COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 77 of 2021

B E T W E E N

PAUL F. MAJOR

Applicant/ Intended Appellant

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Intended Respondent

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

APPEARANCES: **Ms. Krystal Rolle, QC with Ms. Kendrea Demeritte for the Applicant/Intended Appellant**

Mr. Ferron Bethell, QC with Mrs. Viola Major for the Intended Respondent

DATES: **30 June, 2022; 11 August, 2022**

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Civil Appeal- Application for conditional leave to appeal-Application for stay of execution - Whether appeal as of right- Whether the Court should exercise its discretion to grant leave to the Privy Council- Whether the intended appeal is one of general public importance - Section 23 of the Court of Appeal Act

On 26 April 2021, the Applicant's claims for unfair dismissal, wrongful dismissal, breach of contract and defamation were dismissed in the Supreme Court with costs certified for two counsel. The Applicant filed a Notice in the Court of Appeal on 7 June 2021. On 7 April 2022 the Court dismissed the appeal and affirmed the decision of the Supreme Court in its entirety. On 13 April 2022 the Applicant made an application for leave to appeal to the Judicial Committee of Her Majesty's Privy Council on the grounds that, inter alia, that his appeal to the Privy Council is as of right and he also requested a stay of execution. On 30 June 2022, after hearing the arguments, the Court reserved its decision.

Held: The applications for conditional leave to appeal and for a stay are dismissed. The costs are to be paid by the applicant to the respondent. Such costs are to be taxed, if not agreed. The costs are certified fit for two counsel.

The Court has found that the Applicant does not have an appeal "as of right", and whether the Court grants leave is contingent upon its exercise of discretion. The Applicant bears the responsibility on the application of identifying those points for our consideration. The Court is not satisfied that this is a matter in which it can say that the Applicant has identified points of law of general public importance which are fit to be referred to her Majesty in Council. The Court does not think that it is its responsibility to sift through the proposed grounds to find points of law of general public importance.

As for the application for stay of execution, it is clear that the provision on which the Applicant seeks to rely is only relevant to a situation where this Court has determined that leave should be granted. As the Court has determined not to grant the leave of appeal, the Court has no jurisdiction to grant the stay sought by the Applicant.

*Blue Illusions Limited v The Minister of Agriculture & Marine Resources et al***,** SCCiv App No. 290 of 2015 considered
Durity v. Judicial and Legal Service Commission and Another [1996] 2 LRC 451 considered
Elijah Saatori & Cerebe Design Ltd. v. Cheng Chun Mo alias Peter Cheng & Pioneer Advertising Ltd. No. 41 of 1992 considered
Emmott and Others v. The Treasurer of the Commonwealth of the Bahamas [2001] BHS J. No. 144 considered
*Enos Miller v McKinney Bancroft & Hughes and Hartis Pinder SCCivApp***.** No. 27 of 2021 considered
Frederick Ferguson v Island Hotel Company Limited, IndTribApp. No. 249 of 2016 considered
*Francis Farmer, et al. v. Security and General Insurance Co. Ltd***.** SCCivApp. No. 93 of 2011 considered
Fund Haven Ltd and another v Executive Director of the Securities Commission of the Bahamas [2021] WLR 4223 considered

Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR considered
Hunter v Chief Constable of the West Midlands Police (1982) 1 A.C. 529 considered
Lai Leung and Noray v. R (1972) 20 WIR 433 considered
Li Chen Ling Kaw v Societe Piang Sang Pere et Fils and another [2012] UKPC 19 considered
Julie McIntosh v. Family Guardian Insurance Company, SCCivApp. No. 64 of 2019
Zuliani and others v. Veira [1994] 2 LRC 705

RULING ON APPLICATION FOR CONDITIONAL LEAVE

Delivered by the Honourable Mr. Justice Evans, JA

INTRODUCTION

1. The Intended Appellant (hereinafter '**the Applicant'**) by Notice of Motion filed on the 13th April 2022 makes application for leave to appeal to the Judicial Committee of Her Majesty's Privy Council (the "**Privy Council**") from a Judgment of this Court, delivered on the 7th April, 2022 whereby it was adjudged that: (i) the Applicant's appeal from a Judgment handed down in the Supreme Court (the "Lower Court") on 26th April, 2021 was dismissed, (ii) the Judgment in the Lower Court was affirmed in its entirety, and (iii) the Applicant must pay to the intended respondent First Caribbean International Bank (Bahamas) Ltd. ("Intended Respondent" or "FCIB") the costs of the appeal, certified fit for two counsel, to be taxed if not agreed. The Notice was supported by an affidavit sworn by Wallace I. Rolle and filed along with the said Notice.

2. Over the years, numerous conditional leave applications have come before this Court and there are ample authorities dealing with the issues which have been raised and determined during those applications. In the case of **Enos Miller v McKinney Bancroft & Hughes and Hartis Pinder SCCivApp.** No. 27 of 2021 Crane-Scott JA succinctly summarized the existing legal framework governing appeals to the Privy Council as follows:-

> **"The legal framework regulating appeals to the Privy Council**
>
> **17. As this Court (differently constituted) recently had occasion to point out, there is at present no law which provides for an appeal to lie to the Privy Council (whether "as of right" or "with leave") from decisions of the Court of Appeal in criminal appeals. See Eric Stubbs v. Regina SCCrApp. No. 35 of 2021.**

18. As for civil appeals and as is well known, the constitutional and legal framework providing for a substantive right of appeal to Her Majesty in Council (whether "as of right" or "with leave") from a "judgment or order" of the Court of Appeal given on appeal from a decision of the Supreme Court in civil matters is located in: (i) Article 104(2) of the Bahamas Constitution (appeals involving the enforcement of fundamental rights and freedoms); or (ii) in section 23 of the Court of Appeal Act (in other proceedings).

19. An appeal from any decision given by the Court of Appeal on appeal from a final decision of the Supreme Court made in exercise of the jurisdiction conferred on the Supreme Court by Article 28 (relating to the enforcement of fundamental rights and freedoms) is an "as of right" appeal in accordance with Article 104(2) of the Constitution which provides:

"*Appeals relating to fundamental rights and freedoms.*

104. (1)...

