COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 16 of 2024

In The Matter Of The Winter Trust, The Summer Trust
And The Spring Trust

And In The Matter Of An Arbitration

And In The Matter Of An Application Pursuant To Sections 89, 90 And 91 Of The Arbitration Act 2009

BETWEEN:

GABRIELE VOLPI

Intended Appellant
(Applicant below)

- And -

(1) DELANSON SERVICES LIMITED

(2) MATTEO VOLPI

(3) SIMONE VOLPI

Intended Respondents
(Respondents below)

SCCivApp No. 17 of 2024

In The Matter Of The Winter Trust, The Summer Trust
And The Spring Trust

And In The Matter Of An Arbitration

And In The Matter Of An Application Pursuant To Sections 90 And 91 Of The Arbitration Act 2009

BETWEEN

DELANSON SERVICES LIMITED

Appellant/Applicant

And

(1) MATTEO VOLPI

(2) GABRIELE VOLPI

(3) SIMONE VOLPI

Respondent

BEFORE: **The Honourable Sir Michael Barnett, President**
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Ms. Elspeth Talbot Rice, KC, with Mr. Richard Horton and Ms. Wynsome Carey, Counsel for Gabriele Volpi**

Mr. Brian Simms, KC, with Mr. Marco Turnquest and Mr. Wilfred Ferguson, Jr, Counsel for Delanson Services Ltd

Mr. John Martin, KC, with Mr. John Wilson, KC, and Ms. Michelle Deveaux and Ms. Berchel Wilson, Counsel for Matteo Volpi

Ms. Janet L.R. Bostwick-Dean, Counsel for Simone Volpi

DATES: **26 February 2024; 21 March 2024**

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Civil Appeal – Applications for a Stay of Execution of Arbitration Awards – Jurisdiction – The Arbitration Act s.89, 90, & 91 – Whether the Court has Jurisdiction to Hear Appeals Concerning the Arbitration Act s.89, 90 & 91 where Leave to Appeal has been refused - Substantive Jurisdiction - Serious Irregularity - Question of Law – Judge's refusal of Application for Leave to Appeal – Preliminary Objection

This appeal emanates from a dispute over the entire distribution of several family trusts to Mr. Gabriele Volpi, as settlor of the Trusts by Delanson Services Limited, the trustee. The disputes were referred to a panel of three arbitrators as indicated in a provision of the trust deed that disputes be referred to binding arbitration. The panel made two awards, each being favourable to Mr. Matteo Volpi, a son of Gabriele and a beneficiary to the trust, and unfavourable to Gabriele and Delanson. Gabriele and Delanson challenged the decision of the panel in the Supreme Court under the Arbitration Act. The judge heard and dismissed the challenges. Gabriele and Delanson then filed applications for leave to appeal the judgment which were refused by the trial judge with reasons to follow. Gabriele and Delanson then filed Notices of Motions seeking inter alia, leave to appeal the judgment and the refusal of leave by the judge. Mr. Matteo Volpi then filed a Preliminary Objection stating that the Court of Appeal has no jurisdiction to hear and determine the appeals, to grant leave for any appeal, or to make any ancillary order. The Court heard the parties as to the jurisdiction of the Court.

Held: appeals dismissed, the court having no jurisdiction to hear these appeals.

It is settled law that unless a judge of the Supreme Court grants leave, the Court of Appeal has no jurisdiction to hear an appeal from a judgment of the Supreme Court on an application under section 89 challenging an arbitral award on the ground that an arbitral tribunal lacked substantive jurisdiction; or an application under section 90 challenging an award by an arbitral tribunal on the ground of serious irregularity affecting the Tribunal.

It is also settled law that the Court of Appeal itself does not have the power to grant leave to appeal against such judgments.

The decision in **Sumukan** relied on by Mr. Gabriele Volpi is of little assistance in this case. This was not an application for leave to appeal under section 91(2). This was an application under section 91(1) and that application under section 91(1) was refused. Any judgment on an application under 91(1) is a "decision of the court on an appeal under this section" for the purposes of section 91(5). As the Court in **Henry Boot** stated, unless the leave of a judge of the Supreme Court is obtained this court has no jurisdiction to hear any appeal from a decision of that court on an application under section 91(1) of the Act.

There is no basis for invoking the residuary jurisdiction of the court. No leave having been obtained from the court below, this court has no jurisdiction to hear these appeals

Athletic Union of Constantinople v National Basketball Association (No2)[2002] EWCA Civ 830 applied
Bunge SA v Kyla Shipping Company Ltd [2013] 3 All ER 1006 considered
CGU International Insurance plc v AstraZeneca Insurance Co Ltd [2006] EWCA Civ 1340 considered
Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd. [2000] 3 WLR 1824 applied
Interpods v De la Rue International [2015] EWCA Civ 374 considered
RAV Bahamas Ltd and another v Therapy Beach Club Incorporated (Bahamas)[2021] UKPC 8 applied
Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 243 considered
Therapy Beach Club Incorporated v RAV Bahamas Limited SCCivApp. No. 23 of 2018 mentioned

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JUDGMENT

<u>Judgment delivered by The Honourable Sir Michael Barnett, P</u>

1. These are two applications for a Stay of Execution of arbitration awards pending the determination of two appeals. The appeals were both filed on the 8th February, 2024.

2. The first Notice of Appeal is an appeal brought by Gabriele Volpi ("Gabriele") and it is in the following terms:

> **"TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant on Appeal from:**
>
> **(1) The judgment and order therein of the Honourable Mr. Justice Loren Klein handed down and made on the 28th day of December 2023 (the "Order below"), where by it was ordered that consolidated action commenced by Originating Notice of Motion filed herein by the Appellant on Action No. 2020/APP/sts/00013 on 9th July 2020 and by Originating Notice of Motion filed by the Appellant in Action No. 2020/APP/sts/ooo18 on 23rd September 2020 and by originating Notice of Motion filed on 9th July 2020 by the**

First Respondent in Action No. CLE/gen/No.00632 of 2020 (together the "Consolidated Action") be dismissed in its entirely; and

(2) The judgment and other herein of the Honorable Mr. Justice Loren Klein handed down and made on 6th February 2024, whereby it is ordered that the Appellant's application made by Notice of Application dated 29th December 2023 seeking inter alia declaratory relief and leave to appeal against the Order Below be dismissed (Leave to Appeal Refusal Order"),

FOR THE FOLLOWING ORDERS:

1. Allowing the Appeal against the Leave to Appeal Refusal Order;

2. Setting aside the Leave to Appeal Refusal Order and granting leave to appeal on the grounds of the appeal refused by the Leave to Appeal Refusal Order;

3. Allowing the Appeal against the Order Below;

4. Setting aside the Order Below;

5. To the extent necessary, granting leave to appeal on a question of law;

6. Setting aside and/or declaring to be of no effect and/or varying and/or remitting to the Tribunal in the Arbitration (the "Tribunal") paragraphs 1(a), 1(b), 1(c), 1(d), (3), (4) and (5) of the Operative Part (paragraph 749) of the Partial Award of the Tribunal dated 13 June 2020 and if and to the extent necessary all of those parts of the said Partial Award that set out the reasoning of the Tribunal in support of those Operative Parts of the Partial Award; and

7. Ordering that the Second Respondent do pay the Appellant's costs of the Appeal and of the Consolidated Action, to be taxed on the standard basis if not agreed."

