructive, and reproduce those paragraphs below:**

'[33] Accordingly, the Board concludes that, if an issue relating to the Cayman Islands can properly be determined by the Grand Court, with a right (qualified or not) of appeal to the Court of Appeal and then to the Privy Council, it would be wrong as a matter of principle, in the absence of special factors, for the Judicial Committee to consider that issue under a s 4 petition, and thereby to act as what Lord Pannick described as 'a court of first and last resort'.

[34] There are a number of reasons which justify this conclusion. First, s 4 of the 1833 Act is not intended to provide a mechanism for bringing any issues before the Judicial Committee which a petitioner wants determined by the Committee" it is intended to be limited to issues which cannot be determined through the ordinary judicial process. Secondly, where there is a well-established process for the determination of an issue by the courts, only special circumstances will justify a bypassing of that ordinary process. Thirdly, in a tiered court system the conclusions and reasoning of a higher tier court will be likely to be better than that of a lower tier court because the arguments of the parties tend to become refined and improved as the case progresses up the system and because the judges in a higher tier court benefit from the reasoning of the judge or judges in the lower tier courts. Fourthly, in a case such as this it is normally appropriate that the courts in the territory concerned should express a view before the Privy Council is seised of the case. Fifthly, although it is a point which does not seem to apply in this case, the more senior courts are much less well equipped to receive and deal with oral evidence and fact-finding.'

17 In light of the above, we are of the view that there is no good reason to grant leave at this stage to appeal this decision to JCPC, and refuse the application. Further, we award the costs of the application to Standard Chartered Bank to be taxed if not agreed".

8. In the case of **Levine** Conteh, JA had these comments:

"12 This is an application for leave to appeal to the Privy Council the decision of this Court to dismiss the application by the appellant to have his appeal restored. He had initially appealed against the decision of the learned trial judge on 7th October, 2010, to strike out his action against the respondents for want of prosecution.

…

19 We are satisfied that, in the circumstances, given the interlocutory nature of the proceedings from which the applicant seeks to appeal further, he enjoys no such right of appeal as of right.

20 Clearly, the decision that the applicant seeks to challenge before the Privy Council, is interlocutory in nature: see Salaman v. Warner and others (1891) 1 QB 734 at p.735, per Lord Esher, MR.

21 We find the assertion on behalf of the applicant that he has a right of appeal as of right in the face of the interlocutory nature of this Court's decision, therefore startling.

22 We say startling because, we thought the settled practice and learning on leave to appeal to the Privy Council from this jurisdiction had been determined for quite some time now by this Court in the context of the Constitutional, statutory and Rules of Court provisions relating to appeals to Her Majesty's Privy Council.

23 It (sic) important to remember that the right to appeal is a creature of statute, which may provide when an appeal shall lie and whether as of right or with leave. This point, in our view, is vital, especially in a judicial system with a curial hierarchy such as we have in The Bahamas, with Her Majesty's Privy Council being the final court of appeals.

24 Article 104(2) of the Constitution provides that appeal (sic) shall lie as of right to the Judicial Committee (or such other court as may be prescribed by Parliament under Article 105(3)) from any decision given by this Court in any case from a final decision of the Supreme Court in exercising the enforcement jurisdiction concerning fundamental rights provisions.

25 And in s.23 (1) of the Court of Appeal Act, Parliament has provided for appeals as of right to the Privy Council from decisions of this Court upon appeal from the Supreme Court in civil actions in which the amount sought to be recovered or the value of the property in dispute is of the amount of four thousand dollars or upwards. This section also provides that an appeal shall lie from this Court to the Privy Council, but with the leave of this Court, in any other proceedings.