***(2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council … from any decisions given by the Court of Appeal in any such case*." [Emphasis added]**

20. Apart from Article 104(2), other appeals to the Privy Council from a "judgment or order" of the Court of Appeal in civil proceedings on appeal from the Supreme Court are governed by section 23 of the Court of Appeal Act. Such appeals broadly fall into two classes, that is to say: (i) "as of right" appeals in civil actions which exceed the stipulated $4,000 financial threshold; and (ii) "with leave" appeals from a "judgment or order" of the Court of Appeal "in other proceedings" arising from the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

21. In summary, section 23 of the Court of Appeal Act has two distinct limbs; the first provides for "as of right" appeals exceeding the financial threshold, while the second, provides for appeals in other proceedings and which require the grant of "leave". The section provides:

"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." **[Emphasis added]**

22. The procedural formalities for initiating an appeal to Her Majesty in Council (whether the intended appeal is "as of right" or one which requires the grant of "leave") are governed by sections 3 and 4 of the Bahama Islands (Procedure In Appeals to Privy Council) Order, 1964 ("the 1964 Order").

23. The relevant sections of the Order provide as follows:

"*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 appeal 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.*"**
[Emphasis added]

24. As is evident from the Order itself, whether the intended appeal to the Privy Council is "as of right" or requires the grant of "leave", the procedural formalities laid down in the Order must be followed. <u>Accordingly, an intended appellant must, in the first instance, approach this Court in the prescribed manner within the prescribed 21-day time-frame, and further comply with the conditions imposed by the Court in accordance with the Order before a grant of final leave to appeal can be obtained.</u>

25. Where the procedural requirements of the 1964 Order are for whatever reason not followed, or where conditional or final leave is not obtained from the Court of Appeal pursuant to the 1964 Order, the intended appellant may apply to the Privy Council directly seeking special leave to appeal or, as it is also called, permission to appeal. In this regard see Article 105(2) of the Bahamas Constitution, section 23(3) of the Court of Appeal Act, together with the Judicial Committee (Appellate Jurisdiction) Rules, 2009 and the applicable Practice Directions and other guidance located on the jcpc.uk official website."
[Emphasis added]

3. This particular application, however, engages us in two interesting and novel issues which arise from the positions taken by the parties. These being: (1) how is the financial threshold to be determined? and (2) The ambit of this Court's discretion to refuse leave where the Appeal is "as of right".

THE APPLICANT'S POSITION

4. The Applicant's position as seen from the written submissions filed on his behalf is as follows: -

"13. The Appellant contends that the Court of Appeal Judgment is appealable AS OF RIGHT.

14. Regarding the Appellant's contention that he is entitled to leave to appeal AS OF RIGHT, Articles 104 and 105 of the

Constitution of the Commonwealth of The Bahamas ("The Constitution") must be considered.

15. Articles 104 and 105 of the Constitution provide as follows:-

"104 (1) An appeal to the Court of Appeal shall lie from the final decision of the Supreme Court given in the exercise of the jurisdiction conferred on the Supreme Court by Article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms).

(2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under Article 105(3) of this Constitution from any decision given by the Court of Appeal in any such case. 105. (1) Parliament may provide for an appeal to lie from decisions of the Court of Appeal established by Part II of this Chapter to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under this Article, either as of right or with the leave of the said Court of Appeal, in such cases other than those referred to in Article 104 (2) of this Constitution as may be prescribed by Parliament. (2) Nothing in this Constitution shall affect any right of Her Majesty to grant special leave to appeal from decisions as are referred to in paragraph (1) of this Article.

(3) Parliament may by law provide for the functions required in this Chapter to be exercised by the Judicial Committee of Her Majesty's Privy Council to be exercised by any other court established for the purpose in substitution for the Judicial Committee.

16. By virtue of these Articles, appeals to the Privy Council AS OF RIGHT relate to matters involving breaches of fundamental rights and freedoms and matters set out in Article 28 of the Constitution.

17. However, as stated therein, Parliament may provide for other appeals to the Privy Council.

18. Section 23 of the Court of Appeal Act 1965, Chapter 52 Statute Laws of the Bahamas [hereinafter referred to as "The Act"] makes provision for other appeals to the Privy Council, specifically, for appeals which do not fall within Article 28 of the Constitution.

19. Section 23 of the Act provides as follows:-

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.

20. This Court (differently constituted) in *Bre-X Minerals (Trustee of) v. Walsh Estate'* interpreted Articles 104 and 105 of the Constitution as well as Section 23 of the Act. In so doing, the Court confirmed the circumstances in which leave would be granted AS OF RIGHT.

21. The President of the Court of Appeal, George JA, stated as follows:-

"The effect of Articles 104 and 105 of the Constitution and section 19 of the Court of Appeal Act is to create four avenues of appeal to the Privy Council. In respect of two of these routes - appeals founded on the fundamental rights chapter of the Constitution and appeals from final decisions of the Court in other matters - the role of this Court is limited to ensuring that the procedural preconditions as set out in the Rules governing such appeals are observed. Where, however, the appeal is from a judgment given in interlocutory proceedings, or is a final judgment in civil proceedings where the subject matter is valued at less than 34000, this Court has a duty to be satisfied by the applicants that they have an arguable case and that the matter is one on which the Privy Council has yet to pronounce authoritatively. Hence, if, in appeals following either of the first two paths, the role of this Court is no more than a conduit, limited to moving appeals along, concerned only to ensure that the channels of procedural propriety are respected, when appeals arose from interlocutory proceedings, this Court has an effective function to perform as a

***gate valve on that conduit and the appellants, as here, have the onus of satisfying this Court that they should pass through*".** **(Emphasis Added)**

22. The interpretation of Articles 104 and 105 and Section 23 of the Act by George JA in *Bre-X Minerals (Trustee of) v. Walsh Estate* as well as his conclusion regarding the circumstances where leave to appeal to the Privy Council is AS OF RIGHT were wholeheartedly endorsed and accepted by this Court in *Lockhart & Munroe (A Firm) (As Escrow Agents") v. Mitsui Sumitomo Insurance et al* and in *Farmer and others v. Security and General Insurance Company Limited* The Court Appointed representative of the estate of the late *Gemason Smith.*

23. This Court has thereafter consistently confirmed that leave to appeal to the Privy Council any final order where the amount to be recovered exceeds $4000.00 is AS OF RIGHT save now to the exercise of the Court's inherent jurisdiction addressed below.

24. In such cases the role of this Court, save for the exercise of the inherent jurisdiction addressed below, is limited to merely ensuring that the procedural preconditions as set out in the Rules governing such appeals are observed.

25. The Court, save as aforesaid, has no discretion to exercise.

26. As confirmed by the Rolle Affidavit the sum which the Appellant sought to recover from the Respondent by its Supreme Court civil action was in excess of $208,572.00 which is of course by far in excess of the $4,000.00 threshold prescribed by the Act.