3. The other appeal is by Delanson Services Limited ("Delanson"). It is in the following terms:

"TAKE NOTICE that the Court of Appeal will be move so soon as Counsel can be heard on behalf of Delanson Services Limited, the Appellant herein ("Delanson") on appeal from:

(a) The Judgement ("the Judgment") of His Lordship, the Honourable Mr. Justice Loren Klein ("the Learned

Judge") dated 28 December 2023, whereby the Learned Judge dismissed Delanson's appeal in respect of Delanson's challenges and appeals in respect of a Partial Award issued on 13 June 2020 ("the Partial Award") by an arbitral tribunal in an arbitration seated in The Bahamas (the "Arbitration");

(b) The Learned Judge's judgment handed down on 6 February 2024 refusing permission to appeal the Judgment ("the Refusal").

THE APPEAL IS FOR AN ORDER that:

1. The said Judgment of the Learned Judge be set aside;

2. To the extent necessary, leave to appeal on a question of law;

3. The Partial Award be set aside in whole or in part and declared to be of no effect;

4. Further or alternatively, that the Refusal be set aside, and that leave to appeal against the Judgment below on the grounds set out herein be granted; and,

5. The Respondent's do pay the Appellant's costs of this appeal and the Court below, to be taxed if not agreed."

4. As both appeals arise out of the same judgment, they are being heard together. As I said both appellants seek a stay of the judgment of the court below pending the determination of the appeal. The primary respondent, Matteo Volpi ("Matteo") asserts that this court has no jurisdiction to hear any of the appeals and so the issue of a stay pending appeal is moot. We determined that the issue of jurisdiction must be heard immediately. We continued the stay imposed by the trial judge pending the determination of the jurisdiction issue.

5. For the reasons set out in this judgment we are satisfied that we have no jurisdiction to hear these appeals and that the appeals should be dismissed immediately.

The background

6. A dispute arose with respect to three trusts which were governed by the laws of The Bahamas. They are the Winter Trust, the Summer Trust and the Spring Trusts. The trustee was Delanson. The beneficiaries were Gabriele, who was also the settlor, Matteo, a son of Gabriele, and Simone Volpi ("Simone"), another son of Gabriele. It is common ground that the primary persons in this dispute are Gabriele and Matteo.

7. It is not necessary to go into detail as to the issues in dispute. The trial judge summarized it in paragraph 17 of his judgment as follows:

> **"At the root of these proceedings is a long and acrimonious dispute between Gabriele and Matteo over the distribution of several family trusts which held the wealth generated by Gabriele's businesses. The entirety of the trust assets was distributed to Gabriele, as settlor of the Trusts, in October 2016 by Delanson. That decision was the basis for (and is the subject of) the arbitration proceedings out of which these challenges arise. Sadly, the dispute has not only pitted son against father but has forced family members to choose sides in the fight."**

8. The trust deeds contained a provision that disputes be referred to binding arbitration. The disputes were thus referred to a panel ("the Panel") of three arbitrators.

9. The Panel determined to hear the dispute in stages. It made two awards. A Partial Award was made on the 13th June, 2020. An Additional Partial Award was made on the 26th August, 2020. The awards were favourable to Matteo and unfavourable to Gabriele and Delanson.

10. As a result, both Gabriele and Delanson instituted actions in the Supreme Court under the Arbitration Act, 2009 ("the Act") challenging the awards.

11. Gabriele brought two applications. On the 9th July, 2020 he filed a Motion seeking:

> **"1. An Order pursuant to ss. 90 and/or 91 of the Arbitration Act 2009 ("the Act") setting aside and/or declaring to be of no effect and/or varying and/or remitting to the Tribunal paragraphs (1)(a), (1)(b), 1(c), 1(d), (3), (4) and (5) of the Operative Part (paragraph 749) of the Partial Award of the Tribunal in the Arbitration dated 19 June 2020 (as more particularly defined in the First Affidavit of Michael Peter Bray dated 9 July 2020 and sworn in support of this Originating Notice of Motion) and if to the extent necessary all of those parts of the said Partial Award that are set out in the reasoning of the Tribunal in support of those Operative Parts of the Partial Award.**
>
> **2. To the extent necessary, leave to appeal a question of law.**
>
> **3. Further or alternatively, a declaration pursuant to s. 89 of the Act that the Tribunal had no substantive jurisdiction to make the declaration and orders at paragraphs (1)(a), (1)(b), 1(c), 1(d), (3), (4) and (5) of the Operative part of the Partial Award and an Order declaring those paragraphs to be of no effect and/or setting them aside."**

12. On the 23rd September, 2020 Gabriele commenced another action. That action sought:

> **"1. An Order pursuant to ss.90 and 91 of the Arbitration Act 2009…setting aside and/or declaring to be of no effect and/or varying and/or remitting to a differently constituted tribunal**

and/or remitting to the Tribunal paragraphs 1, (3), (4), (5), (6) and (7) of the Operative Part (paragraph 749) of the Partial Award of the Tribunal in the Arbitration dated 13 June 2020 and paragraph 50(2) of the Operative part (paragraph 50) as more particularly defined in the Second Affidavit of Michael Peter Bray dated 22 September 2020 and sworn in support of this Originating Notion of Motion) and if to the extent necessary all of those parts of the said Partial Award and Additional Partial Award that set out the reasoning of the Tribunal in support of those Operative Parts of the Partial Award."

13. Delanson instituted its action on the 9th July, 2020 (the same day as Gabrielle's first action). By that motion it sought the following Declarations and/or Orders that:

"(a) the Partial Award dated 13 June 2020 (the "Partial Award") and made by Dr. Georg von Segesser, The Rt. Hon. Lord Neuberger of Abbotsbury and Professor Avv. Alberto Malatesta (dissenting), the arbitrators, in the abovementioned arbitration be set aside in whole or in part and declared to be of no effect.

(b) if necessary, pursuant to section 92(8) of the Arbitration Act 2009 (the "Act") and/or the inherent jurisdiction of the Court, the Court grant the Applicant leave to appeal any point of law.

(c) That the arbitration proceedings be stayed pursuant to the Act and/or the inherent jurisdiction of the court pending the determination of this Action.