26 We think that it is also important to remember that even the so-called "appeal as of right" is not without conditions. Indeed, under The Bahamas Islands (Procedure in Appeals to Privy Council) Order, 1964, sections 3 and 4 provide for the application for leave to appeal to the Privy Council and the grant of conditional leave in the first instance by this Court. And, until conditional leave has been granted in the first instance, there is no pending appeal before the Privy Council: see Harbour Cold Stores Ltd. v. Chas E. Ramson Ltd and Others, (1980-84) LRC, 308, at pp 320-322, the judgment of Carberry JA, on an application to appeal to the Privy Council. Furthermore, in The Judicial Committee (Appellate Jurisdiction) Rules Order of 11th February,2009, it is expressly stated in Part 2 in Article 10 that " In cases where permission to appeal is required, no appeal will be heard by the Judicial Committee unless permission to appeal has been granted either by the court below or by the Judicial Committee"

27 Does the instant application concern a decision of this Court that is appeasable (sic) as of right? We respectfully do not think so. The decision which is sought to be appealed to the Privy Council does not fall within Article 104(2) of the Constitution nor for that matter within the financial quantum provided for in the first limb of s.23(1) of this Court's Act. The decision concerns the refusal to restore the applicant's appeal against its striking out for his continuing non-compliance with a simple order to file the record of his appeal. This decision must in our view, fall under any other proceedings within the contemplation of s. 23(1); and therefore requires leave of this Court to be appealed to the Privy Council.

28 In Bre-X Minerals (Trustee of) v Walsh Estate, (2000) BHS J. No.250, after an analysis of the provisions, both constitutional and statutory, relating to appeals to the Privy Council, per George P, articulated some guidelines regarding such appeals, after stating instances in which this Court can be no more than a conduit, limited to moving appeals along, concerned only to ensure that the channels of procedural propriety are respected and stated a propos the present application, "...when appeals arose from interlocutory proceedings, this Court has an effective function to perform as a gate valve on that conduit and the applicants... have the onus of satisfying this Court that they should pass through".

29 In the instant application, apart from the bare assertion that the appeal, or rather proposed appeal, is as of right, there is no attempt, for example, in an accompanying affidavit to his Notice of Motion, why this Court should be satisfied that he should pass through the conduit to the Privy Council.

30 This Court (differently constituted) recently had the opportunity on two occasions, to revisit the question of leave to appeal to the Privy Council as of right or whether alternatively, the appeal is interlocutory in nature and the grant of leave is subject to the discretion of the Court.

31 The first occasion was in Lockhart and others v. Mitsui Sumitomo Insurance (London Management) Ltd and others, BLR /2012/Vol.2, a judgment of this Court delivered on 17th July, 2012, Allen P. examined the relevant constitutional and statutory provisions and relevant judicial authorities to conclude that a judgment of the Supreme Court in inter-pleader proceedings was interlocutory and therefore required leave and was not an appeal as of right.

32 Importantly, Allen P stated at para.18 of her judgment:

> **'18... in accordance with the reasoning in Bre-X Minerals, it is my opinion that the appellants would not be entitled as of right to appeal the order of this Court to the Privy Council as the appeal does not entail a monetary claim or the equivalent thereto as**

required by section 23 of the Court of Appeal Act. Instead, the appeal falls within the description of 'any other proceedings' which section 23 of the Court of Appeal Act clearly states requires the leave of the Court.' (Emphasis added as had been adumbrated above).

33 The second occasion, as recently as 15th January this year, was in Farmer and others v. Security and General Insurance Company Limited (2013) 1 BHS J. No. 13. a judgment of the Court delivered by the learned president.

34 In both Lockhart and others and Farmers and others supra, the decisive factor was the nature of the proceedings from which the appeal was launched and for which a further appeal to the Privy Council was sought; and not the amount of monetary claim at stake. In the first case, it was an appeal against an interpleader order and in the other, it was an appeal against a setting aside of an action in the Supreme Court which was reversed by this Court. In each case, this Court determined that the intended appeal to the Privy Council required leave because of the interlocutory nature of the proceedings involved.