…

The Court's Inherent Jurisdiction

35. In considering the question of whether the Court has a discretion to refuse conditional leave to appeal to the Privy Council in the case of Blue Illusions Limited v The Minister of Agriculture & Marine Resources et al' (hereinafter referred to as "The Blue Illusions Case"), the Court imposed what amounts to a third consideration on applications for conditional leave beyond the Section 23 requirements, namely the exercise of its inherent jurisdiction in appropriate cases.

36. The Court then re-affirmed this additional consideration in the case of *Julie McIntosh v Family Guardian Insurance*

***Company*? (hereinafter referred to as "The Julie McIntosh Case"). [Emphasis added]**

THE INTENDED RESPONDENT'S POSITION

5. In its written submissions in response the Intended Respondent sets out its position as follows:-

> **"8. For the reasons set forth below, it is respectfully submitted that: (i) the Notice of Motion seeking leave to appeal to the Privy Council "as of right" is grossly misconceived and should be denied because the Applicant has not sought liquidated damages of at least $4,000.00, as required under Section 23(1) of the Act; (ii) even if the Applicant had sought liquidated damages in an amount satisfying the statutory threshold (and he did not), leave to appeal "as of right" should still be denied to prevent an abuse of the Court's process; (iii) even if the Applicant had sought leave to appeal in the Court's discretion (and he did not), such leave should be denied because he has not demonstrated an arguable case to succeed on appeal or that his proposed appeal raises a point of law of general public importance; and (iv) the Applicant's request for a stay of execution of the Lower Court and Court of Appeal Judgments should be denied. As shown below, the Applicant's Skeleton Arguments provide no support for any aspect of the Notice of Motion."**

ISSUES TO BE DETERMINED.

6. In my view the issues for determination as derived from the positions taken by the parties are as follows.

(1) Whether the $4,000.00 threshold for "as of right" appeals prescribed in Section 23(1) of the Act excludes unliquidated claims and only contemplates claims for liquidated damages?

(2) Whether the leave to appeal sought if determined to be "as of right" should still be denied to prevent an abuse of the Court's process if the Court is satisfied that the Applicant has not demonstrated an arguable case to succeed on appeal?

(3) In the event that the intended appeal is determined to be "as of right" does the Court retain a discretion to refuse leave if satisfied that the Applicant has not demonstrated that his proposed appeal although arguable, raises no point of law of general public importance?

7. I should note here that the Applicant also sought an order for a stay of execution of: (1) the Lower Court's Judgment; AND (2) the Court of Appeal's Judgment pending the final

determination of the appeal before the Judicial Committee; and does so on the grounds: (i) that his intended appeal is arguable with real prospects of success and (ii) that the Respondent having already set down its Bill of Costs arising out of the Lower Court's Judgment for Taxation on 14th April, 2022 will proceed with such Taxation and enforcement and likely also the Taxation of the costs awarded by the Court of Appeal's Judgment unless a Stay of Execution is granted as aforesaid. We heard the stay application and that will be another issue for our determination.

Factual Background

8. The facts of the Applicant's case are well laid out in this Court's Judgment which he now seeks leave to appeal and I will not reproduce them here**.** I note however that it is common ground between the parties that the Intended Respondent operates as a Commercial Bank licensed under the laws of the Commonwealth of the Bahamas. The Applicant had been employed by the Respondent for a period in excess of 22 years until his employment was terminated on 2nd June, 2015. The Applicant commenced legal action against the Intended Respondent in the Supreme Court by a Generally Indorsed Writ of Summons filed on 5th April, 2016. By the civil action the Applicant pleaded various causes of action which included Unfair Dismissal, Wrongful Dismissal and Breach of Contract.

9. By the Applicant's Amended Statement of Claim he sought damages in the minimum amount of $208,572.00. The Applicant's civil action was ultimately heard in the Lower Court on 27th through 28th May, 2019 and on 17" June, 2019. The learned trial Judge delivered his Judgment on 26th April, 2021 whereby he dismissed the Applicant's action in its entirety. The Lower Court Judgment was appealed by Notice of Appeal filed on 7 June, 2021 and the said Appeal resulted in the Court of Appeal Judgment which the Applicant now seeks leave to further appeal to the Privy Council.

APPEAL AS OF RIGHT

10. Mr. Ferron Bethell Q.C submitted that an appeal "as of right" can only be maintained where the amount sought to be recovered is for a liquidated amount of at least $4,000.00. In support of this submission leading Counsel relied on the dicta of Lord Nolan in the Privy Council decision in **Zuliani and others v. Veira** [1994] 2 LRC 705 , where he stated at page 6:

> **"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."**

11. **Zuliani** was a decision emanating from the High Court of St Christopher and Nevis. The following facts are derived from the Judgment of Lord Nolan. In those proceedings the respondent claimed from the appellants the sum of $US 286,411.99 as remuneration for

legal services rendered by him to them. This sum was referred to in para 1 of the respondent's statement of claim as the amount owed for work done as shown by the respondent's bill dated 11 July 1988. On 28 November 1989 the appellants served a defence disputing the substantial merits of the respondent's claim on a number of grounds and asserting that in so far as the respondent had done any work for them, he had been duly paid therefor. The defence thus pleaded by the appellants was comprehensively and emphatically rejected by the trial judge, Satrohan Singh J, in the judgment which he gave on 25 March 1991. There was no appeal against this part of his judgment.

12. However, the points relied upon by the appellants before the Court of Appeal of the Eastern Caribbean Supreme Court and before their Lordships were points of law which were not pleaded but were raised at the outset of the hearing before the judge. They related to the form and to the delivery of the bill of costs dated 11 July 1988, upon which the respondent's statement of claim was based. In particular, it was contended on behalf of the appellants that the bill was defective in that it charged the appellants jointly in respect of all the items covered, whereas in truth it should have charged them severally in respect of individual items for which they were respectively responsible. The learned judge accepted this contention but did not accept that it defeated the respondent's claim. He gave judgment for the respondent against the appellants severally in respect of ten of the eleven items. The appellants succeeded only to the extent that, as the respondent conceded in the course of his cross-examination, the first of the eleven items fell to be excluded because the services in question had been rendered before he qualified as a barrister and solicitor; and the fee charged for the ninth item fell to be reduced because it exceeded the maximum amount allowable by statute for the type of work carried out.

