COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp & CAIS No. 100 of 2022

IN THE MATTER OF a Grant of Easement by deed dated 22 July 2004 between Chub Cay Resorts Limited of the first part, Chub Cay Associates Limited of the second part AND Cynthia S Brouwer et al (collectively called the Grantees) of the third part, recorded in the Registry of Records in book 11394 at pp. 435 to 454.

BETWEEN

CHUB CAY REALTY LLC

Applicant/Intended Appellant

AND

RICHARD and PAMELA ESCOBAR

CHARLES VOSE JR

MSAIRNSEA LLC

Intended Respondents

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Carlson Shurland, KC with Ms. Asha Lewis, Counsel for the Applicant/ Intended Appellant**

Mr. John Delaney, KC with Ms. Lena Bonaby, Counsel for the Intended Respondents

DATES: **15 November 2023; 15 February 2024**

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Civil Appeal - Application for leave to appeal to the Privy Council - Whether appeal "as of right"- Section 23(1) Court of Appeal Act- Whether appeal involves a point of law? – whether appeal involves general or public importance? -Interpretation of "property in dispute" in Section 23

The application is for leave to appeal to the Privy Council from a judgment rendered by the Court of Appeal on July 20, 2023. This appeal primarily revolves around the interpretation of a clause within a deed, granting the appellants specific rights concerning property and amenities owned by the respondent on Chub Cay in the Berry Islands. The appellants possess lots on Chub Cay, while the respondent, Chub Cay Realty LLC, holds ownership of the Chub Cay Club premises, encompassing the clubhouse, hotel, restaurant, and facilities utilized by lot owners, members, guests, and visitors. Following the Court's decision to grant the appeal and adjust the second declaration to outline the appellants' entitlement to utilize various facilities on par with other property owners and non-members of the club, the applicant seeks leave to appeal this ruling, a move contested by the intended respondents. After hearing submissions on the application the Court reserved its decision

Held: (Barnett, P dissenting) Application for leave to appeal to the Privy Council is refused. The applicant is to pay the costs of the application to be taxed if not agreed.

per Isaacs, JA:

Section 23 of the Court of Appeal Act does not explicitly define "property in dispute." Unlike the broader term "property dispute," which encompasses various land-related conflicts, including those concerning titles, ownership, restrictive covenants, easements, or usage limitations, "property in dispute" implies contested claims over a specific property. It typically pertains to disputes under specific laws like the Quieting Titles Act or cases involving trespass, boundary disputes, or adverse possession. I disagree with the President's interpretation suggesting that "property in dispute" extends to encompass disputes over the scope of an easement. Such an interpretation would constitute judicial overreach, as Parliament deliberately opted for a narrower term. In alignment with Lord Nolan's stance in Zuliani, which advocates for a strict interpretation of legislative provisions, I believe that "property in dispute" should be strictly construed to involve conflicting property claims, excluding broader disputes like easements or licenses. Consequently, I do not consider the current application an appeal as of right. Although I concur with the President's judgment on other matters, I see no need to further elaborate on the application. Therefore, I decline to grant leave for the application, as it fails to meet the criteria outlined in Section 23 of the COA Act and does not raise any issues of general public importance. However, despite my refusal, the applicant retains the option to directly apply to the Privy Council for special leave.

Jacpot Ltd (Appellant) v Gambling Regulatory Authority (Respondent) (Mauritius) [2018] UKPC 16 considered
Meghji Lakhamshi & Brothers v Furniture Workshop [1954] AC 80 mentioned
Zuliani and others v. Viera, [1994] 2 LRC 705 considered

per Evans, JA:

The applicant argues that the proposed appeal raises the important issue as to recreational easements and that this issue has not yet been considered in The Bahamas. There are two points to be made. Firstly, at the hearing in the Court of Appeal the applicant /intended appellant conceded that the trial judge was correct in law with respect to recreational easements. The issue in this case

was simply the proper construction of the 2004 Grant. That does not involve any point of law of general or public importance. Secondly, the issue of recreational easements has already been considered by a higher court in **Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd** [2018] UKSC 57. The law in this regard has been decided and there is no basis for this court to consider that the issue needs to be revisited. In my judgement, whilst the proper construction of the 2004 Grant is important to the parties, this court having made its determination on that issue, it does not raise a point of law of general or public importance that warrants the attention of the apex court, therefore I would refuse leave on the third limb of section 23 also.

