COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 69 of 2021

B E T W E E N

DEYVON JONES

Appellant/ Intended Respondent

AND

FML GROUP OF COMPANIES LIMITED

Respondent/ Applicant

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

APPEARANCES: **Mr. Charles MacKay for the Appellant**
Mr. Damien Gomez, QC for the Respondent

DATES: **25 July 2022; 1 September 2022**

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Civil Appeal- Application for conditional leave to appeal- Whether appeal as of right- Whether the Court should exercise its discretion to grant leave to the Privy Council- Section 23 of the Court of Appeal Act

On 26 March 2018, the appellant, Devyn Jones a former employee of the respondent FML, filed a claim in the Supreme Court against FML, seeking damages for breach of contract, or alternatively, for constructive dismissal.

On 20 April 2021 the trial judge dismissed the appellant's alternative claims for breach of contract or constructive dismissal and ordered the appellant to pay costs of the action to the respondent to be taxed, if not agreed. On 28 March 2021, the appellant Jones filed a Notice of Appeal seeking an order from this Court to set aside the judgment in its entirety. On 18 May 2022 Jones' appeal was allowed by Court majority, and FML was ordered to pay the appellant the sum of $120,000.00 and interest on the said sum. On the 31 May 2022 FML made an application to the Court for conditional leave to appeal the decision to the Judicial Committee of Her Majesty's Privy Council. On 25 July 2022, after hearing the arguments, the Court reserved its decision.

Held: The application for conditional leave to appeal to the Privy Council is dismissed. The costs are to be paid by the applicant to the respondent. Such costs are to be taxed, if not agreed.

This is not a proper case to grant leave to appeal to the Privy Council. A review of the judgment of this Court shows that the case does not involve any important and disputed principle of law. It is a simple case arising out of employment law and an employment agreement. The applicant FML does not assert that the appeal should not have been allowed or allege that the finding by this court that it was in breach of the employment contract. It simply asserts that the damages should be limited to that held by the dissenting judge and not the larger sum as held by the majority. The differences in the three judgments relate to the evaluation of what the evidence proved or did not prove. This is not an issue of unsettled law nor is it an issue of general public importance. Application dismissed.

Michael Levy v Attorney General [2013] JMCA App 11 mentioned
Durity v JLSC TT 1995 CA 27 considered
Johann D Swart et al v Appollon Metaxides and Silver Point Condominium Apartments SCCivApp. No. 78 of 2012 considered
Zuliani and Others v Veira [1994] 3 LRC 705 considered

JUDGMENT

Judgment delivered by The Hon. Sir Michael Barnett, P

1. This is an application for conditional leave to appeal to the Privy Council. The action in the Supreme Court was commenced by Deyvon Jones against the FML Group of Companies claiming damages for breach of contract.

2. The statement of claim was in the following terms:

1. The Plaintiff is a citizen of the said Commonwealth who was, on 10" June 2015, engaged by the Defendant herein, FML. Group of Companies Ltd. ("FML"), as its Chief Operations Officer ("COO0")

2. The Defendant is 2 Bahamian Company incorporated under the laws of the said Commonwealth and is still subsisting under registered number 55,244-C with the Companies Department of the Office of the Registrar General.

3. FML is licensed under the Gaming Act, 2014 ("G.A4-2074") as a Gaming House Operator. Its license number is WST0005.

4. As a pre-condition of the Plaintiff being engaged, the Plaintiff was required to and did obtain authorization and approval from the Bahamas Gaming Board in accordance with Section 24(a) of GA-2014. Accordingly, the Plaintiff was issued by the Gaming Board with Key Employee License Number 4149.

5. Upon and since his engagement, FML executed divers Compensation Agreements for the benefit of the Plaintiff, the last being that dated 1* May 2017 by which FML is required, inter alia, to pay the Plaintiff 2 monthly salary of Thirty Thousand Dollars ($30,000.00).