13. The decision of the learned judge was upheld by the Court of Appeal on 23 March 1992. The question then arose whether the appellants were, as they contended, entitled as of right to appeal to Her Majesty in Council. Section 99 of the Constitution of St Christopher and Nevis which, so far as relevant provided that:-

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

14. The 'prescribed value according to Section 99(5) was $EC 5,000.

15. The appellants contended that the respondent's claim, even after the reductions conceded by the respondent, amounted to many times the prescribed value, subject only to such items as might be disallowed on taxation. The Court of Appeal held, however, in a decision on 2 October 1992, that since the amount of the judgment or the liability thereunder had not yet been determined it could not be asserted with certitude that the value of the matter in dispute

on appeal exceeded the prescribed value. The court therefore refused the appellants' application for leave to appeal as of right. On 9 February 1993, however, the appellants were granted special leave by the Privy Council to appeal against both of the decisions of the Court of Appeal**. [**Emphasis added]

16. In dealing with the issue as to whether the appeal was "as of right" Lord Nolan at page 6 of his Judgment observed as follows:-

> **"In the circumstances, the appeal against the second decision of the Court of Appeal is of no practical significance, but it raises a question of general importance. Again, in agreement with the Court of Appeal, their Lordships would answer the question in favour of the respondent. 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." [Emphasis added]**

17. Mr. Bethell further submitted that the principle in **Zuliani** has been accepted and followed in a number of jurisdictions. He cites firstly **Durity v. Judicial and Legal Service Commission and Another** [1996] 2 LRC 451, where at page 14, the Court of Appeal of Trinidad and Tobago, relying on the case of **Zuliani,** observed that: -

> **"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."**

18. Leading Counsel further cited the useful case **of Elijah Saatori & Cerebe Design Ltd. v. Cheng Chun Mo alias Peter Cheng & Pioneer Advertising Ltd**. No. 41 of 1992, where Godfrey, J. A., giving the judgment of the Court of Appeal of Hong Kong, stated:-

> **"The appellants claim to be entitled to appeal as of right to Her Majesty in Council; <u>failing that, they invite this court, in the exercise of its discretion, to grant them such leave.</u> The claims made in the action are claims for unliquidated damages which, if substantiated, would result (say the appellants) in an award of over £9,000,000.**
>
> **…**
>
> **Appeals from this court to Her Majesty in Council are regulated by an Order in Council made on 10 August 1909 (as subsequently amended). Rule 2 of the rules set out in the Order (as amended) provides as follows:**
>
> **2. Subject to the provisions of these Rules, an Appeal shall lie —**
>
> **(a) as of right, from any final judgment of the court, where the matter in dispute on the Appeal amounts to or is of the value of $500,000 or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $500,000 or upwards; and**
>
> **(b) at the discretion of the Court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision."**
>
> **<u>Since appeal as of right is permitted only where the matter in dispute is of the value of (or in excess of) the precise figure of $500,000, it is clear that a claim for unliquidated damages, which may or may not result in an award of $500,000 or more, is excluded.</u> No doubt there will be cases where it can be said as a matter of the utmost probability, or even of virtual certainty, that the damages ultimately to be awarded, if the appellants were successful, would be in excess of $500,000; and in such a case this court might in its discretion think it right to grant leave to appeal. Equally, however, there will be cases where, although the likely amount of damages if the appellants were successful would be above the threshold, the case itself was so lacking in merit that this court would in its discretion think it right to refuse leave to appeal.**

Approaching the matter in this way (as we believe we should, on the authority of *Zuliani v. Veira* [1994] 1 WLR 1149; see especially per Lord Nolan at p. 1155E-G) we are satisfied that this is not a case in which the appellants are entitled to appeal as of right. So we have to consider whether we ought to grant them the necessary leave to appeal in the exercise of our discretion." [Emphasis added]

19. Mr. Bethell did not refer us to the case of **Li Chen Ling Kaw v Societe Piang Sang Pere et Fils and another** [2012] UKPC 19, a more recent case in which the issue was addressed again. This case involved a dispute between an estranged couple (husband and wife) relative to rented commercial premises. The matter reached the Privy Council where Lord Hope reading the Judgment of the court observed as follows:

"[14] On 8 June 2010 the Appellant applied to the Supreme Court for conditional leave to appeal as of right to the Judicial Committee of the Privy Council against the judgment of the Supreme Court, on the ground that her interest related to a matter which was not less than the prescribed amount of Rs 10,000 and that her interest had been prejudiced to an extent of not less than Rs 10,000. Conditional leave to appeal was refused by the Supreme Court. It was of the opinion that the Appellant was not entitled to appeal as of right. On 24 March 2011 the Judicial Committee granted special leave to appeal.

[15] The Judicial Committee did not give reasons for its decision to give special leave. It is not its practice to do so. But it may be observed that it is not easy to understand why the Supreme Court thought that an appeal as of right did not lie in this case. It is true that the monthly rent of the premises is only Rs 550. But the amount of the rent payable each month is not a true measure of the value to the Appellant of being able continue to trade in the premises. No figures were produced to indicate how much profit she derives from the business each year, but it is hard to believe that it is less than the relatively modest sum of Rs 10,000 per annum. Given that the Appellant's case is that she is entitled to remain as tenant of the premises under the protection of the Landlord and Tenant Act 1999 as amended until at least 31 December 2017, her argument that she was entitled to an appeal as of right seems unanswerable. However that may be, the Board was satisfied that special leave ought to be granted." [Emphasis added]

20. The comments of Lord Hope though obiter, may signal a possible shift in the thinking of the Board on the issue of an appeal "as of right". It must be noted however, that in **Li Chen Ling Kaw** the Board did not treat with **Zuliani** and did not expressly disapprove of the

earlier decision. In any event the difference between the two cases may be more apparent than real. I say so because even in **Zuliani** it is noted that Lord Nolan made the point that: "**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." [Emphasis added]**

21. In the circumstances of the present case it is inconceivable to think that the claim being pursued by the Applicant does not relate to a sum in excess of Four Thousand Dollars. ($4,000.00). It is to be noted Section 23 of the Court of Appeal Act does not use the words 'liquidated damages' and no definition is found in the Act. The authorities relied on by Mr. Bethell, however, including **Zuliani**, differentiate between claims for 'liquidated' and 'unliquidated' damages.

22. Mr. Bethell seeks to meet this issue by relying on a definition from **Halsbury's Laws of England/Damages (Volume 29 (2019)/3. Types of Damages** to the effect that, liquidated damages are a definite sum that must be paid to a plaintiff if the plaintiff prevails on his cause of action, whereas unliquidated damages—which "most cases" involve—are amounts that are not owed until the court makes an assessment of the amount, if any, that the plaintiff should be paid.