Ashley Dawson-Damer v Grampian Trust Company Limited (2) Lyndhurst Limited SCCivApp. No. 30 of 2022 considered
Jacpot Ltd (Appellant) v Gambling Regulatory Authority (Respondent) (Mauritius) [2018] UKPC 16 considered
Paul F. Major v First Caribbean International Bank SCCivApp 77 of 2021 considered
Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57 considered
Responsible Development for Abaco v Attorney General SCCivApp No. 248 of 2017; considered

per Barnett, P (Dissenting):

Section 23 does not define the meaning of the expression “property in dispute”. It is to be noted that the section does not say “property dispute”. That in my judgment is a much wider term and can encompass any dispute relating to land. It is not limited to disputes as to title or ownership. It certainly can include disputes as to restrictive covenants, easements or limitation on use. It includes any dispute which involves directly or indirectly a question relating to real property. The only limitation is that the land itself must exceed four thousand dollars in value. If section 23 contained the words “property dispute” it would not be difficult to construe it as including the dispute in this action. This would be consistent with the language used in other jurisdictions which refer to ‘disputes involving directly or indirectly a claim to or question respecting property’. This is a dispute concerning the scope of “recreational easements” granted by a deed dated 20th July, 2004. In my view, this falls within section 23 as ‘a property in dispute’. That is to say the value of the property which is the subject matter of this dispute. It is land valued in excess of $4000.00. In the result, in my view the applicant/intended appellant is entitled to appeal as of right. This appeal is not about the proper construction of section 23, which I accept is a point of law of general and public importance. The appeal is about the proper construction of the 2004 Grant. In the circumstances, although the construction of section 23 is not free from doubt, for the reasons set out in this judgment, I would accede to the application and grant leave on the usual terms as to the bond and the preparation and dispatch of the record of appeal.

Armbrister v Lightbourn [2012] UKPC 40 mentioned
Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd [2018] UKPC 27 mentioned
Finlayson v Caterpillar SCCivApp. No. 99 of 2022 considered
Meghji Lakhamshi & Brothers v Furniture Workshop [1954] AC 80 considered

Ocean Estates v Pinder [1969] 2 A.C. 19 mentioned
Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57 mentioned
Renaissance Ventures Ltd v Comodo Holdings [2018] ECSC J1008-3 considered
Zuliani and others v. Viera [1994] 2 LRC 705 considered

JUDGMENT

<u>Judgment delivered by the Hon. Mr. Justice Jon Isaacs, JA</u>

1. Before us is an application for leave to appeal to His Majesty in Council ("the Privy Council") from a judgment of this Court delivered on 20th July, 2023 ("the Judgment") wherein the Court allowed the appeal of the intended respondents and dismissed the appeal of the intended appellant. The intended appellant is the unsuccessful party making the application.

2. I have read the judgment of my brother, the President, allowing the application for leave to appeal to the Privy Council. For reasons set out below, I am unable to travel the path he has chosen to take. In other words, I do not accede to the application to grant leave as, in my view, the proposed appeal is not an appeal as of right and nor does it raise a question of general public importance.

3. I agree with him that if the appeal was of right then it should not be refused as being an abuse of process.

4. The history of the dispute between the parties was rehearsed in paragraphs 4 through 21 of the Court's judgment.

5. Suffice it to say that the dispute stems from what the Court identified in paragraph 1 of our judgment where we said that the appeal:

   > **"… concerns the proper construction of a provision in a deed granting the appellants certain rights with respect to property and facilities owned by the respondent on Chub Cay in the Berry Islands"**.

6. We heard and allowed the intended respondents' appeal and made the following order:

   > **"In the result, the appeal is allowed by varying the second declaration to read:**

> **"DECLARED that pursuant to clause 2 (a) of the 2004 Grant of Easements, the Plaintiffs are entitled to use that portion of the Club (as defined in the 2004 Grant of Easements) and other facilities which are open to non-members of the Club and to guests of the Club including the bar, restaurant, club, hotel, beach, common areas, pathways, and any facility whether recreational in nature or otherwise upon the same terms and conditions as the Club Marina Utilities and other facilities are made available to other property owners on Chub Cay and to non-members of the Club including the payment of fees and other charges common to other users of the Club Marina Utilities and other facilities."**

7. The intended appellant now seeks leave to appeal this decision to the Privy Council.

8. The intended appellant submits that it has an appeal as of right and the intended respondents object to the application. They say it is not an appeal as of right.