(d) The Applicant be granted leave to serve the Respondents in Nigeria, the United Kingdom, Switzerland or wherever they may be found with notice of this Motion and any other pleadings filed in this Action."

14. The three motions were heard by Klein J. He reserved his judgment. After a long and lamentable delay, Klein J delivered a written judgment on 28th December, 2023. The judgment was in excess of 600 paragraphs. In that judgment, he dismissed the applications by Gabriele and Delanson. In that judgment the trial judge said:

"CONCLUSION AND DISPOSITION OF APPLICATIONS/APPEALS

[617] I have indicated my findings on the various challenges and grounds of appeal in the foregoing analyses and discussion and given my reasons for so doing. Neither considered individually nor together do the grounds relied on by the applicants demonstrate that the Tribunal made any errors with

respect to its substantive jurisdiction under s. 89 or committed any serious irregularities either in contravening the general duties at s. 44 or falling foul of the closed list of irregularities at s. 90. Further, as leave to appeal on points of law is not available, necessarily none of the matters said to constitute errors of law can be appealed. Even if I am wrong on that point, there is no guidance as to the applicable test for leave, and by analogy many (although I cannot say all) of the legal grounds would not meet the test for leave and are unlikely to succeed on the merits.

[618] For convenience, I summarize my conclusions as follows:

Challenge to jurisdiction:

(1) I dismiss the claim that the Tribunal lacked substantive jurisdiction pursuant to s. 89 on the basis that the Trusts were authorised purpose trusts and that the statutory pre-conditions for instituting a claim in respect of such Trusts were not fulfilled. I do not find that the Trusts were properly to be classified as APTs and, even if they were, compliance with statutory pre-conditions goes to admissibility and not jurisdiction; therefore, s. 89 is not engaged.

(2) I dismiss the claim that the Tribunal was not competent to rule on its jurisdiction to determine Gabriele's counterclaim for mistake and thus lacked substantive jurisdiction under s. 89. The claim for the court to hear the mistake claim de novo is not properly before the Court, and in any event is outside the limited review jurisdiction of the supervisory court.

(3) Properly construed, The Arbitration Act 2009 excludes the ability to seek leave to appeal on questions of law; the only route of appeal on points of law is the parties' express opt-in by consent. As Matteo did not consent to such an appeal, there is no ability for the applicants (appellants) to appeal on points of law.

Grounds of Challenge/Appeal

For the reasons given above:

(4) As to the claim that the Tribunal's construction of the scope of Delanson's powers amounted to errors of law (Delanson's Gr. 1 and Gabriele Gr. 1), I dismiss this claim as no appeal on a point of law is available under s. 91.

(5) The claims that the Tribunal's determination of the APT issue constituted an error of law and/or amounted to serious irregularities (Delanson Gr. 2 and Gabriele Gr. 7) are also dismissed. No appeal on a point of law is available under s. 91 and no serious irregularity giving rise to substantial injustice is made out.

(6) As to Delanson's Gr. 3, and Gabriele Gr. 4, I dismiss the claim that the Tribunal's determination that there was inadequate deliberation for the distributions amounted to serious irregularities giving rise substantial injustice.

(7) I dismiss the claim that the Tribunal's findings on the reasons for the distribution (Delanson's Gr. 4) constitute seriously irregularity giving rise to substantial injustice.

(8) I dismiss the claim that the Tribunal's decision on the exercise of its discretion to set aside the distributions on the basis that they were voidable and not void (Delanson's Gr. 5, Gabriele's Gr. 4) amounted to a serious irregularity giving rise to substantial injustice.

(9) Gabriele's challenge on the failure of the Tribunal to determine the "scope of powers rectification claim" (Gabriele's Gr. 2) on the grounds of serious irregularity also falls to be dismissed (if not rendered moot), as it was contingent on the issue being determined in the Additional Award, which it was. Necessarily no serious irregularity can be made out and still less a serious irregularity which has caused or will cause the applicants or any of them substantial injustice.

(10) The Tribunal's determination that a fraud on a power makes the exercise of the power void rather than voidable (following the UK CA authority of Cloutte v Storey) (Gabriele's Gr. 3), does not amount to a serious irregularity giving rise to substantial injustice under s. 90.

(11) The Tribunal's findings that Gabriele knowingly received Trust assets (Gabriele Gr. 6) does not constitute any serious irregularity giving rise to substantial injustice.

(12) I dismiss the claim that the Tribunal's finding that the transfer of the assets held by Adiana to the Winter Trust (Gabriele's Gr. 9) was valid amounted to a serious irregularity because of the view the Tribunal took of expert evidence on Liechtenstein law, still less a serious irregularity giving rise to substantial injustice.

(13) The challenge that the Tribunal's conclusion in the Additional Award created an inconsistency with the Tribunal's determination of the scope of powers in the Partial Award amounted to a serious irregularity giving rise to substantial injustice (Gabriele's Gr. 10) is also dismissed.

[619] My conclusions may appear to be little consolation for the prodigious efforts of Mr. Black and Mr. Simms, who ably and skillfully argued what they must have appreciated at the outset was an uphill case, considering the high threshold for a s. 90 challenge, which Matteo correctly telescoped as the primary basis for the claims.

[620] In my judgment, the Partial Award and Additional Award were comprehensive, well-reasoned and impressive documents emanating from an eminent and highly experienced Tribunal (whether one agrees with all of their findings and conclusions or not). This is not to give undue deference to the Tribunal, which Mr. Simms cautioned me against at the outset of the hearing, particularly having regard to the fact that one of its members is a former law lord and member of the Privy Council - the apex court for this jurisdiction. I have borne this in mind, but as (as indicated earlier in the Ruling), what I have paid deference to is not the subjective composition of the tribunal, but to the requirements of the Arbitration Act and case law principles that arbitration awards are not be read in a hypercritical way. In other words, the court should not seek to accentuate 'motes' where there is no 'beam'.

[621] Having said that, these Awards did not invite or justify the multiple and overlapping challenges made under the numerous grounds and heads of challenge. For example, it is clear that to the extent that challenges were fashioned on what were substantially evidential matters or attacks on the reasoning of the Tribunal or its ex gratia reasoning on assumed findings, these were grievance points which really ought not to have been pursued.

[622] I therefore dismiss all of the challenges and appeals and confirm the Partial Award and the Additional Award of the Arbitral Tribunal."