35 Section 23 (1) of the Court of Appeal Act, pursuant to which it is expressly claimed that the application for leave to appeal to the Privy Council is made in this case has already been reproduced above; and as has been stated, the instant application does not relate to any monetary claim of any amount; it simply concerns the refusal by this Court to restore the appellant's appeal which had been struck out for his continuing non-compliance with an order to file the record of his proposed appeal and his failure to show any good or sufficient reason why his appeal should be restored.

36 Clearly, even by the provision on which the appellant relies, s23 (1) of the Court of Appeal Act, he perforce needs and must have leave of this Court.

37 We fail to understand or appreciate why the appellant would, in the circumstances, want to stand pat on his claimed right of appeal as of right".

9. As noted, Mr. Murphy, in his affidavit, asserted that the judgment against which the intended appellant seeks leave to appeal is in respect of a judgment given in interlocutory proceedings. Notwithstanding this averment Ms. MacMillan-Hughes submitted that given the substance of the proceedings before the learned judge the appeal may be from a final judgment rather than from an interlocutory judgment. In support of her submission counsel relied on the case of **Strathmore Group Ltd v Fraser** [1992] 3 NZLR 385.

10. The facts in **Strathmore** were that Strathmore alleged breach of fiduciary duty by the respondent, who contended that a compromise had been reached between the parties and the petitioner had agreed to abandon his claim. The petitioner alleged that there was no valid compromise. The issue was tried as a preliminary issue and was determined in the respondent's favour, but there was also evidence and argument directed to the issue of whether the petitioner had abandoned his claim, which was initially determined in the petitioner's favour but later reversed by the Court of Appeal. The petitioner sought leave to appeal to the Privy Council, but the Court of Appeal rejected his application on the ground that the judgment was interlocutory and there was no right of appeal to the Privy Council against interlocutory judgments. On the petitioner's application for special leave to appeal to the Judicial Committee, held, where the hearing of an action was divided into two parts and there was an appeal after the determination of one part, justice required that a further right of appeal should lie if such an appeal would have been permissible had all the issues been determined prior to the appeal to the Court of Appeal. The determination of both issues in the respondent's favour amounted to a final judgment and the Court of Appeal had erred in refusing to grant leave. The Privy Council would exercise its discretion in favour of the petitioner and, accordingly, the appeal would be allowed and leave would be granted.

11. In her written submissions Ms. MacMillan-Hughes noted that:

> **"7. … the Judicial Committee held that a party cannot be deprived of a right to appeal solely because the hearing is divided into 2 parts and that where such a division occurs, any party may appeal without leave against such an Order in circumstances where, had both parts been heard together and the order been made at the end of the complete hearing he would have been able to appeal without leave. In that case the preliminary hearing had been ordered in the interests of justice and for the possible saving of time and expense. It was not intended to deprive any party of an opportunity to appeal as of right.**
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> **8. The Committee held that it was illogical to deprive a litigant of a right to appeal where the final hearing had been divided, by drawing an anology with those cases where a frivolous and vexatious litigant had been**

> **deprived of any right to a hearing. In the first case, the separate issues had been pleaded, entertained, supported with evidence, argued and considered and there was every reason why a decision on such issues should be among those appealable as of right. By contrast, in those cases where no reasonable cause of action was held to have been disclosed the Court had concluded that there was no issue proper to be determined at all."**

12. It should be noted that in **Strathmore** there were three issues raised (1) the compromise issue, namely whether Strathmore had agreed to abandon its claim in respect of the share sale; (2) the cancellation issue, namely whether any compromise had been cancelled by breach on the part of the respondents; and (3) the misconduct issue, namely whether Strathmore was entitled to damages in respect of the share sale. These were clearly issues which constituted a part of the substantive action for breach of fiduciary duty and not collateral issues.