6. In breach of his contract of employment, FML discontinued paying the Plaintiff his monthly salary in November 2017 although the Plaintiff continued with his duties as COO for FML under the belief that said unpaid salary were, none-the-less, forthcoming.

7. Alternatively, the actions and antics of FML of discontinuing the payment of the Plaintiff's salary along with the following, amounted to the Plaintiff being constructively dismissed from his employment as COO:

(a) Beginning 23" February 2018, FML locked out the Plaintiff from the computer system, an absolute necessity for the Plaintiff to carry out the job for which he was engaged, thereby preventing him from having any dealings whatsoever with FML in his capacity as COQO; and

(b) FML's said actions along with its recent inability to pay all winnings to the gaming public in full whenever presented, has led to the Plaintiff losing the necessary trust and confidence he considers himself to be reasonably entitled for his satisfaction that FML is sufficiently solvent for him to be able to carry out

his normal duties as COO which includes giving the gambling public comfort that their winnings will be fully paid by FMIL; and

(c) FML's said actions are inconsistent with Sections 24(a), 24(b)(iv) and 24(b)(v) of the GA-2014; and

(d) Commencing on or about 19" February 2018, FML started an unsubstantiated rumor that the Plaintiff, in his capacity as COO, was engaged fraudulent activities against FML without any evidence or otherwise verifiable belief that any such activity had occurred. Such rumor, coupled with non-payment of salaries, without anything more, potentially placed the Plaintiff within the ambit of the disqualifying clause of Section 25(1)(g) of the GA-2014 preventing him from being able to be licensed as a Key Employee for any other Gaming House Operator; and

8. As such, the Plaintiff treats the employment relationship as between the Plaintiff and FML as at an end, effective 23® February 2018 when the Plaintiff was locked out of FML's computer system.

9. The result of the conduct of FML in terms of its treatment of the Plaintiff, the Plaintiff considers his continued employment as COO to be intolerable.

10. Other relevant terms of the engagement of the Plaintiff with FML as its COO duly licensed as a Key Employee, are as follows:

(i) Contract Commenced:	**10th June 2015**
(ii) Term of Contract:	**2 years (9 months)**
(iii) Date of Termination:	**23 February 2018**
(iv) Number of Months employed:	**33**
(v) Annual Salary:	**$ 360,000.00**
(vi) Hourly Salary Rate:	**$ 187.50**
(vii) Monthly Salary:	**$ 30,000.00**

11. By reason of the matters complained of aforesaid, the Plaintiff has suffered AND continues to suffer loss and damage as follows:-

<u>PARTICULARS OF LOSS & DAMAGE</u>
(a) Unpaid Salary (November 2017- February 2018) $120,000.00

(b) Accrued Vacation (9 weeks): $ 67,500.00

(c) Three Months Termination Notice: $90,000.00

(d) Basic Award $60,750.00:

(e) Compensatory Award-Employment Act, 2001 (24 months): $ 720,000.00

- **Unpaid NIB: $**
- **Legal Fees (Labour Dispute) to Messrs. Commercial Law Advocates: $ 30,000.00**

(f) Opportunity Costs 4.25% 2017 prime rate on Interest on 5% Option Purchase of Nassaugame.com ($72,750 x 2.75 year) (estimated value of 5% shares as at 2015 is $300,000.00): $35,062.50

(g) False criminal accusation/defamation:

1. The Plaintiff claims interest pursuant to the Civil Procedure (Award of Interest) Act, 1992 on that amount determined by the Court is due to the Plaintiff at such rate and for such period as the Court deems fit.

AND THE PLAINTIFF CLAIMS:
(A) An Order for damages for breach of contract or alternatively, constructive dismissal from the FML; and
(B) An Order for aggravated and/or exemplary damages; and
(C) An Order for interest as pleaded; and
(D) An Order for all costs of and occasioned by the bringing of this action; and

3. Although the statement of claim particularized the loss and damage in excess of $1 million, the actual claim was for unliquidated damages.