15. Immediately following that judgment both Gabriele and Delanson filed applications seeking leave to appeal that judgment to the Court of Appeal. The application by Gabriele was in the following terms:

“1. Gabriele Volpi (‘GV’), the Applicant/Appellant makes an application pursuant to section 11(f) of the Court of Appeal Act, sections 89(4), 90(5) and 91(5) of the Arbitration Act 2009, Order 31A Rule 18(2)(d) of the Rules of the Supreme Court 1976, Rule 26.1(2)(q) and Rule 66.3 of the Civil Procedure Rules 2022, Section 16(3) of the Supreme Court Act and/or the inherent jurisdiction of the Court for the following orders and declarations:

a. A declaration that GV does not require the leave of the Supreme Court in order to appeal the Ruling of His Lordship Justice Loren Klein made on 28th December 2023 (‘the Decision’) that the Supreme Court has no jurisdiction under section 91 of the Arbitration Act, 2009 to give leave to appeal to the Supreme Court on a question of law arising out of an award in arbitral proceedings save with the agreement of the parties.

b. In the alternative, an Order granting leave to appeal against the ruling that GV has no right of appeal in respect of the Tribunal’s errors of law.

c. An Order granting leave to appeal against the Learned Judge’s dismissal of:

i. GV’s application that the Tribunal lacked substantive jurisdiction pursuant to s.89 of the Arbitration Act 2009; and

ii. GV’s application that the Tribunal committed serious irregularities which have caused or will cause substantial injustice pursuant to s.90 of the Arbitration Act 2009; and

iii. to the extent necessary, GV’s appeals in respect of the Tribunal’s errors of law pursuant to s.91 of the Arbitration Act 2009.”

16. The application by Delanson was filed on the same day and was in similar terms. It stated:

“1. The Applicant/Appellant herein, Delanson Services Limited, make an application, pursuant to sections 67, 89(4), 90(4), 91(5) of the Arbitration Act and/or under the inherent jurisdiction of the Court, for the following relief:

a. A declaration that the matters raised in the first main ground of appeal in the Intended Applicant/Appellant's Grounds of Appeal in the draft Notice of Appeal Motion attached hereto at Schedule 1 may be the subject of an

appeal to the Court of Appeal without permission to appeal being necessary;

b. **The Court do order that, to the extent necessary and in any event, permission to appeal each of the Grounds of Appeal referenced in the Intended Applicant/Appellant draft Notice of Appeal Motion attached hereto at Schedule 1 be granted;**

c. **The Court do certify to the extent necessary that each of the Grounds of Appeal referenced in the Intended Applicant/Appellant draft Notice of Appeal Motion attached hereto at Schedule 1 raises matters of general public importance".**

17. Those applications were heard over three days and on the 6th February, 2024 Klein J refused the applications for leave to appeal to this court. He gave an oral ruling and promised to give written reasons by 22nd March, 2024. Those written reasons were not available at the time of the hearing for a stay.

18. It is against that background that I am obliged to consider the issue of the jurisdiction of the court to hear the two appeals referred to above.

19. It is to be noted that both appeals seek to challenge two different judgments. The appeals seek to challenge the judgment on the 28th December, 2023 as well as the judgment of the 6th February, 2024.

20. The material sections of the Act are sections 89, 90 and 91. Those sections are as follow:

"89. (1) A party to arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court —

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order —

(a) confirm the award;

(b) vary the award; or

(c) set aside the award in whole or in part.

(4) <u>The leave of the court is required for any appeal from a decision of the court under this section.</u>

90. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant —

(a) failure by the tribunal to comply with section 44;

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may —

(a) remit the award to the tribunal, in whole or in part, for reconsideration;

(b) set the award aside in whole or in part; or

(c) declare the award to be of no effect, in whole or in part.

(4) The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(5) <u>The leave of the court is required for any appeal from a decision of the court under this section.</u>

91. (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. And an agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except with the agreement of all the other parties to the proceedings.

(3) On an appeal under this section the court may by order —

(a) confirm the award;

(b) vary the award;

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or

(d) set aside the award in whole or in part.

(4) The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(5) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal." [Emphasis added]

21. The Act is patterned on the English Arbitration Act, 1996 ("the English statute"). Indeed, sections 89 and 90 are identical to sections 67 and 68 of the English statute. Section 91 is similar to but not identical to section 69 of the English statute. The differences between section 91 of the Act and section 69 of the English statute are material and will be discussed later.

22. In **RAV Bahamas v Therapy Beach** [2021] UKPC 8 the Privy Council had to consider the Act. It said:

> **"[26] The 2009 Act is similar in structure and content to the 1996 Act and many of its provisions are materially identical. It was common ground that the policy underlying the two Acts was similar and that it was appropriate to have regard to the English law authorities when interpreting materially identical provisions.**
>
> **[27] An important aim of the Acts was to be supportive of arbitration and to limit the intervention of the courts. As Lord Steyn stated of the 1996 Act in Lesotho (2005) 101 ConLR 1, [2006] 1 AC 221(at [26]): 'A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process.'**
>
> **[28] Section 90 of the 2009 Act is integral to the achievement of that purpose. Under the predecessor Arbitration Acts the courts were able to intervene and remit matters to the arbitrators on generalised grounds and in a broad category of cases. Under s 90 such intervention is only possible where there is a 'serious irregularity', which means an irregularity of one or more of the kinds listed in s 90 and 'which the court considers has caused or will cause substantial injustice'."**

23. Although those observations were made in respect of section 90 of the Act, it is my judgment that those observations are applicable to sections 89 and 91 as well. All sections in Part XIII of the Act under the heading "Powers of the Court in relation to Award" should be construed having regard to that major purpose.

24. I propose to deal first with the challenge to the judgment of the 28th December, 2023.

25. In relation to sections 89 and 90 of the Act, it is in my judgment settled law that unless a judge of the Supreme Court grants leave, the Court of Appeal has no jurisdiction to hear an appeal from a judgment of the Supreme Court:

    (a) on an application under section 89 challenging an arbitral award on the ground that an arbitral tribunal lacked substantive jurisdiction; or
    (b) on an application under section 90 challenging an award by an arbitral tribunal on the ground of serious irregularity affecting the Tribunal.

26. It is also settled law that the Court of Appeal itself does not have the power to grant leave to appeal against such judgments.

27. Sections 89 (4) and 90 (5) are clear that the leave of the judge of the Supreme Court is a prerequisite for the Court of Appeal to have jurisdiction to entertain such an appeal. In **Therapy Beach Club Incorporated v RAV Bahamas Limited SCCivApp. No. 23 of 2018**

this court had jurisdiction because leave was given by the judge in the court below, Winder J (as he then was).