13. Strathmore's case was considered by this Court (differently constituted) in **Lockhart and another v. Mitsui Sumitomo Insurance (London Management) Ltd and others** SCCivApp. & CAIS Nos. 110 and 114 of 2010 where Allen, P. observed as follows:

> **"19. It is further my opinion that the case of Strathmore Group Ltd. v. Fraser [1992] 3 NZLR 385, relied on by Counsel for the appellants, may be distinguished from this case, as <u>the ruling on the preliminary issues in that case led to an appeal to the Court of Appeal, which finally determined the issues in the entire case thereby eliminating the need for a trial in the lower court.</u> Needless to say, this case, unlike the case of Strathmore did not finally dispose of the claim of the appellants, but is of an interlocutory nature as described in the case of Salaman cited above". [Emphasis added]**

14. In the present case by way of generally indorsed Writ of Summons the intended respondent brought an action against the intended appellant in the court below, as a result of an accident which occurred on the intended appellant's premises on 6 May 2012. The Writ is stamped 6 May 2015 and the receipt is dated 7 May 2015. A Statement of Claim alleging personal injury as a result of the intended appellant's negligence was later filed. By way of Defence the intended appellant pleaded section 9 of the Limitation Act and filed a summons to strike out the intended respondent's action pursuant to the Rules of the Supreme Court Order 18, rule 19 and/or the inherent jurisdiction of the court. The learned judge below dismissed the intended appellant's strike out summons. The intended appellant's appeal of that decision to this Court was dismissed.

15. What is clear is that neither in the court below, nor in the judgment of this Court, which the intended appellant seeks to appeal to the Privy Council, were the substantive issues raised in the Writ and Statement of Claim considered or decided. This was clearly an application pursuant to Order 18, rule 19 and/or the inherent jurisdiction of the court seeking to have the action struck out on the basis that it was frivolous and vexatious and had no chance of success due to the expiration of the limitation period.

16. It is also to be noted that as pointed out by Mr. Munroe, QC the intended appellant's supporting affidavit of Valdere J. Murphy which accompanied the Notice of Motion for leave to apply to the Privy Council filed on 20 April 2021 indicated at paragraph 6 that, **"…the Respondent has not specifically pleaded any special damages in his Statement of Claim filed in the Supreme Court on 8 January 2019."** In these circumstances it cannot be said with any certainty that the judgment or order of the court upon appeal from the Supreme Court in this action is one 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. In these circumstances it was clearly not a final order.

17. The above findings do not, however, dispose of this application as Ms. MacMillan–Hughes further submitted that if we were to take the view that the judgment is interlocutory we ought still to grant leave in the exercise of our discretion. Counsel submitted that the intended appellant's Notice of Motion discloses an arguable appeal and raises matters of public importance and is of public interest.

18. In support of her submission counsel cited the case of **AWH Fund Limited (In Compulsory Liquidation) v. ZCM Asset Holding Company (Bermuda) Limited** [2014] 2 BHS J. No. 53 where at paragraph 25 Allen, P. opined as follows:

> **"25 In Smith v Cosworth Casting Processes Ltd [1997] 4 All ER 840 the United Kingdom, Court of Appeal provided useful guidance for an appellate court considering whether to grant leave to appeal. In Cosworth Lord Justice Woolf opined:-**
>
> > **'(1) The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**

> **(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.'"**

19. In response Mr. Munroe drew our attention to the case of **Philomen Dean v Chanka Bhim** [2019] UKPC 10 where Lord Briggs stated:

> **"6. It is the settled practice of the Board not to interfere with concurrent findings of primary fact by the courts below. This is the practice regardless whether an appeal lies to the Board as of right, as in this case, or only with leave…"**

20. In my view the proposed appeal does not raise an arguable issue. The question which the learned judge had to determine was whether the Writ was issued within the limitation period. As pointed out in this Court's judgment:

> **"18. Order 6, rule 6(3) is very clear. It says: "(3) Issue of a writ takes place upon its being sealed by an officer of the Registry."**
>
> **19. Moreover, Order 60, rule 2 provides:**
>
> > **'2. (1) Any document filed in the Registry in any proceedings must be sealed with a seal showing the date on which the document was filed.'**
>
> **20. There is no dispute that the Writ was sealed by an officer of the Registry on 6 May 2015."**

21. In order to prove its claim the intended appellant was required to satisfy the learned judge that the Writ of Summons was not issued on 6 May 2015. This required evidence to rebut the presumption that the seal on the document was bona fide. The learned judge heard evidence and made a finding of fact. This Court had no basis to set aside that finding and based on the decision in **Philomen Dean** the Privy Council has a settled practice not to interfere with concurrent findings of primary facts by the courts below.

