COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 27 of 2021

B E T W E E N

ENOS MILLER

Intended Appellant/Applicant

AND

MCKINNEY BANCROFT AND HUGHES

First Intended Respondent

AND

HARTIS PINDER

Second Intended Respondent

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

APPEARANCES: **Intended Appellant / Applicant appeared pro se**

Mr. Timothy Eneas with Ms. Alexandria Russell, Counsel for the Intended Respondents

DATES: **13 October 2021; 15 November 2021**

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Civil Appeal – Application for conditional leave to appeal to the Privy Council – Appeal "as of right" – Appeal "with leave" in 'any other proceedings' – Whether the Court of Appeal has jurisdiction to grant conditional leave to appeal to the Privy Council in the absence of a provision of any law conferring a substantive right of appeal from the Court's refusal under section 11(f) to grant leave to appeal to the Court of Appeal – Article 104 of the Constitution – Section 23 Court of Appeal Act – Sections 3 & 4 of the Bahama Islands (Procedure In Appeals to Privy Council) Order, 1964 – Section 11(f) of the Court of Appeal Act

On 19 November 2020, following a contested hearing, a Supreme Court judge exercised her Case Management powers under O. 31A rule 18(2)(i) Rules of the Supreme Court, 1978 and dismissed the intended appellant's claim after making a decision on a preliminary issue. As the judge's order

was interlocutory and required leave to appeal, the intended appellant sought leave from the judge under section 11(f) of the Court of Appeal Act to appeal her ruling to the Court of Appeal. Leave was refused by the judge and the intended appellant then renewed his application for leave to appeal before the Court of Appeal which refused him leave to appeal in its written Judgment handed down on 29 July 2021.

On 18 August 2021, the intended appellant applied to the Court of Appeal for conditional leave to appeal the Court's refusal to grant him leave to appeal. His conditional leave application was grounded in section 23 of the Court of Appeal Act, Ch. 52 and sections 3 and 4 of the Bahama Islands (Procedure In Appeals to Privy Council) Order, 1964. However, during oral arguments, the unrepresented intended appellant also claimed that he had an appeal to Her Majesty in Council "as of right" under Article 104 of the Constitution as the dismissal of his action denied him access to justice and a fair hearing. The application is resisted by the intended respondents who claim, *inter alia,* that the Court of Appeal has no jurisdiction to grant conditional leave under the Bahama Islands (Procedure In Appeals) Order, 1964 since neither Article 104 of the Constitution nor section 23 of the Court of Appeal Act, confers a substantive right of appeal on the intended appellant to pursue an appeal to the Privy Council against the Court of Appeal's judgment refusing him leave to appeal to that Court. The intended respondents further contend that a refusal by the Court of Appeal of leave to appeal to the Court of Appeal under section 11(f) of the Court of Appeal Act, is not a "judgment or order" upon appeal from the Supreme Court which is appealable to Her Majesty in Council within the meaning of section 23.

After hearing the contending arguments, the Court reserved its decision.

Held: The application for conditional leave to appeal to Her Majesty in Council is dismissed. The intended respondents shall have their costs of the application to be taxed, if not agreed.

The intended appeal to Her Majesty in Council does not engage Article 104 of the Bahamas Constitution since the learned judge's Dismissal Ruling was not 'a final decision of the Supreme Court given in exercise of the jurisdiction conferred on her by Article 28 of the Constitution'. More importantly, the intended appeal does not qualify as an appeal *"as of right"* from a decision given by the Court of Appeal 'in any such case' within the meaning of Article 104(2). The Court of Appeal's written Judgment of 29 July 2021 refusing leave to the intended appellant to appeal is a decision given in the exercise of the statutory discretion conferred by section 11(f) of the Court of Appeal Act to grant or refuse leave to appeal from an interlocutory ruling in the court below. The Refusal Judgment is a decision of this Court given following the hearing of a renewed application to this Court for leave to appeal an interlocutory ruling made in the court below. Such a judgment or order or decision is not appealable to Her Majesty in Council under the clear and unambiguous terms of Article 104(2) of the Constitution.