4. The trial judge dismissed the claim by Jones. Jones appealed to this court. The court allowed the appeal. The court by a majority awarded Jones the sum of $120,000.00 as damages. I also allowed the appeal but would only have awarded damages in the sum of $30,000.00

5. FML now seeks to appeal the judgment of the court awarding Jones $120,000.00. The application is in the following terms.

> **"(i)The Honourable Court of Appeal erred in fact and in law in finding that the Intended Appellant owed the Intended Respondent the sum of One Hundred and Twenty Thousand dollars ($120,000.00) and ought to have found that the intended Appellant owed the Intended Respondent the sum of Thirty Thousand dollars ($30,000.00) together with interest thereon for**

the reasons given by the Honourable President of the Court of Appeal Sir Michael Barnett in his dissenting judgment"

6. The application is opposed by Jones.

7. There are two issues raised by this application. Is the appeal as of right under section 23 of the Court of Appeal Act? If so, is it hopelessly unmeritorious so as to warrant refusal of leave.

8. If the proposed appeal is not as of right, should we exercise our discretion in any event and grant leave.

9. The starting point is section 23 of the Court of Appeal Act. It 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."**

10. This provision is similar to statutory provisions found in other jurisdictions in the region.

11. In considering a similar provision in the law of St Christopher and Nevis the Privy Council said in **Zuliani and Others v Veira** [1994] 3 LRC 705. In that case a solicitor sought to sue his clients for unpaid fees, The solicitors bill of costs did not satisfy the statutory requirement by the courts held that the solicitors was still entitled to recover his fees on the bills, The Privy Council upheld the decision of both the Court of Appeal and the judge at first instance. At the end of the judgment the Privy council addressed the issues of an appeal of of right under the law of St Christopher and St Kitts. Their provision was in the following term**s:**

> **"(1) An appeal shall He from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases – (a) final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards …"**

12. The Privy Council said**:**

> **"In providing that the automatic right of appeal should arise only where the matter in dispute was of the value of (or in excess of) a precise figure the legislature has chosen not to include an**

award of unliquidated damages. In the view of their Lordships this provision should be strictly construed. No doubt there will be many cases, of which the present is one, where it can be said as a matter of the utmost probability, or even of virtual certainty, that the damages ultimately awarded will be in excess of $EC 5,000, and in such cases the Court of Appeal may very well think it right, as general rule, to grant leave in the exercise of its discretion. Equally, however, there may be cases – and again the present case may serve as an example – where the likely amount of damages is at or above the statutory threshold, but which are so lacking in merit that the Court of Appeal in its discretion would refuse leave."

13. The Privy Council judgment determines that there is no appeal as of right where the claim is for unliquidated damages. This was so even if it was virtually certain that the amount of those damages would exceed the threshold sum provided for in the statute. It further stated that "the Court of Appeal may well think it right as a general rule, to grant leave in the exercise of its discretion" in circumstances where the amount at issue is likely to exceed the threshold figure.

14. The decision in Zuliani was considered by the Court of Appeal of Trinidad and Tobago in **Durity v JLSC** TT 1995 CA 27 . In that case it was an application for judicial review and an appeal against a refusal to grant leave for an application for judicial review. The Court of Appeal of Trinidad and Tobago said:

Now, whilst I do not think it can be disputed that the appeal involves directly or indirectly a claim to or a question respecting property, even assuming that damages are available to an applicant in judicial review proceedings, in my view, it is now well settled that the provision in s 109(1)(a) of the Constitution, namely that 'the matter in dispute on the appeal … is of the value of fifteen hundred dollars or upwards' does not contemplate unliquidated damages. Even if it does, I do not think 'it can be said as a matter of the utmost probability, or even of virtual certainty, that the damages ultimately awarded will be of the prescribed value or in excess of same, in the circumstances of this case.