22. I have also given consideration as to whether the proposed appeal raises any point of public importance and I can see none. Additionally, there does not appear to me to be any area of the law which requires clarification by their Lordships of the Privy Council. In these circumstances

I would dismiss the intended appellant's application and award costs to the intended respondent, such costs to be taxed if not agreed.

The Honourable Mr. Justice Evans, JA

Judgment delivered by the Honourable Sir Michael Barnett, P:

23. I have read in draft the judgment of my brother Evans, JA.

24. I agree with him that this application for leave to appeal to the Judicial Committee of the Privy Council must be refused. It raises no point of law of public importance that needs to be considered by the Board.

25. The law in this regard is not in dispute. A Writ is issued when sealed by an officer of the court.

26. Order 6 Rule 6(3) is very clear: **"Issue of a writ takes place upon its being sealed by an officer of the Registry"**. On the face of the Writ, it was sealed on 6 May 2015. The intended appellant's case is that that is wrong, and it was not in fact sealed by an officer of the court on that date. This is so notwithstanding that in their submissions in the Court at the hearing of the appeal Ms. McMillan-Hughes stated:

> **"In order for there to be fraud or anything of that nature or malfeasance or anything like that requires knowledge and intent. There is no evidence to suggest that and nor was it suggested by the appellant. All that was set out in the evidence was that the record reflected that the filing fee required to be paid in order to commence the action had not been paid on 6th May; and 6th May was the last date upon which the action could be brought."**

27. Therefore, there is no doubt that as a matter of fact that the Writ in this matter was sealed by an officer of the Registry on 6 May 2015. That is on the face of the Writ and there is no allegation that the Writ was fraudulently backdated to that date.

28. In **Responsible Development for Abaco (RDA) Ltd. v The Rt. Hon. Perry Chistie et. al**. SCCivApp. No. 248 of 2017 this Court cited with approval the views of the Court of Appeal of the Eastern Caribbean Court in **Renaissance Ventures Ltd. v Comodo Holdings** [2018] ECSC J1008-3 as follows:

"12. The Bermuda Court of Appeal cited with approval the views of 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) which 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, of 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.'"**

29. In my judgment, this proposed appeal is simply how to apply settled law to the facts of this case. It does not warrant the attention of the Privy Council.

30. The intended appellant suggests that it is an issue of law because as a matter of law, it cannot be sealed unless a filing fee is paid. The intended appellant asserts that the evidence indicated that the filing fee was not in fact paid until 7 May 2015. In my view the law in this regard is settled and set out in my judgment which is sought to be appealed. As the Court of Appeal of England said in **Butters and another v Hayes** [2021] EWCA Civ 252:

> **"23. (3) As a matter of construction of Part I of the Act [i.e. the Limitation Act], an action will be brought within the limitation period if it is issued by the court within that period. The statement in Bhatti that an action will be statute-barred if issued in time but without the appropriate fee is not correct."**

31. In my judgment the intended appellant's assertion that the failure to pay the filing fee until 7 May 2015 prevents the Writ from having been issued on 6 May 2015 as is apparent on the Writ is not an arguable point of law. It does not, in my judgment, require the attention of the Privy Council.

32. I agree that leave should be refused. No doubt if the Privy Council considers that the issue raised by the proposed appeal warrants their attention it could grant the applicant special permission to appeal.

The Honourable Sir Michael Barnett, P

33. I have read in draft the judgments of my brother Evans, JA and Barnett, P. I agree with the reasons and disposition of the application as proposed by them.

The Honourable Madam Justice Bethell, JA