9. This application to appeal to the Privy Council is made pursuant to section 23 of the Court of Appeal Act ("COA Act"). That section 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. The intended appellant argues that it is an appeal as of right as it is **"an appeal from the Supreme Court in a civil action in which…the value of the property in dispute is of the amount of four thousand dollars or upwards"**.

11. The President has noted in his judgment that the provisions of section 23 of the COA Act are different from other provisions in other CARICOM countries that provide for appeal to the Privy Council. As he has referred to and set out the relevant legislation of such countries as Jamaica, Trinidad and Tobago, Antigua and Barbuda and the Cayman Islands, I again rely on his industry to avoid unnecessary repetition.

12. As the President stated, *"regretfully, we can gain very little guidance from decisions of the courts of the region in construing our section 23. The provisions in those jurisdictions are much wider than section 23*".

13. Similarly, in the Privy Council decision of **Jacpot Ltd (Appellant) v Gambling Regulatory Authority (Respondent) (Mauritius)** [2018] UKPC 16, the Board considered Article 81 of the Mauritian Constitution, which is the homologue to section 23 of the of the COA Act, to determine "the value threshold". Article 81 reads, so far as relevant:

> **"(1) An appeal shall lie from decision of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases**
> **…**
> **(b) where the matter in dispute on the appeal to the Judicial Committee is of the value of 10,000 rupees or upward or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 10,000 rupees or upwards, final decisions in any civil proceedings;**
>
> **(2) An appeal shall lie from decision of the Court of Appeal or of the Supreme Court to the Judicial Committee with the leave of the Court in the following cases**
>
> **(a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee, final decisions in any civil proceedings;**
> **…**
>
> **(5) Nothing in this section shall affect any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter."**
> (Emphasis added)

14. In their judgment in **Jacpot Ltd**, the Board mentioned **Meghji Lakhamshi & Brothers v Furniture Workshop** [1954] AC 80 at paragraph 13:

> **"13. In *Meghji Lakhamshi & Brothers v Furniture Workshop* [1954] AC 80, the Judicial Committee held that an order for possession of tenanted property made in favour of the landlord exceeded the threshold value if the property was worth more. Lord Tucker, delivering the advice of the Board, said at p 88**

> **that in such a claim Page 8 "… it is the value of the property, not the value of the claim or question, which is the determining factor. <u>The presence of the word 'indirectly' seems to require this construction.</u>"** (Emphasis added)

15. It is clear that their Lordships found that they ought to consider the "value of the property" because of the specific wording of the Mauritian Constitution, to wit, "**the appeal involves, directly or <u>indirectly</u>, a claim to or a question respecting property**".

16. Section 23 does not define the expression "property in dispute". As the President has observed the section does not say "property dispute". The phrase "property dispute" is a much wider term and as the President said can encompass any dispute relating to land. It is not limited to disputes as to title or ownership. It certainly can include disputes as to restrictive covenants, easements or limitation on use. It includes any dispute which involves directly or indirectly, a question relating to real property.

17. However, the expression in section 23 is "property in dispute". This, as a matter of language, means "property to which there are disputed claims". Example of these are disputes under the Quieting Titles Act or actions as to trespass which involve boundary disputes or dispossession by adverse possession. I do not agree that the words "property in dispute" mean "the property the subject matter of the dispute" as the President has suggested, thus including disputes as to the scope of an easement, which is the dispute in this matter. In my view, to arrive at such an interpretation would be to indulge in judicial legislation since Parliament chose not to follow the lead of Jamaica or any of the other jurisdictions that employed the broader terminology in their legislations. Contrary to the opinion expressed by the President that the broader interpretation "*does no violence to the language in the statute*", it goes against what Parliament has consciously chosen to do and in that regard stretches the expression well beyond the limit of its elasticity and into the realm of judicial legislation.

18. As pointed out by Lord Nolan in **Zuliani**

> **"in providing that the automatic right to 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 for unliquidated damages. In the view of their Lordships this provision should be *strictly construed*"**.

19. In my view, as Parliament has chosen to use the expression "property in dispute" and not "property dispute", or any of the more liberal formulae that were in existence in 1964 when this provision was first enacted, and has not chosen to amend the provision to be consistent with the other legislation in the region, I must - albeit with much reluctance - give the phrase a strict construction. I thus conclude that the phrase "property in dispute" is limited

to actions involving competing claims to property and not to wider disputes like easements or licences in relation to property such as exist in this case.