28. The authority for that proposition may be found in a recent decision of the English Court of Appeal. In **Interpods v De la Rue International** [2015] EWCA Civ 374 Briggs LJ (as he then was) said:

> **"4. The public interest that arbitration should produce a high degree of finality compared with ordinary litigation led to Parliament proscribing strictly limited avenues of challenge and appeal under each of sections 67 and 68 as well as under section 69 of the Act. Though not identically worded, each provides that an appeal to this court may only be made if the court appealed from gives permission: See section 67(4), 68(4) and 69(8).**
>
> **5. Any room for doubt that this was the meaning of the relevant provisions was laid to rest by this court in Athletic Union of Constantinople v National Basketball Association (No 2)[2002] EWCA Civ 830 by Lord Phillips, Master of the Rolls, at paragraph 12."**

29. As pointed out earlier, sections 67 and 68 of the English statute are identical to section 89 and 90 of the Act.

30. In the earlier decision of **Athletic Union of Constantinople v National Basketball Association (No 2)** [2002] EWCA Civ 830 referred to by Briggs LJ, Lord Phillips said:

> **"(4) Sections 67, 68 and 69 demonstrate a consistent legislative policy that no appeal shall be made against the decision of a court without the permission of that court. In this respect, there is no logical reason for distinguishing between the effects of ss 67(4) and 68(4) on the one hand, and the effect of s 69(8) on the other hand.**
>
> **(5) In reserved judgments, this court has recently unanimously held that, on the true construction of s 69(8), a party who wishes to appeal from the decision of the High Court or the county court on appeal from an arbitration award requires the permission of the High Court or the county court, as the case may be, and that the Court of Appeal has *no jurisdiction* either to grant permission itself or to review a refusal of the High Court or county court to grant permission: (see Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] 1 QB 308). Much of the reasoning of Waller LJ, who gave the leading judgment in that case, can be applied to s 67(4)."**
> [Emphasis added]

31. In short, in the absence of the leave of Klein J or some other judge of the Supreme Court, there is no jurisdiction in this court to hear the appeals from the judgment on the applications under sections 89 and 90 of the Arbitration Act.

32. As regards the appeals of the judgment with respect to the appeals under section 91(1) of the Act, the position is slightly different. Section 91 of the Act is different from section 69 of the English statute. I have already recited section 91 above.

33. Section 69 of the English statute is as follows:

> **"69 Appeal on point of law**
>
> **(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.**
>
> **(2) An appeal shall not be brought under this section except—**
>
> > **(a) with the agreement of all the other parties to the proceedings,** ***or***
> >
> > ***(b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3).***
>
> ***(3) Leave to appeal shall be given only if the court is satisfied—***
>
> > ***(a) that the determination of the question will substantially affect the rights of one or more of the parties,***
> >
> > ***(b) that the question is one which the tribunal was asked to determine,***
> >
> > ***(c) that, on the basis of the findings of fact in the award—***
> >
> > > ***(i) the decision of the tribunal on the question is obviously wrong, or***
> > >
> > > ***(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and***
> >
> > ***(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.***
>
> ***(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.***

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order -

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part. The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8)The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

34. The parts of the English statute which are in italics are not found in the Arbitration Act. Other than that, the provision is identical.

35. In Russell on Arbitration the learned authors summarized the law as follows;

"Apart from applying to the court to challenge an award on the s.67 (lack of substantive jurisdiction) or s.68 (serious irregularity) a party may be able to appeal to the court on a question of law arising out of an arbitral award. The right to an appeal may be excluded by clear agreement and even if there is no exclusion agreement, which is often included by virtue of the parties choosing an institutional set of rules which contain a general exclusion of the right to appeal, there are a number of restrictions on the right to bring an appeal. <u>Unless all the parties agree to the appeal, the appellant must obtain leave from the court, which will only be given if the court is satisfied on certain</u>

> **<u>specific matters, which will be discussed in the following paragraphs.</u>"** [Emphasis added]

36. The position in the Bahamas is different. Unless the parties agree, there can be no appeal to the Supreme Court on a point of law. The Bahamas Parliament did not include the provisions in the English statute which gave the court the power to grant leave to appeal in the absence of agreement by the parties. This is clearly a deliberate decision of Parliament.

37. As regards section 91(5) the section is identical to section 69(8) of the English statute.

38. That section was considered by the English Court of Appeal in **Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd.** [2000] 3 WLR 1824. In that case, a dispute was referred to an arbitrator, who made an interim award in favour of one of the parties. The other party appealed to a judge under section 69(1) of the English statute. That appeal was dismissed by the judge, who refused permission to appeal to the Court of Appeal under section 69(8) of that Act. The losing party applied to the Court of Appeal for permission to appeal on the questions whether the Court of Appeal could review the judge's refusal to grant permission or itself grant permission for the applicant to appeal. The English Court of Appeal held:

> **"In the result it is not open to a would-be appellant to challenge in the Court of Appeal a decision of the High Court (or the county court) under section 69 without leave of the High Court (or the county court), and the refusal of the High Court (or the county court) to grant leave to appeal is not capable of challenge in the Court of Appeal."**

39. The English Court of Appeal held that it had no jurisdiction to hear an appeal under section 69(8) of the English statute which is identical to section 91(5) of the Act.

40. In the present case both Gabriele and Delanson argue that leave is not required under section 91(5) because there was no judgment by Klein J on an appeal on a point of law. It is necessary to recite the argument of Gabriele as contained in his submissions. He says;

> **"A. Gabriele's appeal as of right**
>
> **1. Gabriele respectfully submits that he is permitted, without the leave of the Court below, to appeal the learned Judge's decision that the Court has no jurisdiction to grant leave to appeal against errors of law committed by an arbitral tribunal without the consent of the successful party to the arbitration (the 'Jurisdiction Threshold Issue').**
>
> **2. In the proceedings below, Gabriele brought appeals against errors of law committed by the Tribunal. Before the learned Judge, there were two issues:**
>
> > **a. First, a preliminary jurisdictional issue, namely whether the Court has jurisdiction under ss.91 and 92 of the Arbitration Act to grant leave to appeal against an error of**

law committed by the Tribunal where (unsurprisingly) the successful respondent refuses to consent to the appeal being brought. This is the Jurisdiction Threshold Issue.

b. Second, if the Court does have jurisdiction to grant leave to appeal, whether it should do so and allow the appeal against the errors of law committed by the Tribunal.

3. In his Judgment, the Judge held that he did not have jurisdiction to grant leave to appeal absent the consent of the successful party. On the first issue – the Jurisdiction Threshold Issue – he therefore found against Gabriele. While he made some obiter observations in respect of the appeals, he did not decide, and nor did he purport to decide, the substantive issues as to whether to grant leave to appeal or whether to allow the appeals (see in particular paragraphs [426], [461] and [532] of the Judgment). The matter was disposed of exclusively on the basis that he had no jurisdiction to grant leave to appeal. Matteo's contention to the contrary (at paragraph 2(a) of his Notice of Preliminary Objection) that the Court below actually considered and determined the appeals on their merits is respectfully submitted to be clearly incorrect.

4. The first question therefore is whether Gabriele requires the leave of the Court at all to pursue an appeal against the Judge's decision on the Jurisdiction Threshold Issue. Gabriele respectfully submits that he does not.