23. Leading Counsel further cited the case of **Emmott and Others v. The Treasurer of the Commonwealth of the Bahamas** [2001] BHS J. No. 144, in which the Supreme Court of The Bahamas held at paragraph 27:

> **"Parties to a contract may agree that in the event of a default, the defaulting party would pay to the other party a particular sum of money if it represents a genuine pre-estimate of the damages which would probably have arisen from the breach. If the agreement is not obnoxious as a penalty which is held in terrorem over the defaulting party, such a sum constitutes liquidated damages and is payable by the party in default. The term is also applied to sums expressly made payable as liquidated damages under a statute. In every other case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are unliquidated."**

24. If Mr. Bethell is right that section 23 is to be construed as referring to claims for liquidated damages only (as per **Zuliani** and the cases which followed it) then clearly the Applicant would not have an automatic appeal "as of right". It would also follow that the category of cases which do pass that test would be much smaller than originally thought. This would

represent a marked change from the way that such applications have been dealt with in the past.

25. The force of Mr. Bethell 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 the damages ultimately awarded will be in excess of $EC 5,000.00 (the statutory threshold). In such a case, Lord Nolan said, the Court of Appeal may very well think it right, as general rule, to grant leave in **the exercise of its 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 a **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 ($4,000.00). 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]

POWER TO AVOID ABUSE OF PROCESS

27. Mrs. Rolle Q.C acknowledges in her written submissions that the Court on the hearing of an application for leave to appeal has an inherent jurisdiction which it may exercise separate and distinct and/or in addition to its Section 23 jurisdiction. She contends that this inherent jurisdiction is limited to the Court confirming that the intended appeal is not an abuse of process. Further that the Court in the exercise of this inherent jurisdiction to prevent an abuse of its process would have to be satisfied that there has been conduct on the part of the Appellant which involves, *"an element of oppression; or perversity, in the sense that it is frivolous and vexatious; and there must also be some ulterior purpose in the use of the process which offends justice, such as the unjust harassment or annoyance of the other party."*

28. In support of this submission Mrs. Rolle referred to the case of **Blue Illusions Limited v The Minister of Agriculture & Marine Resources et al,** SCCiv App No. 290 of 2015. In that case Allen, P., stated:

> **"40. Other than the decision of the CCJ in LOP, there was no other authority which Counsel were able to find to assist us, but I am persuaded by the dictum of President de la Bastide in LOP, that there may be applications for leave to appeal as of right**

> **under section 23, including cases which meet the financial threshold, in which the proposed appeal may be shown to be oppressive, perverse, or frivolous and vexatious and it is just and equitable for the Court to exercise its inherent power to prevent abuse of its process. Indeed, even in such a case if the Court of Appeal refused leave to appeal, the Privy Council would nevertheless be able to grant leave to an intended appellant so refused**." [Emphasis added]

29. In **Blue Illusions** Conditional leave was granted as the Court was not satisfied that the intended respondent had demonstrated that the conduct of the intended appellant in bringing the appeal was oppressive, perverse or frivolous and vexatious so as to require the exercise of the Court's inherent jurisdiction to prevent abuse of its process and injustice. However, the issue arose again in the case of **Julie McIntosh v. Family Guardian Insurance Company,** SCCivApp. No. 64 of 2019, where the intended appellant's application for conditional leave was refused notwithstanding that her appeal was "as of right" and exceeded the financial threshold. Crane-Scott JA in delivering the Court's decision observed as follows: -

> "**5. Following the decision of this Court (differently constituted) in *Blue Illusions Limited v. The Minister of Agriculture and Marine Resources and others* [2017] BHS J. No. 97, it is now well established that upon an application for conditional leave and notwithstanding that an appellant may have met the financial threshold in section 23(1) of the Act for appeals as of right, the Court of Appeal may, in the exercise of its inherent jurisdiction to prevent abuse of its process and protect the interests of justice, refuse conditional leave where it is manifest that the intended appeal would be oppressive, perverse, vexatious and/or an abuse of its process.**
>
> **6. As we indicated, none of the 10 grounds of the intended appeal disclosed any discernable grounds of appeal arising from the judgment of this Court which was handed down on 10 June 2020. Nor, in our view, did any of the grounds raise any genuinely arguable point of law or of fact requiring their Lordships consideration at this time.**
>
> **7. In the exercise of the Court's inherent jurisdiction to prevent abuse of the courts' processes, we accordingly, determined that Ms. McIntosh's application seeking conditional leave should be refused notwithstanding that we were satisfied that she had met the financial threshold for appeals set out in section 23(1) of the Act".**

30. The decision in **Julie McIntosh** was arrived at after examining the intended grounds of appeal which the intended appellant wished to advance before Her Majesty in Council.The Court found that all 10 grounds contained numerous allegations about the judge's findings and other complaints which had not been raised in the pleadings nor before the Court of Appeal when the appeal was heard. The Court was clearly of the view that an appeal which meets the financial threshold, but which has no prospects of success is frivolous and vexatious and the pursuing of the same would be an abuse of the process of the Court.

THE NEED FOR AN ARGUABLE CASE WHICH, RAISES A POINT OF LAW OF GENERAL PUBLIC IMPORTANCE?

31. Mrs. Rolle was adamant in her position that in cases of this nature the role of this Court, save for the exercise of the inherent jurisdiction addressed in the **Blue Illusions** and **the Julie McIntosh** cases, is limited to merely ensuring that the procedural preconditions as set out in the Rules governing such appeals are observed. She urged on us that the Court, save as aforesaid, has no discretion to exercise. The extent to which Mrs. Rolle held to this position is seen in that the Notice of Motion does not contain an alternative request that the Court find that the grounds filed raised points of law of public importance. The submissions filed on behalf of the Applicant were also devoid of any attempt to identify the points of law of public importance.

32. Mr. Bethell submitted that the Applicant must demonstrate: (i) *that he has an arguable case to succeed on appeal and (ii) that his proposed appeal raises a point of law of general public importance.* He further submitted that given that the Applicant has not requested discretionary leave, this Court need not reach the question of whether he could be entitled to such leave.

33. There is no dispute that appeals relative to claims which do not meet or exceed the financial threshold, require the grant of leave and that such leave will not be granted unless the Applicant demonstrates that: (i) that he has an arguable case to succeed on appeal and (ii) that his proposed appeal raises a point of law of general public importance. What is at issue between the parties is whether such requirement can apply where an Applicant meets the financial threshold.

34. Neither party has provided this Court with any authority from this jurisdiction which deal frontally with this issue. However, in my view the dicta of Lord Nolan in **Zulaini** is useful. As noted above Lord Nolan was of the view that where the likely amount of damages is at or above the statutory threshold, but the Appeal is so lacking in merit that the Court of Appeal in its discretion would likely refuse leave.

35. The obvious question which arises is whether the position articulated by Lord Nolan in **Zulaini** is any different to the position accepted by this Court in **Blue Illusions** and the subsequent case of **Julie McIntosh**? It is also well known that the Privy Council will only hear matters which it considers to be of general public importance and even a referral from this court does not guarantee that the Appeal will be accepted.