In Zuliani v Viera [1994] 3 LRC 705, [1994] 1 WLR 1149 the defendant's application for leave to apply as of right to the Judicial Committee of the Privy Council under s 99(1)(a) of the Constitution of Saint Christopher and Nevis 1983 was dismissed by the Court of Appeal. By that provision, appeals lay from final decisions of the Court of Appeal in civil proceedings where the matter in dispute was of or above the prescribed value, which was $EC5,000. Upon special leave

> **being granted by the Judicial Committee to appeal, it was held, inter alia:**
>
> **'(2) That an appeal as of right under section 99(1)(a) of the Constitution lay only where the matter in dispute was of the prescribed value or more but did not lie against an award of unliquidated damages, and since the precise sums payable by the defendants to the plaintiff pursuant to the judge's order remained to be quantified on taxation the defendants were not entitled to appeal as of right from the dismissal by the Court of Appeal of their appeal from the judge's decision; and that, accordingly, the Court of Appeal had correctly dismissed the defendants' application for leave to appeal.' (See the headnote [1994] 1 WLR 1149 at 1150–1151.) [Emphasis Added]**

See also the decision of the Court of Appeal of Jamaica in **Michael Levy v Att. Gen. [2013] JMCA App 11 at para 24** where Morrison JA cited **Zuliani**.

15. In my judgment, as the claim brought in this case was for unliquidated damages and even though the statement of claim particularized the loss and damage in excess of $1 million and this court held that the damages was in excess of the $4000 threshold, the actual claim in the Supreme Court was not a claim "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". It is therefore not an appeal as of right

16. It is accepted that under section 23 even where the proposed appeal is not as of right, this court has a residual discretion to grant leave to appeal to the Privy Council.

17. In **Swart**, SCCivApp. No. 78 of 2012, this court said:

> **"10. It is settled law that we should not exercise our discretion to grant leave unless the appeal involves a point of general or public legal importance. This point was made by this court in Callenders & Co (a firm) v The Comptroller of H.M Customs SCCivApp No. 63 of 2012and in Responsible Development for Abaco (RDA) Ltd. v The Rt. Hon. Perry Christie et.al. SCCivApp. No. 248 of 2017.**
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> **11. In that latter case, I referred to two recent decisions which were helpful in determining the issue of general or public legal importance.**
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> **12. In Renaissance Ventures Ltd v Comodo Holdings [2018] ECSC J1008-3 (decided on 8 October 2018) the Court of Appeal of the Eastern Caribbean 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." [Emphasis added]

13. More recently the Court of Appeal of Bermuda in Siddiqui and others v Athene Holding Limited (2019) 95 WIR 342 said:

> **"51. Persuasive attempts at a more compendious explanation of what is meant by a "question of great or public importance" have been made in the case law.**
>
> **52. It will be apparent that leave should not be given where there is, on proper analysis, no genuine dispute as to the applicable principles of law. This is especially important to emphasize in the present case in light of the Appellants' arguments to be examined below, where, as will be discussed, there appears to be a confusion between a dispute as to the applicable principles of law and a dispute as to the applicability of settled principles of law to the facts of the case in dispute."**

18. A review of the judgment of this Court shows that the case does not involve any important and disputed principle of law. It is a simple case arising out of employment law and an employment agreement. The applicant FML does not assert that the appeal should not have been allowed or allege that the finding by this court that it was in breach of the employment contract. It simply asserts that the damages should be limited to that held by the dissenting judge and not the larger sum as held by the majority.

19. In real terms, the differences in the three judgments relate to the evaluation of what the evidence proved or did not prove. This is not an issue of unsettled law nor is it an issue of general public importance.

20. In my judgment, this is not a proper case to grant leave to appeal to the Privy Council. I would refuse leave.The costs are to be paid by the applicant to the respondent. Such costs are to be taxed, if not agreed.

The Honourable Sir Michael Barnett, P

21. I agree.

The Honourable Madam Justice Crane-Scott,JA

22. I also agree.

The Honourable Mr. Justice Evans, JA