Further, the Court is satisfied that the intended appellant has no appeal *"as of right"* within the contemplation of the first limb of section 23 of the Court of Appeal Act. Additionally, his intended

appeal from this Court's Refusal Judgment of 29 July 2021 also does not qualify under the second limb of section 23 as a *"with leave"* appeal from a decision of this Court "in other proceedings" arising from the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

The language of section 23 of the Court of Appeal Act does not confer a right of appeal to the Privy Council against this Court's judgment or order of 29 July 2021 made pursuant to section 11(f) refusing him leave to appeal to the Court of Appeal. Accordingly, there is, in reality, "no provision of any law relating to such appeal" which would ground the intended appellant's application for conditional leave within the meaning of section 4 of the Bahama Islands (Procedure In Appeals to Privy Council) Order. In the result, the application for conditional leave to appeal to Her Majesty in Council has no legal basis and cannot be sustained as quite simply, the Court has no jurisdiction to grant the intended appellant the leave he seeks.

Blue Illusions Limited v. The Minister of Agriculture and Marine Resources and others SCCivApp. No. 290 of 2015 mentioned
Bre X Minerals (Trustee of) v. Walsh Estate [2000] BHS J. No. 250 considered
Calderon v. Calderon [1992] 43 WIR 43 mentioned
Callenders & Co (a firm) v. The Comptroller of H.M. Customs SCCivApp. No. 63 of 2012 mentioned
Colin Wright et al v. Bahamas Communications and Public Officers Union Plan & Trust Fund SCCivApp. Nos. 111, 128, 157 & 158 of 2018 mentioned
Collier v. Elders Pastoral Ltd (1991) 3 PRNZ 478 mentioned
Dwight Major and anor v. Attorney General et al SCCivApp. No. 34 mentioned
Eric Stubbs v. Regina SCCrApp. No. 35 of 2021 mentioned
Farmer and others v. Security and General Insurance Company Ltd [2013] 1 BHS J. No. 13 considered
Freeport Container Port v. Jermaine Campbell SCCrApp. No. 130 of 2020 mentioned
Gaydamak and anor v. UBS Bahamas Ltd and anor [2006] UKPC 8 mentioned
Hot Pancakes Limited v. CS & P S.A. vs Amber Louise Murphy and Ansbacher Ltd SCCivApp. No. 95 of 2020 mentioned
Julie McIntosh v. Family Guardian Insurance Company SCCivApp. No. 64 of 2019 considered
Lane and anor v. Esdaile and anor [1891] AC 210 mentioned
Levine v. Barnett and others [2013] 1 BHS J. No. 137 considered
Lockhart and others v. Mitsui Sumitomo Insurance (London Management) Limited et al [2012] 2 BHS J. No. 57 considered
LOP Investments Ltd. v. Demerara Bank Ltd and others (2009) 74 WIR 333 mentioned
Ramson v. Barker and anor [1982] 33 WIR 183 mentioned
Re Poh [1983] 1 All ER 287 mentioned
Responsible Development for Abaco Ltd v. The Rt. Hon. Perry Christie SCCivApp. No. 248 of 2017 mentioned
Ross v. Bank of Commerce (St. Kitts Nevis) Trust and Savings Association Ltd [2012] UKPC 3 mentioned
Siddiqui and others v. Athene Holding Ltd [2019] 95 WIR 342 mentioned

Standard Chartered Bank (Switzerland) SA v. UBS (Bahamas) Ltd [2014] 1 BHS J. No. 81 mentioned
Swart and others v. Metaxides and anor [2014] 1 BHS J. No. 93 mentioned
Terou Bannister and anor v. Hampton Ridge Condominium Association Ltd. SCCivApp. No. 149 of 2018 mentioned
The Queen v. Gilbert Henny CCJ 21 (AJ) mentioned

JUDGMENT

Judgment delivered by The Honourable Madam Justice Crane-Scott, JA:

Introduction

1. This is an application by the intended appellant/applicant ("Mr. Miller") for conditional leave to appeal to the Judicial Committee of Her Majesty's Privy Council ("the Privy Council") against a written Judgment of this Court handed down on 29 July 2021 whereby we refused a renewed application by Mr. Miller under section 11(f) of the Court of Appeal Act, Ch. 52 for leave to appeal.