36. A search of the Privy Council's website will reveal that information is contained there by way of directions as to the requirements for appeals from Commonwealth Countries as follows: -

> **" Commonwealth Appeals**
>
> **To bring an appeal to the Judicial Committee of the Privy Council, you must have been granted leave by the lower court whose decision you are appealing. In the absence of leave, permission to appeal must be granted by the Board. <u>In some cases there is an appeal as of right and a slightly different procedure applies</u>.**
>
> **<u>In civil cases, the lower court will generally grant you leave to appeal if the court is satisfied that your case raises a point of general public importance</u>.**
>
> **In criminal cases, it is unusual for the lower court to have the power to grant leave unless your case raises questions of great and general importance, or there has been some grave violation of the principles of natural justice**." [Emphasis added]

37. It is noted that in the directions posted to the website it is stated that *in some cases there is an appeal as of right and a slightly different procedure applies*. The notice does not condescend to explain how the procedure differs where there is an appeal as of right. However, it has been well established that one of the roles of this Court in granting leave to appeal to the Privy Council is to provide a filter for cases where parties seek to have their appeals placed before the Board for hearing. It follows that in the proper fulfilment of that function this Court should seek to sort out those cases which do not meet the criteria established by the Board. This creates no prejudice as Section 23 (3) of the Court of Appeal Act provides that "**(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".**

38. I am of the view therefore that notwithstanding the fact that the Applicant has met the financial threshold this Court has to be satisfied that his proposed grounds of Appeal manifests arguable grounds which raise points of general public importance. In this regard it must be appreciated that a proposed Appeal may contain arguable grounds, but those grounds may not contain points of law of general public importance. An appeal which does not pass the first limb in that there are no arguable grounds is subject to being struck out as constituting an abuse of the process of the Court. Where however the grounds are arguable but contain no points of law of public importance this Court in the exercise of its discretion may refuse the application.

39. The significance of this distinction is best understood by reviewing the way the Court responds to instances where there is a likelihood of its process being abused. This point is

made by Lord Diplock in **Hunter v Chief Constable of the West Midlands Police** (1982) 1 A.C. 529 where at 536 he opined that**:**

> **"[there is an] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power." [Emphasis added]**

40. Before moving to the substance of the proposed grounds of appeal I note that in **Lai Leung and Noray v. R** (1972) 20 WIR 433, Fraser JA opined as follows: -

> **"It is not necessary, and perhaps it would not be wise, to attempt to point out or prescribe all the grounds which may be available for the purpose of testing the exceptional public importance of a point of law; but it may safely be said that the point raised should involve a new principle of law or require the elucidation of some new aspect of established and familiar principles of law; or possibly also, where the point raised disclosed that the due and orderly administration of justice has been diverted into a new course which might create a precedent for the future. In short the point of law has to be not only one of public importance but it needs also to be exceptionally so**."

41. In our jurisdiction the phrase predominantly used is "**of general public importance**." This is more consistent with the case of **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone** [2013] eKLR where the Supreme Court of Kenya stated the principle as follows:-

> **"(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest."**

42. It is also important to note that the position espoused by the Judicial Committee in the case of **Fund Haven Ltd and another v Executive Director of the Securities Commission of the Bahamas** [2021] WLR 4223 is that "**the general importance of a point is very much a**

matter for the local court to consider and determine rather than the Board and considerable' deference will be given to the views of the Court of Appeal on such a matter." It follows that in arriving at our decision we are required to utilize our knowledge of the jurisprudence of this jurisdiction and how and to what extent it affects the general public in the Bahamas.

THE SUBSTANCE OF THE PROPOSED APPEAL

43. The Applicant's Notice of Appeal Motion identifies his proposed grounds as follows: -

> **"AND FURTHER TAKE NOTICE that the Appellant's intended grounds of appeal will include firstly each and every one of the 28 grounds of appeal advanced by the Notice of Appeal, (all such grounds being hereby incorporated into this Notice of Motion by reference), all 28 of which were dismissed by the Court as lacking in merit. The Appellant will be asserting and contending before the Judicial Committee that the Court of Appeal similarly erred in each and every such respect as set out in the Notice of Appeal.**
>
> **AND FURTHER TAKE NOTICE that secondly, in additional to the aforesaid 28 grounds of appeal, the Appellant intends to advance before the Judicial Committee additional grounds of appeal which shall include but shall not be limited to the following additional grounds as set out in the various Tables below separated by subject matter."**

What then followed was seven and a half pages containing tables which set out what I would term arguments.

44. The information in the tables do not identify specific points of law nor seek to indicate the general public importance of the proposed grounds. In fact, the said Notice goes on to say that: -

> **"AND FURTHER TAKE NOTICE For the avoidance of doubt that the reference to and inclusion of the aforementioned intended grounds in this Notice is wholly WITHOUT PREJUDICE to the Appellant's contention that he is entitled to obtain leave to appeal AS OF RIGHT by virtue inter alia of Section 23(1) of the Act, and in keeping with Section 2.1.1 of the JCPC Practice Direction 1 AND without conceding that the Court on the hearing of the application for leave to appeal AS OF RIGHT is empowered to make a determination as to the merits of the intended appeal pursuant to the exercise of a discretion to grant leave or otherwise."**

45. We raised with Mrs. Rolle at the beginning of the hearing the fact that she had not pleaded in the alternative that we should exercise our discretion if we determined that the Applicant did not have an appeal "as of right". However, she declined to do so. Her response is reflected as follows: -

> "**Moving on to point No. 2 quickly, we maintain -- and we touched on it at the beginning -- and I said that the approach that this court has consistently taken is that when you assert in your papers that you are entitled to appeal as of right and you do not ask the court to exercise its discretion, the court's approach has consistently been to proceed to exercise its discretion notwithstanding and to determine that point.**
>
> **…**
>
> **This is what the court does, regardless of whether you raise it in your Notice of Motion.**
>
> **...**
>
> **Now, I am only demonstrating that because I want to respond to what my learned friend has said in his submissions. But I maintain unequivocally that this is an as of right appeal and the exercise of the court's discretion does not arise."**

46. Mr. Bethell in response submitted that if the Applicant wanted to move the court on the discretionary point, he ought to have set that out in his application. Learned Counsel further opined that: -

> **"This court is a creature of statute, and it is moved by the application before the court. The application before the court is presently crafted as an appeal as of right and not in the alternative or anything else."**

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 immoveable 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 points 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.