20. In the result, I do not regard the application as an appeal as of right.

21. Inasmuch as I have already expressed my concurrence with the remainder of the President's judgment, there is no need for me to give further treatment on the application.

22. In the circumstances, I refuse the application for leave because it has not been shown that the application is as of right on any limb of section 23 of the COA Act and nor does it raise any issue of general public importance.

23. Notwithstanding my refusal to grant leave, the applicant is always at liberty to apply directly to the Privy Council for special leave. The applicant is to pay the costs of the application to be taxed if not agreed.

The Honourable Mr. Justice Isaacs, JA

Judgment delivered by the Hon. Mr. Justice Evans, JA

24. This is an application for leave to appeal to His Majesty in Council from a judgment of this Court delivered on the 20th July, 2023.

25. The applicant/intended appellant asserts that it has an appeal as of right. The intended respondents assert that there is no appeal as of right and even if there was an appeal as of right it should be refused as the proposed appeal is an abuse of process. Moreover, they argue that if leave was sought as a matter of discretion, the proposed appeal does not involve a point of law of general or public importance. For those reasons leave should be refused.

26. I have had the opportunity to review the draft judgment prepared by the Learned President wherein he proposes to grant leave on the basis that the Applicant has an appeal as of right. Unfortunately, I am unable to agree with that proposed disposition.

27. The factual background is pretty well set out in the Judgment of the Learned President and I adopt them for the purposes of my comments.

28. In my view the question as to whether the Appellant has an appeal as of right turns on the proper interpretation of the words **'property in dispute'** as used in Section 23 of the Court of Appeal Act. That section 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."**

29. It is to be noted that the provisions of section 23 is different from other provisions found in other Caribbean Countries territories which still provide for appeal to the Privy Council.

30. In particular, it is noted that in Jamaica, Antigua and Barbuda and the Cayman Islands uses the phrase "**where the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of …"**

31. In Trinidad and Tobago, the words used are "**the claim to or question respecting property or a right of the value of…"**

32. It is obvious that the provisions in those jurisdictions are much wider than section 23. The phrase used in those jurisdiction is '**a claim to or question respecting property or a right'.** This phrase contemplates **(i)** a claim to a particular property**(s); (ii)** a claim relative to a piece of property; and (iii) a claim to a right obtained relative to that property'. That in my judgment is a much wider term and can encompass any dispute relating to land. It is not limited to disputes as to title or ownership. It includes any dispute which involves directly or indirectly a question relating to real property the only limitation is that the land itself must exceed four thousand dollars in value.

33. Section 23 uses the phrase "property in dispute" but that section nor the Act provides a definition to assist with the meaning of the expression "**property in dispute**". If section 23 contained the words "property dispute" I would be more inclined to construe it as including the dispute in this action. This would be consistent with the language used in other jurisdictions which refer to 'disputes involving directly or indirectly a claim to or question respecting property'. It is also significant that the expression '**or a right'** is also absent from section 23. The presence of that phrase would have given some force to the Intended Appellant's position.

34. However, the expression in section 23 is "property in dispute". The words **directly or indirectly** are not used**.** As such I agree with the view of my Brother Isaacs JA that this as a matter of language means "property to which there are disputed claims". For example,

disputes under the Quieting Titles Act or actions as to trespass which involve boundary disputes or dispossession by adverse possession. However, in the present case there was no dispute as to title relative to the real estate on which the club is situated. The matter as I understand it related to a dispute about the construction of an agreement that was entered into between the parties. That dispute centered on the benefits of club members Vis a Vis privileges afforded to non-club members.

35. In my view one would have to greatly stretch the meaning of **'property in dispute'** to bring the list between the parties under that umbrella. This was more of a dispute relative to '**a right'** and as noted earlier that phrase is absent from Section 23.

36. I agree with my Brother Isaacs JA that as Parliament has chosen to use the expression "**property in dispute**" and not "**property dispute**" or any of the more liberal formulae that were in existence in 1964 when this provision was first enacted and has not chosen to amend the provision to be consistent with the other legislation in the region the phrase must be given a strict construction. It should be limited to actions involving competing claims to property and not to wider disputes like easements or licences in relation to property such as exists in this case.