5. Pursuant to s.10 of the Court of Appeal Act 1964 [Supp Auth/4/8], the Court of Appeal has jurisdiction to hear and determine an appeal from any final decision of the Supreme Court. Pursuant to s.11 (f) of that Act, leave to appeal is required in respect of any interlocutory decision (save in respect of the particular matters set out therein), but not in respect of any final decision of the Court. In the present case the Court's decision on the Jurisdiction Threshold Issue is a final decision, not an interlocutory decision, so there is no requirement under the Act to seek leave to appeal against that decision unless the Arbitration Act 2009 imposes a requirement for leave to appeal.

6. Under s.91(1) of the Arbitration Act 2009 [Supp Auth/3/71], a party to arbitral proceedings may (subject to the resolution of the Jurisdiction Threshold Issue) "appeal to the court on a question of law arising out of an award made in the proceedings". Section 91(5) then provides that:

"The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal" (emphasis added).

7. Accordingly, s.91(5) of the Act provides that, where the Court below has decided an appeal under s.91, that is a judgment of the Supreme Court for the purposes of an onward appeal to this Court, but an onward appeal does not lie without the leave of the Court.

8. <u>But in this case, there is no "decision of the court on an appeal under [s.91]" because the Judge decided that he had no jurisdiction to entertain any such appeal and therefore made no decision on the substance of Gabriele's s.91 appeal. Accordingly, s.91(5) is not engaged and s.10 of the Court of Appeal Act 1964 applies because the Judge's decision on the Jurisdiction Threshold Issue in a final decision for which leave to appeal is not required.</u>

9. It is submitted that the decision below as to the construction of ss.91 and 92 of the Arbitration Act, and in particular the decision that those sections curtail the Court's jurisdiction to grant leave to appeal without the successful respondent's agreement, is manifestly not a decision on an appeal under s.91. An appeal under s.91 is an "appeal to the court on a question of law arising out of an award made in the proceedings". The separate and prior question of the extent of the Court's jurisdiction to entertain such appeals is self-evidently not itself such an appeal. It follows that an appeal against the Court's decision on the Jurisdiction Threshold Issue is not subject to the leave requirement under s.91(5).

10. That this is so accords with basic common sense and with the parties' fundamental rights to access to justice and a fair hearing. The requirement at s.91(5) of the Act to obtain the Court's leave to bring an appeal to this Court is premised on the notion that that would be a second appeal, i.e. it would be a further appeal against the Judge's decision that the arbitrators had not committed an error of law, and so dismissing the first appeal against their decision. Thus, the leave requirement at s.91(5) incorporates the familiar test on second appeals where leave is required, namely reconsideration on the grounds of

> **general public importance. But the Judge's decision on the Jurisdiction Threshold Issue is not a second appeal. For obvious reasons, the only court that has determined that issue is the Court below, and this appeal against the Court's decision on that issue is a first appeal. As well as being outside the letter of s.91(5), it would therefore also be wholly contrary to the spirit and purpose of that section to apply the leave requirement under that section to an appeal against the Judge's findings (findings which the Judge made for the first time, not on appeal from anything the Arbitral Tribunal found) as to the construction and operation of the Arbitration Act itself.**
>
> **11. Respectfully, therefore, this Court should hear Gabriele's appeal on the Jurisdiction Threshold Issue. If that appeal is successful, it should then go on to determine the s.91 applications for leave to appeal and the appeals which the learned Judge did not determine (because of his decision that he had no jurisdiction to do so). It is respectfully submitted that those matters should be rolled up and heard together."** [Emphasis added]

41. In a nutshell Gabriele argues that the requirement of leave to appeal is restricted to appeals from decisions on the merits of a determination that there was or was not an error of law.

42. For this they rely on the decision of the English Court of Appeal in **Sumukan Ltd v Commonwealth Secretariat** [2007] EWCA Civ 243. In that case Sumukan Limited sought to appeal on a point of law, a decision of an arbitration tribunal relating to ownership of the software. The application before the judge was an application for leave to appeal under section 69(2)(b) of the English statute. As pointed out earlier, that section is not part of Bahamas law. The English judge refused leave under section 69(2)(b) on the basis that the ability to appeal had been excluded by agreement. It was that refusal to grant leave under section 69(2)(b) that was the subject of an application on section 69(8), which is our section 91(5).

43. The court of appeal in **Sumukan** held that a decision under an application for leave under section 69(2)(b) was not a "decision of the court on an appeal under this section" for the purposes of section 69(8) of the English statute.

44. In my judgment the decision in **Sumukan** is of little assistance in this case. This was not an application for leave to appeal under section 91 (2) (as could be made in England and was made in **Sumukan**). This was an application under section 91(1) and that application under section 91(1) was refused (for whatever reason). Any judgment on an application under 91(1) is in my view a "decision of the court on an appeal under this section" for the purposes of section 91(5). As the Court in **Henry Boot** stated, unless the leave of the court is obtained this court has no jurisdiction to hear any appeal from a decision of the court on an application under section 91(1) of the Act.

45. Counsel for Gabriele suggested that this was an application for declaratory relief and not an appeal under section 91. As a result, they say that Gabriele has an appeal as of right under section 12 of the Court of Appeal Act. In my view this is form over substance. The motion filed on 9th July, 2020 sought "An Order pursuant to ss. 90 and/or 91 of the Arbitration Act 2009 ("the Act") setting aside and/or declaring to be of no effect and/or varying and/or remitting to the Tribunal". They clearly fell within the purview of an application under section 91(1) and therefore the requirement of section 91(5) had to be met.

46. Delanson also insists that it is entitled to appeal as of right. It says:

> **"16.4 Quite apart from the above points, the Scope of Appeals Finding rested on the erroneous conclusion that the common law right to appeal an error on the face of an arbitral award had been abrogated by the Arbitration Act 2009, such that the only right of appeal was that found in the Arbitration Act. That conclusion was erroneous because the Arbitration Act (by s 102(2)) merely prohibited the revival of any jurisdiction which had previously been abrogated, and the common law jurisdiction had not previously been abrogated. Section 102 did not itself purport to abrogate any jurisdiction, and at most it was ambiguous on that question; Parliament cannot override fundamental rights such as the right of appeal by ambiguous words. Nor is there anything inherently unworkable in having two regimes for appeals in place (one under s 91, and one at common law): see the judgment of the Eastern Caribbean Supreme Court in VTB Bank (PJSC) v Miccros Group Ltd (BVIHC (COM) 2018/0067) [TAB11/Page348/AB], where Jack J declined to hold that the Conveyancing and Law of Property Act 1961 had impliedly repealed the Fraudulent Conveyances Act 1571, even though they covered almost identical ground.**
>
> **16.5 Again, separately from the above points, the court's supervisory jurisdiction over trusts is itself a basis for the court's intervention where there has been an error of law on the face of an arbitral award relating to a trust. That supervisory jurisdiction is well-established: see the decisions of the Judicial Committee of the Privy Council Schmidt v Rosewood Trust Ltd [2003] UKPC 26 [TAB13/Page396/AB]| and Crociani v Crociani [2014] UKPC 40 [TAB14/Page424/AB]. In the latter case, in explaining that the court might be less willing to enforce an exclusive jurisdiction clause in the case of a trust deed than in the case of a contract, the Board reasoned that although a court does not have "some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts [...] what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries,**