THE THREE CORE ISSUES ASSERTED

1) The US Person Policy

49. The first issue I will describe as the **US Person Policy**. In her submissions Mrs. Rolle contended as follows: -

> **"Now, what became a live issue, and perhaps probably the most fundamental issue of fact in this matter, was whether or not the US Persons Policy was in operation, was in practice in 2011. The first instance judge said that it was. In fact, before I get into what the first instance judge said, the core assertion on this issue, the pleaded assertion on this issue was that the US Persons Policy was not implemented until 2014. That is the position that the appellant/applicant has taken from the very beginning in his pleadings. And in his pleadings he says in support of that assertion, there are two documents that demonstrate this and at the trial I will be relying on these documents for their full terms and effect, the usual pleadings.**
>
> **He is now at a point where this matter has been determined at the first instance, it has been determined at the Court of Appeal level; and, respectfully, the first instance judge nor the Court of Appeal has actually looked at these documents and made a determination pursuant to his pleading as to whether or not, based on these documents, it can be said that the US Persons Policy was indeed in practice in 2011."** [Emphasis added]

50. It should be noted that the documents in issue were before the trial Judge and were referenced in the pleadings. Notwithstanding this the Applicant asserts that neither Court looked at the documents. It is difficult see the basis on which the Privy Council could make that finding of fact. Additionally, it is not the practice of the Board to determine issues of facts where the lower courts have already made findings on the same. As we pointed out to Counsel during submissions, the best that could reasonably be argued is that the Judge did not take advantage of seeing those documents. In any event the resolution of that point has no relevance to anyone besides the parties involved and therefore raises no point of general public importance.

2) The Natural Justice Issue

51. Mrs. Rolle submitted that in our written Judgment this Court has determined that the rules of natural justice, specifically the right to be heard, is something that is not necessarily mandated or required to be considered in an action for unfair dismissal. Counsel argued that apart from the fact that this is a potential error having regard to the authorities (not only

locally, but also in the UK) it is a departure from what this Court itself has previously determined. She concludes that this is an important point for the Privy Council to decide.

52. The submission relates to paragraphs [140] and [142] where the Court stated as follows: -

> **"140. We have considered the respective submissions. As we have already stated in our discussion in relation to the earlier grounds, unlike section 98 of the ERA, in The Bahamas, the "fairness principle" in section 35 of the BEA contains no reference to "equity". Furthermore, nothing in sections 33 or 35 expressly requires a court or tribunal to have regard to natural justice or the Audi Alteram Partem rule when determining whether an investigation is reasonable or unreasonable; or when considering whether a dismissal is fair or unfair. Whether a dismissal is fair or unfair will always depend on "the substantial merits of the case" which will include an evaluation of the circumstances of the dismissal and its reasonableness (or otherwise) and an overall assessment of the fairness or unfairness of the dismissal, based on the factual inquiry which must necessarily be undertaken in each individual case.**
>
> **…**
>
> **142. We have examined the Bahamas Industrial Tribunal decision of *Thurston and another v. John Bull Limited* relied on by Mrs. Rolle. Admittedly, between paras 38-40 the Tribunal adverted to a number of English decisions where the rules of natural justice are specifically discussed. What emerges from those cases, however, is that it does not follow that an alleged breach of the rules of natural justice will *inexorably* lead to a finding that a particular dismissal was unfair. Despite Mrs. Rolle's urgings to the contrary, the authorities show that even in the face of an employee's allegation that the rules of natural justice have been breached, what has to be determined in each individual case is whether the process that led to the employee's dismissal was in the particular circumstances fair and reasonable and the dismissal fair or unfair." [Emphasis added]**

53. A proper reading of these two paragraphs would, however, reveal that there is no merit in the submission proffered by Mrs. Rolle. The point made at paragraph [140] is that neither sections 33 nor 35 **"expressly"** set out a requirement for natural justice. Further, the Judgment clearly states that whether a dismissal is fair or unfair depends on '**the substantial merits of the case.**" Additionally, the Court or tribunal is required to conduct **an overall assessment of the fairness or unfairness of the dismissal.** It is obvious that in that process, the question whether natural justice was afforded to the employee in question can be an important factor. However, as the Court noted in paragraph [142] an alleged breach of the

rules of natural justice will not ***inexorably*** lead to a finding that a particular dismissal was unfair. This is simply a recognition that whether an alleged breach of natural justice will be determinative will ultimately depend on the circumstances of each case i.e. on the substantial merits of the case.

54. Mrs. Rolle in seeking to support this issue relied on the case of **Frederick Ferguson v Island Hotel Company Limited,** IndTribApp. No. 249 of 2016. In referring to that case Counsel asserted that the now President, Sir Michael Barnett, '*stated quite unequivocally that if there is a failure for the employee to be afforded the opportunity to be heard, the dismissal would be unfair".* I have had the opportunity to review that case and it seems that the relevant portion is at paragraph 25 which states that: -

> **"25. In our judgment, for an investigation which leads to termination to be reasonable, an employee must be confronted with the employer's belief that he was guilty of the misconduct and given an opportunity to explain his conduct and show why the proposed disciplinary action is not warranted. This point was made by this court in *Bahamasair Holdings Ltd v Omar Ferguson* SCCivApp No. 16 of 2016 in the context of a claim for unfair dismissal where this court noted with approval the statement by Stephen Isaacs J (as he then was) that *"the failure to give an employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of the case a denial of natural justice and therefore unfair."* The point was also made by Bain J in Newbold v Commonwealth Building Supplies Ltd [2013] 1 BHS J No 37 where at paragraph 51 she said:-**
>
> ***"The Courts have to consider what is a reasonable investigation. The person conducting the investigation has to ensure that the person being investigated is given full particulars of the complaint and is given the opportunity to confront the complainant."***

55. There are a few points which arise. Firstly, it cannot reasonably be disputed that sections 33 and 35 do not **expressly** require or mandate a court or tribunal to have regard to natural justice or the Audi Alteram Partem rule when determining whether an investigation is reasonable or unreasonable; or when considering whether a dismissal is fair or unfair. That notwithstanding, and as the authorities amply demonstrate, adherence to natural justice can be one of the matters which a court or tribunal may take into consideration when evaluating the reasonableness of an investigation; and/or whether the dismissal was fair or unfair.

56. Secondly, in assessing the 'substantial merits of a case' in an unfair dismissal claim, a failure to afford natural justice is undoubtedly an important factor for consideration, but it cannot always be said that such a failure will inevitably or inexorably result in a finding that the dismissal was unfair. In The Bahamas, the "fairness principle" in section 35 is simply: "the substantial merits of the case. This means that the 'substantial merits' of each case must depend on the particular facts of each case.