37. Further, in the recent decision of this Court in **Ashley Dawson-Damer v Grampian Trust Company Limited (2) Lyndhurst Limited** SCCivApp. No. 30 of 2022 Crane-Scott JA delivering the decision opined as follows: -

> **"12. At the hearing before us, Counsel for Grampian, Mr. Sean Moree K.C., quite properly conceded that Ashley's appeal is indeed "as of right". In this regard, it appears, he could not resist the written submissions of Ashley's Counsel, Mr. Richard Wilson K.C., that the appeal relates to a claim involving or pertaining to a dispute about underlying property**
> **where the property in dispute "is of the value of four thousand dollars or upwards"; and as such, falls squarely into limb 2 of section 23(1) of the CoA Act.**
>
> **13. Notwithstanding Grampian's concession and having ourselves considered the leave application, we agree with Mr. Wilson that there is clear and consistent authority from around the Commonwealth and from the Board, which establishes that the value threshold for an "as of right" appeal is not limited to a money claim. In this regard see: *Meghji Lakhamshi & Brothers v. Furniture Workshop* [1954] AC 80 (at 87-88); *Becker v City of Marion Corporation* [1977] AC 271 (at 284); *Li Chen Ling Kaw v. Societe Piang Sang Pere et Fils* [2012] UKPC 19 (paragraphs 14-15); and most recently the Board's guidance in Jacpot Ltd v.**

Gambling Regulatory Authority (Mauritius) [2018] UKPC 16 (paragraph 13).

14. <u>The current position in relation to "as of right" appeals is summarized in the Board's decision in *Jacpot* (above) where Lord Sumption explained:</u>

"13...[t]hese decisions are authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and <u>(ii) that where an appeal will determine the existence of a proprietary right or a proprietor's right of disposal over the property, there is an appeal as of right if the property's value exceeds the threshold."</u> **[Emphasis added]"**

38. It should be noted that the application by **Jacpot Ltd** was for special leave to appeal from the dismissal by the Supreme Court of Mauritius of an application for judicial review. The relevant provision was in the following term: -

> **"(1) An appeal shall lie from decision of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases-**
> **…**
> **(b) where the matter in dispute on the appeal to the Judicial Committee is of the value of 10,000 rupees or upward or where the appeal involves, <u>directly or indirectly,</u> a claim to or a question respecting property or a right of the value of 10,000 rupees or upwards, final decisions in any civil proceedings;"**

39. Although that provision is clearly wider than our section 23 the Board limited its application to those instances where '***<u>an appeal will determine the existence of a proprietary right or a proprietor's right of disposal over the property</u>***

40. In these circumstances I cannot agree with the Learned President that the applicant has an appeal as of right. It follows that unless the circumstances require us to exercise our power to grant leave under the third limb of section 23 the Application must be dismissed.

41. It is settled law that this court will not exercise its discretion to grant leave unless the intended appeal raises an arguable case and that the proposed appeal involves a point law of general of public legal importance. See **Responsible Development for Abaco v Attorney General** SCCivApp No. 248 of 2017; and the more recent case of **Paul F. Major v First Caribbean International Bank** SCCivApp 77 of 2021

42. The applicant/intended appellant argues that the proposed appeal raises the important issue as to recreational easements and that this issue has not yet been considered in The Bahamas. There are two points to be made. Firstly, at the hearing in the Court of Appeal the applicant

/intended appellant conceded that the trial judge was correct in law with respect to recreational easements. The issue in this case was simply the proper construction of the 2004 Grant. That does not involve any point of law of general or public importance.

43. Secondly, the issue of recreational easements has already been considered by a higher court in **Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd** [2018] UKSC 57. The law in this regard has been decided and there is no basis for this court to consider that the issue needs to be revisited.

44. In my judgement, whilst the proper construction of the 2004 Grant is important to the parties, this court having made its determination on that issue, it does not raise a point of law of general or public importance that warrants the attention of the apex court.

45. 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.

46. In my judgement the proposed appeal does not involve a point of law of general and public importance and therefore I would refuse leave on the third limb of section 23 also.

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The Honourable Mr. Justice Evans, JA

Judgment delivered by the Hon. Sir Michael Barnett, P

47. This is an application for leave to appeal to His Majesty in Council from a judgment of this Court delivered on the 20th July, 2023.

48. As stated in paragraph 1 of the judgment of this court, the appeal concerned **"the proper construction of a provision in a deed granting the appellants certain rights with respect to property and facilities owned by the respondent on Chub Cay in the Berry Islands"**.

49. The judgment records that **"The appellants are owners of lots on Chub Cay. The respondent, Chub Cay Realty LLC is the owner of the premises known as the Chub Cay Club. The respondent owns the clubhouse, hotel, restaurant and the facilities on the island used by lot owners, members of the Chub Cay Club and guests and visitors to Chub Cay"**.