2. For the reasons which appear below we have refused Mr. Miller's application for conditional leave.

3. The following summary will provide the necessary context for consideration of the application.

Background

4. In our Judgment of 29 July 2021 ("the COA Refusal Judgment") we refused leave to Mr. Miller to pursue his intended appeal to this Court against an interlocutory Ruling of Charles, J. ("the Dismissal Ruling") handed down in the Supreme Court on 19 November 2020 in which the learned judge dismissed his Writ and Statement of Claim with costs.

5. Charles, J.'s Dismissal Ruling was handed down after the judge had decided a preliminary issue which she had fixed for hearing before her on 20 February 2020 pursuant to her Case Management powers under O. 31A rule 18(2)(i) Rules of the Supreme Court ("RSC"), 1978 and which empowered her to **"dismiss or give judgment on a claim after a decision on a preliminary issue."**

6. The judge's decision to hold a hearing on a preliminary issue was made after the withdrawal and dismissal of Mr. Miller's Summons for Summary Judgment on 12 December 2019. Mr. Miller was also present when the judge made several Case Management orders for the future

conduct of the action and, more specifically, gave directions for the hearing and determination of a preliminary issue which she clearly articulated. Mr. Miller did not protest the judge's decision to determine the action on a preliminary issue, and in any event, the Case Management Order was not appealed. The relevant portions of the Order are reproduced below:

> **"1. The Summons filed by the Plaintiff on the 19th June 2019 is hereby withdrawn and dismissed with costs of the application being costs in the cause.**
>
> **2. The preliminary issue of <u>whether the Plaintiff's claims alleged in the Writ of Summons filed on the 30th April 2019 are either statute barred pursuant to the Limitations Act, Ch. 83 or violate the doctrine of laches</u> is adjourned to the 20th February, 2020 at 2:30 p.m.**
>
> **3. The parties are to email written submissions canvassing the preliminary issue to the Court in Microsoft Word format no later than the 12th February, 2020. Physical copies of the submissions are to be lodged with the Court's clerk no later than 13th February, 2020.**
>
> **4. The parties are to exchange written submissions canvassing the preliminary issue no later than the 12th February, 2020. Any reply submissions by either of the parties are to be exchanged between the parties and emailed to the Court in Microsoft Word format no later than the 18th February, 2020 …." [Emphasis added]**

7. Mr. Miller filed written submissions as directed and participated at the hearing of the preliminary issue on 20 February 2020 without objection. As noted, on 19 November 2020, the learned judge issued her Dismissal Ruling and dismissed his Writ and Statement of Claim with costs.

8. The factual background which led to Mr. Miller's Supreme Court action is set out at paragraph 2 of the COA Refusal Judgment delivered by Evans, JA on 29 July 2021.

9. There is no need to reproduce it again. It is sufficient only to recall that in 1997 Mr. Miller had agreed to purchase five lots of land situated at Englerston, New Providence from Imperial Life Assurance Company of Canada under a written Agreement for Sale between himself, as purchaser and Imperial, as vendor.

10. He paid the required deposit of $19,000 to the respondents in 1997 in their capacity as Imperial's attorneys-at-law. The respondents held the deposit as stakeholders under the Agreement for Sale. Most importantly, the respondents did not act for Mr. Miller who engaged separate legal representation in connection with the sale/purchase transaction.

11. By way of a letter issued to Mr. Miller in January 1999, time was made of the essence of the Agreement for Sale and he was given 7 days to complete. Having failed to complete the transaction within the stipulated timeframe, the Agreement was cancelled, and the deposit forfeited and forwarded to the vendor in accordance with Clause 10 of the Agreement.

12. Some 20 years following the cancellation of the Agreement for Sale and the forfeiture of the deposit, Mr. Miller filed a Writ and Statement of Claim seeking damages and making numerous claims for relief against the respondents, including a claim for unjust enrichment.

13. As indicated, at paragraph [48] of her written Dismissal Ruling, the learned judge determined the preliminary issue and dismissed Mr. Miller's action on the ground that the Writ and Statement of Claim failed to disclose a reasonable cause of action and/or constituted an abuse of the process of the Court.