> **which represents a clear and [...] significant distinction between trusts and contracts." The question of the role of the court's supervisory jurisdiction over trusts in the arbitration context is of great public importance in a jurisdiction such as The Bahamas which is both a thriving centre for trusts and has provided for trust arbitration through bespoke legislation."**

47. In my judgment, these arguments on behalf of Delanson are unsustainable. They are inconsistent with the principle which undergirds the Act that it was 'to reduce drastically the extent of intervention of courts in the arbitral process.'

48. The Court of Appeal is a creature of Parliament. It has the powers given to it by Parliament and Parliament can curtail the right of access to this court. It often does so by imposing restrictions. It must be recalled that Parliament has not denied any access to the Court of Appeal (a denial of which may raise issues under Article 20 of the Constitution). Parliament has regulated access by imposing the requirement that leave must be obtained from a judge of the Supreme Court.

49. The ability to appeal to the Court of Appeal has nothing to do with the supervisory jurisdiction of the court in matters involving trusts.

50. The parties have agreed to resolve their disputes by arbitration, not by actions in the court. That is their right. Having exercised that right, they are governed by the terms of the arbitration agreement and the Act. The role of the court and the right of appeal to the Court of Appeal is restricted by the Act.

51. As Briggs LJ said in **Interpods** (op cit) "**The public interest that arbitration should produce a high degree of finality compared with ordinary litigation led to Parliament proscribing strictly limited avenues of challenge and appeal under each of sections 67 and 68 as well as under section 69 of the Act".**

52. In my judgment, as no leave has been obtained from a judge of the Supreme Court this court has no jurisdiction to hear an appeal from the decision of Klein J delivered on the 28th December, 2023.

53. This court must be careful not to undermine the clear policy of the Act to limit the jurisdiction of the court in arbitral proceedings by acceding to forensic strategies and applications clearly designed to avoid the provisions of the Act and its major purpose.

54. I move now to the appeal against the judgment of the 6th February, 2024.

55. The applications of the 29th December, 2023 were in substance applications for leave to appeal the judgment of the 28th December, 2023. If Gabriele and Delanson had appeals as of right they could have come directly to this Court pursuant to such an alleged right. The judge of the Supreme Court could not give that right by any declaration. If that right is given by a statute then a would-be appellant could appeal to this court asserting that right. Any application to the court to declare that right would in my judgment be otiose.

56. In substance Gabriele and Delanson are appealing the refusal by Klein J to grant leave to appeal the judgment of the 28th December, 2023. They assert that they do not require leave to appeal the refusal to grant leave.

57. Ex facie, that argument is inconsistent with the decision of the court in **Athletic Union of Constantinople v National Basketball Association (No 2)**where Lord Phillips said:

> **"the Court of Appeal has no jurisdiction either to grant permission itself <u>or to review a refusal of the High Court or county court to grant permission</u>: (see Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd[2001] 1 QB 308). Much of the reasoning of Waller LJ, who gave the leading judgment in that case, can be applied to s 67(4)."** [Emphasis added]

58. I am satisfied that based on these authorities under the Act, there is no jurisdiction in this court to entertain an appeal against the judgment of the 6th February, 2024 refusing permission to appeal.

59. Both Gabriele and Delanson argue that notwithstanding the statutory provisions there is a residuary jurisdiction to set aside a decision refusing leave where it can be said that the decision to refuse leave is not in fact a decision under the law. For this, they rely upon the decisions of the English Court of Appeal in **CGU International Insurance plc v AstraZeneca Insurance Insurance Co Ltd** [2006] EWCA Civ 1340 and **Bunge SA v Kyla Shipping Company Ltd** [2013] 3 All ER 1006. In both cases, a party was refused leave to appeal to the Court of Appeal a decision of a judge on an appeal under section 69 of the English statute.

60. In **CGU v AstraZeneca** the court noted:

> **"[8] It is therefore common ground in this case that, without the commercial court judge's leave to appeal, the merits of his decision on the appeal to him from the award, cannot come before this court. And it is also common ground that, as a corollary of the need for leave to appeal from the judge, this court cannot entertain an appeal, or an application for permission to appeal, on the merits of the judge's decision to refuse leave to appeal: Lane v Esdaile [1891] AC 210, 60 LJ Ch 644, 40 WR 65, itself applied in Henry Boot. As Tuckey LJ said in North Range (at para 11): "What is clear is that there is no appeal from the judge's refusal to give leave on the merits."**
>
> **[9] The issue is whether the residual discretion, to consider where necessary the fairness of the judge's refusal of leave to appeal, in the event of a breach of art 6 of the Convention, propounded by this court in North Range, survives the per**

incuriam submission made to us; and if it does, assists the Applicant on the facts of this case."

61. The Court continued:

"[38] Subject to the question of a residual jurisdiction in cases where what is in question is not a review of the commercial judge's discretion (which as I have said there is common ground cannot be the subject matter of an appeal from a refusal of leave under s 69(8)) but a matter of unfairness, I do not consider any of this to be now capable of dispute. Indeed, it seems to me that the drafting of the applicable provisions of the 1996 Act may even go beyond the Lane v Esdaile principle of construction. That appears to suggest that the grant to a particular court of a power to give or refuse permission to appeal should be interpreted, without more, as the grant of an exclusive power to do so. In the case of s 69(8), however, and similar provisions of the 1996 Act, the language expressly provides that the power granted is exclusive: "But no such leave lies without the leave of the court . . ."

62. The English Court after analyzing the case law then and the complaint in that case said:

"CONCLUSION
[99] In conclusion, I would affirm the North Range residual jurisdiction <u>to enquire into unfairness in the process of a refusal of leave</u> under s 69(8), but reject the challenge in this case.

[100] It is important to underline what was also said in North Range about the dangers of this residual jurisdiction being misused. There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not only wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration." [Emphasis added]

63. The position was reaffirmed in **Bunge**. The court said:

"THE LAW

[10] Section 69(8) of the 1996 Act provides that "no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be

considered by the Court of Appeal". "The court" in the sub-section is the High Court not the Court of Appeal, see Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] QB 388, [2001] 1 All ER 257, [2000] 3 WLR 1824 and Athletic Union of Constantinople v National Basketball Association (No 2)[2002] EWCA Civ 830, [2002] 3 All ER 897, [2002] 1 WLR 2863.