50. This court allowed the appeal and made the following order:

> **In the result, the appeal is allowed by varying the second declaration to read:**
>
> **"DECLARED that pursuant to clause 2 (a) of the 2004 Grant of Easements, the Plaintiffs are entitled to use that portion of the Club (as defined in the 2004 Grant of Easements) and other facilities which are open to non-members of the Club and to guests of the Club including the bar, restaurant, club, hotel, beach, common areas, pathways, and any facility whether recreational in nature or otherwise upon the same terms and conditions as the Club Marina Utilities and other facilities are made available to other property owners on Chub Cay and to non-members of the Club including the payment of fees and other charges common to other users of the Club Marina Utilities and other facilities.**

51. The applicant/ intended appellant now seeks leave to appeal this decision to the Privy Council. That application is resisted by the intended respondents.

52. The applicant/intended appellant asserts that it has an appeal as of right. The intended respondents assert that there is no appeal as of right and even if there was an appeal as of right it should be refused as the proposed appeal is an abuse of process. Moreover, they argue that if leave was sought as a matter of discretion, the proposed appeal does not involve a point of law of general or public importance. For those reasons leave should be refused.

53. This application requires a careful consideration of Section 23 of Court of Appeal Act. That section 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."**

54. That section provides three routes to an appeal to the Privy Council from a judgment of the Court of Appeal. Of course Article 104 of the Constitution provides a fourth route to appeal to the Judicial Committee in constitutional matters.

55. First, an appeal as of right exists where the appeal is from a civil action in the Supreme Court in which the amount sought to be recovered by any party is of the amount of $4000 or upwards. Secondly, an appeal as of right also exists where the appeal is from a civil action in the Supreme where the value of the property in dispute is of the amount of $4000 or upwards. Thirdly, an appeal, not as of right but as a matter of discretion, exists where the appeal is from an action in the Supreme Court in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial Sides of the Supreme Court.

56. Section 23 does not provide for an appeal from a judgment of the Court of Appeal on an appeal from an action on the criminal side of the Supreme Court.

57. There is no suggestion that in this action any party sought the recovery of a liquidated sum in excess of $4,000. It is not an appeal as of right on the first limb of section 23, see **Zuliani and others v. Viera, [1994] 2 LRC 705**

58. In order for this appeal to the Privy Council to be an appeal as of right, it must fall within the second limb of section 23. That is to say it must be **"an appeal from the Supreme Court in a civil action in which…the value of the property in dispute is of the amount of four thousand dollars or upwards"**.

59. Section 23 in its terms was first found in an amendment in 1912 to the then Supreme Court Act. Section 35 was in the following terms:

> **"35. An appeal shall lie to Her Majesty in Council from any judgment or order of the Court in a civil action subject to such restrictions, limitations and conditions as may from time to time be prescribed in relation thereto by Her Majesty in Council: Provided that in such action the amount sought to be recovered or the value of the property in dispute, is of the amount of three hundred pounds or upwards; or, if the amount sought to be recovered, or the value of the property in dispute is less than 300 pounds, by leave of the Court."**

60. When the Court of Appeal Act was enacted in 1964 and appeals then lie to the Privy Council from the Court of Appeal and not from the Supreme Court to the Privy Council that section 35 of the then Supreme Court Act was in substance re-enacted in the Court of Appeal Act notwithstanding that the statutory provisions in other jurisdiction were different.

61. For example, in Jamaica, section 111 of their Constitution is in the following terms:

> **"111(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases- where <u>the matter in dispute</u> on the appeal to Her Majesty in**

Council is of the value of one thousand dollars or upwards where the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

a. **final decisions in proceedings for dissolution or nullity of marriage**
b. **final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and**
c. **such other cases as may be prescribed by Parliament."** (emphasis added)

62. That provision was found in the law of Jamaica in 1964 when section 23 of the Court of Appeal Act was enacted. The Bahamas Parliament did not to follow that formula, it simply re-enacted the existing provision.