14. Following the dismissal of his action, Mr. Miller applied to the judge under section 11(f) of the Court of Appeal Act, seeking leave to appeal and a stay pending appeal. In a subsequent written Ruling ("the Leave to Appeal Ruling") handed down on 12 February 2021, the learned judge refused Mr. Miller's application for leave to appeal. Between paragraphs [10] through [28], after examining the intended grounds of appeal, the learned judge found none of them to have any realistic prospects of success.

15. In a renewed application to this Court under section 11(f) of the Court of Appeal Act for leave to appeal, Mr. Miller expanded his 14 intended grounds of appeal and sought instead to rely on 38 proposed grounds many of which overlapped. As appears from the COA Refusal Judgment, this Court was satisfied that none of Mr. Miller's intended grounds of appeal had any realistic prospects of success. We also found that none of the proposed grounds raised any issue which required this Court's attention in the public interest; and further, that none of the grounds raised a point of law requiring clarification on appeal. Mr. Miller is unhappy with our decision and wishes to appeal our Refusal Judgment to the Privy Council.

16. Against the foregoing background, we turn to examine the application for conditional leave.

The legal framework regulating appeals to the Privy Council

17. As this Court (differently constituted) recently had occasion to point out, there is at present no law which provides for an appeal to lie to the Privy Council (whether "as of right" or "with

leave") from decisions of the Court of Appeal in criminal appeals. See **Eric Stubbs v. Regina** SCCrApp. No. 35 of 2021.

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

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

> **"Appeals relating to fundamental rights and freedoms.**
>
> **104. (1) ...**
>
> **(2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council … from any decisions given by the Court of Appeal in any such case." [Emphasis added]**

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

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

> **"Appeals to the Privy Council**
>
> **23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount**

sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

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

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

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

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

"Application for leave to appeal

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

Conditional leave to appeal

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such

appeal shall, in the first instance be granted by the Court only -

> **(a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding one thousand pounds sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay costs of the appeal (as the case may be); and**
>
> **(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose." [Emphasis added]**

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

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

26. As would be expected, the constitutional and legal framework for appeals to the Privy Council from decisions of the Court of Appeal has been the subject of numerous decisions of this Court. The decisions provide useful guidance regarding the various categories of decisions of this Court which are appealable to the Privy Council, and whether such appeals are *"as of right"* or *"with leave"*. The decisions further shed light on the expected role of the Court of Appeal in readying the various categories of appeals for hearing before Her Majesty in Council and the circumstances in which applications for leave may be granted or refused. See for example: **Bre-X Minerals (Trustee of) v. Walsh Estate** [2000] BHS J. No. 250; **Lockhart and others v. Mitsui Sumitomo Insurance (London Management) Limited et al** [2012] 2 BHS J. No. 57; **Farmer and others v. Security and General Insurance Company Ltd** [2013] 1 BHS J. No. 13; **Standard Chartered Bank (Switzerland) SA v. UBS (Bahamas) Ltd** [2014] 1 BHS J. No. 81; and **Blue Illusions Limited v. The Minister of Agriculture and Marine Resources and others** SCCivApp. No. 290 of 2015; and **Freeport Container Port v. Jermaine Campbell** SCCrApp. No. 130 of 2020.

27. In **Bre-X Minerals** (a case decided in 2000 before the publication in 2005 of the revised edition of the Court of Appeal Act) the Court of Appeal (differently constituted) had occasion to consider section 19 of the Act which now corresponds in all respects to section 23 of the revised Act.

28. Writing for the Court, Georges, JA identified what he said were four avenues of appeal to the Privy Council and explained the limited role of this Court in respect of two categories of *"as of right"* appeals. According to Georges, JA:

> **"6 The effect of Articles 104 and 105 of the Constitution and section 19 [now section 23] of the Court of Appeal Act is to create <u>four avenues</u> of appeal to the Privy Council. In respect of <u>two</u> of these routes – appeals founded on the fundamental rights chapter of the Constitution and appeals from final decisions of this Court in other matters – the role of this Court is limited to ensuring that the procedural preconditions as set out in the Rules governing such appeals are observed..." [Emphasis added]**

29. Continuing, Georges, JA further identified what he considered to be two additional categories of appeals from decisions of this Court upon appeal from the Supreme Court (each, however, requiring the grant of *"leave"* from this Court to appeal to the Privy Council). The Court laid down further guidance as to what has to be established by an applicant seeking such *"leave"*. Georges, JA put the matter in the following way:

> **"6 …Where, however, the appeal is from a judgment given in interlocutory proceedings, *or* is a final judgment in civil proceedings where the subject matter is valued at less than $4,000, this Court has a duty to be satisfied by the applicants *that they have an arguable case and that the matter is one on which the Privy Council has yet to pronounce authoritatively*. Hence, if, in appeals following either of the first two paths, the role of this Court is no more than a conduit, limited to moving appeals along, concerned only to ensure that the channels of procedural propriety are respected, when appeals arose from interlocutory proceedings, this Court has an effective function to perform as a gate valve on that conduit and the applicants, as here, have the onus of satisfying this Court that they should pass through." [Emphasis added]**

30. The above interpretation of the constitutional and statutory provisions governing appeals from decisions of this Court to the Privy Council were subsequently endorsed and applied in another decision of this Court in **Lockhart**. The Court unambiguously held that appeals to the Privy Council against a decision of this Court given on appeal from an interlocutory order of the Supreme Court were not *"as of right"* and required the grant of *"leave"*. Allen, P., writing for the Court of Appeal, had this to say:

> **"16. I wholeheartedly agree with the interpretation of the aforementioned constitutional and statutory provisions by the learned President in Bre-X Minerals (Trustee of) v. Walsh Estate relative to the distinction between appeals as of right under the Constitution, and other final judgments and interlocutory orders. Accordingly, in the circumstances of this case, I adopt the conclusion of the learned President where he said that: "it would be remarkable and inconsistent with the entire scheme of appeals in a hierarchy of courts that a party at the interlocutory stage of proceedings would have an appeal as of right to the third tier court while his right of appeal at the lower tiers is qualified."**

31. In **Lockhart** the Court noted that the ruling of Turner, J. that the appellants should be made the defendants, had been affirmed by the Court of Appeal and so the matter in dispute which had been appealed to the Court had nothing to do with the substantive issue of who was entitled

to the funds held by the stakeholders, which was still a live issue in the court below which had yet to be determined.

32. Having determined that the intended appeal to the Privy Council was not an appeal *"as of right"* and required "leave" and the exercise of the Court's discretion, the Court ultimately refused leave to appeal to the intended appellants. The Court offered the following reasons for its refusal of leave:

> **"24. Finally, the question is whether this Court ought to grant leave to appeal in the instant case. In essence, as stated, this is an application for leave to appeal what amounts to directions by Turner J. as to the role of the parties in the trial of the interpleader issue. No matter the outcome of any such appeal, it will not, and cannot be, dispositive of the real question arising in the action.**
>
> **25. This is therefore not a split trial as in *Strathmore*, where it may be argued that the interest of a more efficient administration of justice requires that the determination of the first part of a trial should be appealed to prevent possibly incurring the unnecessary expense of a second part, nor is this a case where it can be said that the right of the appellants to appeal may be fettered if leave is refused.**
>
> **26. Indeed, once the interpleader issue is heard and determined, any party may appeal without leave and the issue of who should have been the plaintiff and who defendant, would still be at large for consideration on appeal.**
>
> **27. In all the circumstances, I refuse leave to appeal and I award the costs of the application to the respondents to be taxed if not agreed."**

33. An identical approach is observed in **Farmer**. Following the guidance in **Bre-X** and **Lockhart**, the Court of Appeal refused the intended appellants' application for leave to appeal to the Privy Council against its decision given on appeal from an interlocutory order of the Chief Justice in the court below. Having found that the intended appeal from its judgment was not an appeal *"as of right",* the Court, in the exercise of its discretion under section 23 of the Court of Appeal Act, proffered the following reasons for refusing leave to appeal:

> **"11. In our view, the IAs have not demonstrated to us that they have an arguable case, neither have they shown that this matter is one on which the Privy Council has yet to pronounce authoritatively. In James Walker v. Susan Lundburg 2008 WL 576820, the Privy Council clearly stated that a judge cannot set aside an order, whether made by that judge or another judge of coordinate jurisdiction, without some special reason. The special reason usually involves a material change of circumstance. The learned Chief Justice did not provide any special reasons for setting aside his initial Order of 14 December, 2010, and no evidence was pointed to indicating any material change in circumstance capable of warranting a change in the initial decision.**
>
> **12. Further, this matter raises no issues or points of law which require the attention of the Privy Council."**

34. Similar approaches to conditional leave applications may be found in **Hot Pancakes Limited v. CS & P S.A. vs Amber Louise Murphy and Ansbacher Ltd** SCCivApp. No. 95 of 2020 and **Colin Wright et al v. Bahamas Communications and Public Officers Union Plan & Trust Fund** SCCivApp. Nos. 111, 128, 157 & 158 of 2018.