[11] The Court of Appeal cannot therefore entertain an application for permission to appeal <u>from a refusal of a High Court judge to grant permission to appeal from his or her decision on a question of law arising from an award.</u> ***There is, however, a residual jurisdiction to set aside a refusal of permission if the decision to refuse that permission has come about as a result of unfair or improper process such that the decision to refuse permission cannot be categorised as a decision at all.*** **As Mustill LJ said in Aden Refinery Co Ltd v Ugland Management Co Ltd[1987] QB 650, 666, [1986] 3 All ER 737, [1986] 3 WLR 949:**

"I can envisage that if a judge had in truth never reached 'a decision' at all on the grant or refusal of leave, but had reached his conclusion, not by any intellectual process, but through bias, chance, whimsy or personal interest, an appellate or other court might find a way to intervene."

[12] In CGU Insurance plc v AstraZeneca Insurance Co Ltd [2006] EWCA Civ 1340, [2007] 1 All ER (Comm) 501, [2007] Bus LR 162para 45 Rix LJ regarded Mustill LJ "as seeking to express a distinction between a decision however flawed by error and an apparent decision which, because of something which has gone fundamentally wrong in the process, cannot properly be called a decision."

[13] This residual jurisdiction has, since the Human Rights Act 1998, been very slightly amplified or perhaps expressed slightly differently by requiring a decision to refuse permission to appeal to be (as every other decision of a judge) compliant with the requirements of the European Convention on Human Rights so that, for example, an unreasoned decision can be set aside. As Tuckey LJ put it in North Range Shipping Ltd v Seatrans Shipping Corporation[2002] EWCA Civ 405, [2002] 4 All ER 390, [2002] 1 WLR 2397, para 14:

"If, as is accepted, there is a residual jurisdiction in this court to set aside a judge's decision for misconduct then there can be no reason in principle why the same relief should not be available in the case of unfairness. Each is directed at the integrity of the

decision-making process or the decision-maker, which the courts must be vigilant to protect, and does not directly involve an attack on the decision itself."

As Rix LJ pointed out in CGU v AstraZeneca para 50 "What [is] in question [is] not the correctness of the reasons but their adequacy" and at para 79 "What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision." As Rix LJ also pointed out at para 80 "perversity . . . is not enough".

[14] Lastly it is necessary to remind oneself of the dangers of the residual jurisdiction being misused. In Rix LJ's words again (para 100):

"There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration."

[15] It is evident from these citations that a litigant complaining of a refusal of permission under s 69(8) of the 1996 Act has an extraordinarily high hurdle to surmount. Neither counsel was aware of a case in which this court has, in fact, exercised the residual jurisdiction which has been recognised in the decided cases." [Emphasis added]

64. The residual jurisdiction is concerned with the fairness of the process and not the correctness of the decision. It is even more than perversity. This point was made by Rix LJ in **CGU International** when he said:

"In my judgment, an "arbitrary" decision in this context goes beyond perversity as that expression is generally used in our courts and is looking to something which amounts to unfairness in the process, such as deciding on the basis of a litigant's skin colour. Otherwise, the contrast with the "right result" could not be made".

65. We have considered the grounds of appeal in these appeals. In Gabriele's appeal against the 6th February, 2024 he says:

"Appeal against Leave to Appeal Refusal Order – Grounds of Appeal, Relief Sought, and Additional Grounds of Appeal against Order Below

1. The Learned Judge erred in law and/or failed to exercise his discretion properly or at all and/or wrongly exercised his discretion in making the Leave to Appeal Refusal Order:

a. The learned Judge's refusal to grant leave to appeal was not a decision that was open to a reasonable judge to reach, taking into account the general public importance of the issues raised in Intended Appeal, such that the only reasonable application of the test on leave to appeal would be to grant leave to appeal on the grounds of appeal set out herein.

b. The learned Judge delayed for a period of approximately 2½ years in handing down and making the Order Below. It is apparent from the learned Judge's judgment below that, in respect of several of the Intended Appellant's central submissions in the Consolidated Action, the delay in giving judgment caused the learned Judge to forget the nature and content of the Intended Appellant's submissions, and/or the learned Judge failed fully and properly to recollect those submissions, such that the Intended Appellant has not received a fair hearing of his case in the Consolidated Action.

c. As a result of the said delay, the learned Judge's judgment considers and applies several authorities relevant to the issues in dispute in the Consolidated Action. The learned Judge gave no notice of his intention to consider and apply those authorities and gave the Intended Appellant no opportunity to make submissions on the nature and effect of those authorities until after the Order Below had been made, such that the Intended Appellant has not received a fair hearing of his case in the Consolidated Action."

66. In Delanson's appeal it says:

"Third main ground of appeal: the Refusal

1. The Learned Judge failed to exercise his discretion properly or at all and/or erred in law and/or wrongly exercised his discretion and/or there was fundamental unfairness in making the Refusal, in that the Learned Judge failed to take account of:

a. The delay of a period of approximately two and a half years between the hearing of Delanson's appeals and challenges in respect of the Partial Award and the handing down of the Judgment. As a result of the delay, the Learned Judge could no longer recall the detail of the arguments presented to it and made errors in the Judgment which are

attributable to the delay, which required that the Judgment be subject to appellate scrutiny;

b. The fact that the Judgment applied several authorities in respect of which Delanson was given no notice of the Learned Judge's intention to rely on those authorities and no opportunity to make submissions on them, such that Delanson did not receive a fair hearing of its case in the Court below;

c. The fact that the Intended Appeal raises issues of general public importance in The Bahamas, including the extent of rights of appeal in respect of errors of law committed by an arbitral tribunal; the scope of the Purpose Trusts Act 2004, the Arbitration Act 2009 and the Trustee Amendment Act 2011; and the powers of a court or arbitral tribunal to interfere in the exercise of a fiduciary discretion."

67. In our judgment these grounds do not remotely form the basis for a determination that the decision refusing leave was not "decision" or that the process was arbitrary and/or unfair. The application for leave was heard over three days and involved oral submissions and was not heard on the papers. The judgment of the 28th December, 2023 although inexcusably late did not itself vitiate it as a decision. It was clearly well reasoned.

68. I adopt with respect, the observations of Rix LJ when he said: *"There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. <u>The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration.</u>"*

69. In my judgment, there is no basis for invoking the residuary jurisdiction of the court. No leave having been obtained from the court below, this court has no jurisdiction to hear these appeals.

70. Both appeals are dismissed.

The Honourable Sir Michael Barnett, P

71. I agree.

The Honourable Mr. Justice Smith, JA

72. I also, agree.

The Honourable Mr. Justice Turner, JA