63. In Trinidad and Tobago, section 109 of their Constitution is similar to that of Jamaica.

> **"109. (1) An appeal shall lie from the decision of the Court of Appeal to the Judicial Committee as of right in the following cases:**
>
> a. **final decisions in civil proceedings where the matter in dispute on the appeal on the Judicial Committee is of the value of fifteen hundred dollars and upwards or where the claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards;**
> b. **final decisions in proceedings for dissolution or nullity of marriage;**
> c. **final decisions in any civil, criminal or other proceedings which involve a question as to the interpretation of this Constitution**
> d. **except in cases falling under section 108(d), any case referred to in that section**
> e. **final decisions in disciplinary matters under section 81(3) to (5) of the Supreme Court of the Judicature Act under the Legal Profession Act;**
> f. **such other cases as may be prescribed..."**

64. After 1964, the Antigua and Barbuda Constitution provided in section 122

An appeal shall lie from decisions from the Court of Appeal to Her Majesty in Council as of right in the following cases-

> **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"**

65. More recently, the equivalent law in Cayman Islands, section 3(1) of Cayman Islands (Appeal to Privy Council) Order 1984 provides:

> **"3. -(1) Subject to the provisions of this Order, an appeal shall lie as of right from the decisions of the Court to Her Majesty in Council 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 value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards;**
>
> **b. final decisions in proceedings for dissolution or nullity of marriage; and**
>
> **c. such other cases as may be prescribed by any law for the time being in force in the Cayman Island;"**

66. Similar provisions exist in jurisdictions outside the CARICOM region with appeal to the Privy Council. An example is that in Mauritius.

67. Section 23 does not define the meaning of the expression "property in dispute". It is to be noted that the section does not say "property dispute". That in my judgment is a much wider term and can encompass any dispute relating to land. It is not limited to disputes as to title or ownership. It certainly can include disputes as to restrictive covenants, easements or limitation on use. It includes any dispute which involves directly or indirectly a question relating to real property. The only limitation is that the land itself must exceed four thousand dollars in value. If section 23 contained the words "property dispute" it would not be difficult to construe it as including the dispute in this action. This would be consistent with the language used in other jurisdictions which refer to 'disputes involving directly or indirectly a claim to or question respecting property'.

68. However, the expression in section 23 is "property in dispute". What is the proper interpretation of that expression? As a matter language this could mean "property to which there are disputed claims". For example, it may be limited to disputes under the Quieting Titles Act or actions as to trespass which involve boundary disputes or dispossession by adverse possession. Claims of that kind have been heard by the Privy Council. See

Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd [2018] UKPC 27; **Armbrister v Lightbourn [2012] UKPC 40** or **Ocean Estates v Pinder [1969] 2 A.C. 19**. Alternatively, it could also mean simply "property the subject matter of the dispute". This definition would be broad enough to include a dispute concerning easements over property.

69. I am mindful of the decision in **Zuliani** where Lord Nolan in construing the provision in the law of St. Kitts and Nevis, which provided that appeals lie to the Privy Council where the matter in dispute was above a prescribed value, said: "**in providing that the automatic right to 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 for unliquidated damages. In the view of their Lordships this provision should be strictly construed"**. In my judgment although Parliament has chosen to use the expression "property in dispute" and not the wide and clear expression used in similar legislation in the region cited earlier, the words "property in dispute" should be construed as meaning "property the subject matter of the dispute" and thus cover disputes involving directly or indirectly a claim to or question respecting land. This construction would construe our legislation in a manner consistent with other legislation concerning appeals to the Privy Council. It does no violence to the language in the statute. With respect, I do not regard it as judicial legislation. It is simply the court construing a term which can be the subject of different interpretation.

70. This is a dispute concerning the scope of "recreational easements" granted by a deed dated 20th July, 2004. In my view, this falls within section 23 as 'a property in dispute'. That is to say the value of the property which is the subject matter of this dispute. It is land valued in excess of $4000.00. In the result, in my view the applicant/intended appellant is entitled to appeal as of right.

71. The intended respondents argue that there is no evidence that the land in question is valued in excess of $4000.00. In my judgment, this is not a serious argument. The property the subject of this dispute is club facilities on the island of Chub Cay which are worth well over the threshold as is disclosed in the evidence led at the trial in the court below. In **Meghji Lakhamshi & Brothers v Furniture Workshop [1954] AC 80,** the Judicial Committee held "it is the value of the property, not the value of the claim or question, which is the determining factor." Therefore, it is not the value of the easement which is relevant.