57. Finally, we must not lose sight of the fact that the learned judge's finding was that the Applicant was summarily dismissed after a proper investigation. The Applicant's present complaint relates to the role of natural justice in relation to his claim for unfair dismissal. I do not perceive the role of natural justice in the area of employment law to be a point of debate or uncertainty in this jurisdiction. In my view the decision in this case is not one which departs from established authorities. In these circumstances, I would not certify Mrs. Rolle's natural justice issue as one of general public importance in this jurisdiction or as one which requires the attention of the Privy Council.

3) The Jurisdictional point

58. According to Mrs. Rolle in the decision of the first instance judge he stated that the Code of Discipline was one of the documents that governed the terms of the relationship between the employee and employer. Quite apart from having stated that, he went on to consider it, and he made a finding that there was no breach of the Code of Discipline. So he not only expressly accepted its applicability, but he considered it, and made a determination that it had not been breached. Learned Counsel further submitted that the finding that it was operative was not appealed by the appellant and it was not appealed by the respondent.

59. Mrs. Rolle contended that this Court, however, determined that the Code of Discipline did not form a part of the employment contract and this was inconsistent with what the learned judge himself had found; and without the matter having been appealed. That determination by this Court, Counsel says, was made without jurisdiction and so it raises the issue of whether or not on the hearing of an appeal the Court of Appeal has the jurisdiction to vary the first instance judgment without the issue having been raised. This jurisdictional point, she says, raises a serious question of law. The point is one, she contends, which could never be properly described as frivolous or vexatious or abusive, or one which does not really raise an arguable ground of appeal.

60. Mrs. Rolle's complaint is a reference to paragraph [188] of this Court's Judgment which stated as follows: -

> **"188. Secondly, Mr. Bethell referred us to Clause 2 of the Code of Discipline which expressly declares that the procedure "does not form part of the contract of employment with CIBC First Caribbean and is subject to change from time to time at the discretion of the bank." According to Mr. Bethell, in view of that express stipulation in the Code itself, the Appellant's claim that his contract of employment had been breached by FCIB's failure to follow the procedures in Clause 4.5.5. of the Code necessarily failed. We agree."**

61. At the hearing of the appeal the essence of Mrs. Rolle's contention was that by virtue of Clause 4.2.3 and 4.5.5 of the Code of Discipline, the Applicant had a contractual right to be heard and to be represented in relation to the intended dismissal for gross misconduct before he was dismissed. She submitted that the Code of Discipline established a disciplinary

procedure and FCIB's failure to follow procedure ought to have been held to constitute a breach of his employment contract.

62. It is accepted that the trial Judge was of the view that the Code of Discipline was one of the documents which governed the terms of the Applicant's employment. However, his concluded finding was that based on the overwhelming evidence of the Appellant's conduct, there had been no breach of the expired Industrial Agreement, or any failure by FCIB to comply with the Code of Discipline.

63. The trial Judge in arriving at his conclusion on the point did not refer to clause 2 and thus made no finding thereon which this Court has set aside. However, Mr. Bethell in his submissions in support of the grounds set out in the Respondent's Notice filed in support of the learned judge's decision argued that the provisions of Clause 2 of the Code of Discipline clearly showed that the Judge's conclusion was right. That is the context to paragraph [188] of the Judgment about which Mrs. Rolle complains.

64. By virtue of rule 20 (2) of the Court of Appeal Rules, there is no question that the Court of Appeal has jurisdiction to hear and consider a Respondent's Notice which seeks to uphold the judgment of the court below on grounds other than those provided by the judge. In my view, though framed by Mrs. Rolle as a jurisdictional issue, the complaint is completely without merit; and clearly does not raise any point of law of general public importance worthy of referral to the Board.

Conclusions

65. It is noted that in his Notice of Motion the Applicant indicates that the 28 grounds of appeal advanced by the Notice of Appeal, were being hereby incorporated into his Notice of Motion by reference. During the hearing of the appeal all 28 of these grounds were dismissed by the Court as lacking in merit. The Notice of Motion states that the Appellant will be asserting and contending before the Judicial Committee that the Court of Appeal similarly erred in each and every such respect as set out in the Notice of Appeal. In dismissing the grounds of appeal we set out in our Judgment the reasons for finding that those grounds were lacking in merit. We have been provided with no information which would lead us to alter our views as to the lack of merit in those grounds.

66. As noted earlier, the new grounds provided by the Applicant contain complaints relative to the proceedings before this Court during the appeal. Mrs. Rolle did not seek to deal with them in the normal way expected when seeking to have the Court exercise its discretion to grant leave save for the three 'core issues' which she referred to as being reflected in those grounds. This position, it seems, was based on the position articulated in the Notice of Motion that: -

> "**AND FURTHER TAKE NOTICE For the avoidance of doubt that the reference to and inclusion of the aforementioned intended grounds in this Notice is wholly WITHOUT PREJUDICE to the Appellant's contention that he is entitled to obtain leave to appeal AS OF RIGHT by virtue inter alia of**

> **Section 23(1) of the Act, and in keeping with Section 2.1.1 of the JCPC Practice Direction 1 AND without conceding that the Court on the hearing of the application for leave to appeal AS OF RIGHT is empowered to make a determination as to the merits of the intended appeal pursuant to the exercise of a discretion to grant leave or otherwise."**

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 the 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 Applicant has identified points of law of general public importance which are fit to be referred to her Majesty in Council.

THE APPLICATION FOR A STAY

70. As indicated at the beginning of this ruling the Applicant has also made application for a Stay of Execution. The Applicant has filed a Notice of Motion which invokes Section 6 of the Bahama Islands (Procedure In Appeals To Privy Council) Order, 1964 which provides as follows:-

> **"Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, <u>when granting leave to appeal,</u> either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said Judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon." [Emphasis added]**

71. It is clear that the provision on which the Applicant seeks to rely is only relevant to a situation where this Court has determined that leave should be granted. This position was confirmed by the decision of this Court (differently constituted) in the case of **Francis Farmer, et al. v. Security and General Insurance Co. Ltd.** SCCivApp. No. 93 of 2011 where the Court opined that: -

> **"14. As the section demonstrates the jurisdiction to grant a stay in proceedings only arises where the Court decides to exercise its discretion in favour of an intended appellant and grants leave to appeal."**

72. In the present circumstances as we have determined not to grant leave to appeal, we have no jurisdiction to grant the stay sought by the Applicant and the application is refused**.**

73. It is for the foregoing reasons that we dismiss the Applicant's applications for leave to appeal and for a stay. We order that the costs of these applications are to be paid by the Applicant to the Intended Respondent. Such costs are to be taxed if not agreed. We certify those costs to be fit for two counsel.

The Honourable Mr. Justice Evans, JA

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott,JA