72. The intended respondents also argued that leave should be refused as the proposed appeal is an abuse of process. In paragraph 37 of their submissions the intended respondents submit:

> **It is submitted on behalf of the Homeowners that CCRL's Leave Application is frivolous and vexatious. In the exercise of this**

Court's discretion, this Honourable Court should not allow an abuse of its process for the following reasons:

a) CCRL is attempting to re-litigate issues where concurrent findings of fact have already been made by the Supreme Court and this Court. Grounds 1 to 5 are concurrent findings of fact made in the Supreme Court Action and the COA Actions. The Privy Council in Sancus Financial Holdings Ltd and others (Appellants) v Holm and another (Respondents) (British Virgin Islands) [2022] UKPC 419 recently reaffirmed its long-held practice not to interfere with concurrent findings of primary fact by the courts below, save for exceptional circumstances (which have not been provided by the Applicant);

b) in the instant proceedings, CCRL has raised for the first time the issue of the value of the dispute and the associated purported financial burden the Applicant will incur as a result of the Supreme Court Judgment and COA Judgment. The Leave Application is not the appropriate forum for such an issue to be properly ventilated for the first time and should have been raised in the Supreme Court Action or the COA Actions; and

c) the Leave Application appears to be a thinly-veiled tactic of delay by CCRL calculated to weaponise the process of litigation in a manner so as to oppress the Homeowners. Put differently, the ulterior purpose of the Leave Application appears to be wrongly to deny (for as long as possible) the Homeowners their rights under the GOE and the fruits of the judgment in the Supreme Court Action and COA Actions.

73. In **Finlayson v Caterpillar** SCCivApp. No. 99 of 2022 this court considered similar arguments. In the judgment this Court said:

9. The respondent opposed the application for the grant of leave. It submitted that the proposed appeal is an abuse of process. They suggest two reasons for that submission.

Firstly, the respondent says that the appeal is hopeless and has no prospect of success. <u>The fact that the appeal may not succeed does not mean that it is an abuse of process. Abuse of process means "using that process for a purpose or in a way significantly different from its ordinary and proper use of the court process"</u> See Attorney General v. Barker [2000] FLR 759, DC, per Lord Bingham LCJ, at paragraph 19. and Standard Life Assurance Ltd v Gleeds (UK) (a firm) and others [2020] EWHC 3419 (TCC). There is no basis for finding that this appeal is for an

> **improper motive or purpose or that its prospects of success are fanciful.**
>
> **10. Secondly, the respondent argues that the proposed grounds of appeal raise grounds that were not argued before this Court. The same argument was advanced in Blue Illusions and was rejected. At paragraph 43 of the judgment granting conditional leave this Court (differently constituted) said:**
>
> > **"Mr. Moree further submitted that if the Court was minded to grant leave, that the amended grounds which were not argued before this Court on the appeal or which do not reasonably arise from the Court's judgment, be struck out and not be allowed to go forward to the Privy Council. Mrs. Gayle Lockhart Charles rejoins that that objection is more properly taken before the Privy Council, and not this Court. I accede to Mrs. Lockhart Charles' submission, and would not interfere with the grounds filed."**
>
> **11. This is an appeal as of right and, in the circumstances, we accede to the application for leave to appeal to the Privy Council. Conditional leave is granted on the usual terms and the applicant is given 90 days to prepare the necessary record.**

74. I am not persuaded that the proposed appeal is an abuse of process. The Club's desire to have the apex court consider whether this court's construction of the 2004 Grant is correct is perfectly reasonable. It has serious financial implications for the running of the operations at Chub Cay. With respect, this is not an issue of concurrent findings of fact. The issue is the proper construction of a deed. That is an issue of law.

75. Finally, in the event I was wrong and the appeal was not one of right, I would not have exercised my discretion to grant leave. The point of law raised by this appeal is not in my view one of general or public importance. The proper construction of the 2004 Grant may be of importance to the parties but it is a matter of construction with no public law importance. The law with regard to recreational easement has already been considered by the UK Supreme Court in **Regency Villas Title Ltd v Diamond Resorts (Europe) ltd [2018] UKSC 57** and the applicant/intended appellant did not argue that the trial judge got the law wrong. As was said in **Renaissance Ventures Ltd v Comodo Holdings [2018] ECSC J1008-3** (decided on 8 October 2018):

> **"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]**

76. This appeal is not about the proper construction of section 23, which I accept is a point of law of general and public importance. The appeal is about the proper construction of the 2004 Grant.

77. In the circumstances, although the construction of section 23 is not free from doubt, for the reasons set out in this judgment, I would accede to the application and grant leave on the usual terms as to the bond and the preparation and dispatch of the record of appeal.

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The Honourable Sir Michael Barnett, P