35. In **Blue Illusions**, the intended appellants had applied for conditional leave to appeal *"as of right"* to Her Majesty in Council from a decision of this Court given on 9 February 2017 on appeal from a final decision of a Supreme Court judge in which the value of the property in dispute (8 bottlenose dolphins) exceeded the financial threshold in section 23 and in which the appeal had been dismissed.

36. The conditional leave application in **Blue Illusions** was vigorously contested. During the hearing and notwithstanding the previous decisions of the Court in **Bre-X** and **Lockhart** (alluded to earlier) describing the limited role of the Court in relation to *"as of right"* appeals, the intended respondent cited a number of authorities and sought to convince the Court that it had an inherent discretion even where the appeal is *"as of right"*, to refuse conditional leave if the intended appellant failed to show that the intended appeal raised a genuinely disputable issue, or if the appeal was an abuse of the court's process.

37. In its written decision handed down in April 2017, the Court indicated its preference for the dictum of President de la Bastide in the Caribbean Court of Justice case of **LOP Investments Ltd. v. Demerara Bank Ltd and others** (2009) 74 WIR 333. Writing for the Court in **Blue Illusions**, Allen, P., stated:

> **"40. Other than the decision of the CCJ in LOP, there was no other authority which Counsel were able to find to assist us, but I am persuaded by the dictum of President de la Bastide in LOP, that <u>there may be applications for leave to appeal as of right under section 23, including cases which meet the financial threshold, in which the proposed appeal may be shown to be oppressive, perverse, or frivolous and vexatious and it is just and equitable for the Court to exercise its inherent power to prevent abuse of its process</u>. Indeed, even in such a case if the Court of Appeal refused leave to appeal, the Privy Council would nevertheless be able to grant leave to an intended appellant so refused." [Emphasis added]**

38. The Court indicated that it was not satisfied that the intended respondent had demonstrated that the conduct of the intended appellant in bringing the appeal was oppressive, perverse or frivolous and vexatious so as to require the exercise of the Court's inherent jurisdiction to prevent abuse of its process and injustice. Ultimately, the Court of Appeal, granted conditional leave to appeal to the intended appellant to pursue its appeal to the Privy Council.

39. Recently, in **Julie McIntosh v. Family Guardian Insurance Company** SCCivApp. No. 64 of 2019, following **Blue Illusions,** the intended appellant's application for conditional leave was refused notwithstanding that her appeal was "as of right" and exceeded the financial threshold, in circumstances where it was manifest to the Court that the intended appeal would be oppressive, perverse, vexatious and an abuse of process. After examining some 10 intended grounds of appeal which the intended appellant wished to advance before Her Majesty in Council, the Court of Appeal found that none of the proposed grounds disclosed any discernable error of law or of fact in the judgment of the Court against which she wished to appeal. On the contrary, all 10 intended grounds set out numerous allegations regarding the findings of the learned judge in the court below as well as other complaints (including allegations of fraud, deceit and swapped documentation on the part of the intended respondent and its counsel) which had not been raised in the pleadings in the court below nor before the Court of Appeal at the hearing of the appeal.

40. Returning once again to **Blue Illusions.** There, the Court clearly identified what Allen, P., said was the current view of the Court in relation to the four avenues of appeal to the Privy Council conferred under section 23 of the Court of Appeal Act in civil matters. Although not adverting to *"as of right"* appeals under Article 104(2) of the Constitution mentioned by Georges, JA in

Bre-X, and clearly focusing only on sections 11 and 23 of the Court of Appeal Act, Allen, P. described the four avenues of appeal to the Privy Council under section 23 as follows:

> **"10. Consequently, the current view of the Court of Appeal as to the interpretation of sections 11 and 23 is that there are four categories of appeal: 1.) final judgments or orders <u>on appeal</u> in a civil action where the amount sought to be recovered or the value of the property is $4,000 or upwards; 2.) appeals where final judgments or orders <u>on appeal</u> where amount to be recovered or the value of the property is below the financial threshold; 3.) interlocutory judgments or orders <u>on appeal</u> where the amount to be recovered or the value of the property is at or above the financial threshold; and 4.) interlocutory judgments or orders <u>on appeal</u> where the amount to be recovered or the value of the property is below the financial threshold…" [Emphasis added]**

41. We pause to observe that each of these four categories of appeals which this Court identified in **Blue Illusions** involves an intended appeal to the Privy Council from a "judgment or order" of the Court of Appeal which is <u>on appeal</u> from a decision of the Supreme Court in civil proceedings (whether final or interlocutory in nature) and regardless of whether the amount to be recovered or the value of the property is above or below the $4,000 financial threshold.

42. In **Levine v. Barnett and others** [2013] 1 BHS J. No. 137, this Court (differently constituted) assumed jurisdiction to hear an application by an intended appellant for conditional leave to appeal the Court's decision refusing to restore an appeal which had been struck out. The Court assumed jurisdiction to hear the application despite the clear words of section 23 of the Court of Appeal Act and notwithstanding that the "judgment or order" to be appealed to the Privy Council was not one which was given <u>on appeal</u> from a decision of the Supreme Court.

43. As we see it, the exercise of the Court's discretion under the Court of Appeal Rules to refuse to restore or to re-enter an appeal which has been dismissed, does not qualify as a "judgment or order" of this Court given <u>on appeal</u> from a decision of the Supreme Court so as to be appealable to Her Majesty in Council under section 23 of the Act. See for example: **Terou Bannister and anor v. Hampton Ridge Condominium Association Ltd.** SCCivApp. No. 149 of 2018 where this point is clearly made.

44. Notwithstanding **Levine**, we are firmly of the view that there is nothing in the language of section 23 of the Court of Appeal Act which can or should be construed as conferring a substantive right upon a litigant in civil proceedings to appeal to Her Majesty in Council against a decision of this Court made in the exercise of a discretion conferred by the Court of Appeal Act or Rules. As we have just said, a refusal to restore an appeal which has been dismissed pursuant to the Rules of Court, cannot qualify as a "judgment or order" given on appeal from a decision of the Supreme Court so as to be appealable to Her Majesty in Council within the meaning of section 23.

45. Against the foregoing review of the constitutional and legal framework governing appeals to the Privy Council, we turn to consider Mr. Miller's application for conditional leave.

The Application for Conditional leave

46. As appears from Mr. Miller's Motion for conditional leave filed on 18 August 2021, the application is grounded in section 23 of the Court of Appeal Act, Ch. 52. The Motion also invokes sections 3 and 4 of the 1964 Order, set out earlier.

47. Article 104: Although Mr. Miller's Motion for conditional leave made no reference to his having an appeal *"as of right"* under Article 104(2) of the Constitution, in his oral and written submissions, Mr. Miller nonetheless sought to ground his application under the Constitution. At paragraphs 16 through 23 of his written submissions Mr. Miller repeated his submissions previously raised before this Court in April this year at the hearing of his renewed application for leave to appeal to this Court. He persists with his contention that his fair hearing rights under Article 20 of the Constitution were infringed when the judge (prematurely in his view) dismissed his Writ and Statement of Claim following her determination of the preliminary issue. The dismissal of his action by the judge, he claims, unfairly denied him access to justice and a fair hearing. In support, Mr. Miller relied on **Ramson v. Barker and anor** [1982] 33 WIR 183; **The Queen v. Gilbert Henny** CCJ 21 (AJ); and **Ross v. Bank of Commerce (St. Kitts Nevis) Trust and Savings Association Ltd** [2012] UKPC 3.

48. For his part, counsel for the intended respondents, Mr. Eneas, objected to Mr. Miller's attempt to invoke Article 104(2) of the Constitution. He correctly noted that the Motion for conditional leave had this far not been formally amended to enable the intended appellant to move the application under Article 104.

49. He nonetheless submitted that the COA Refusal Judgment of 29 July 2021 is not one which can be appealed to the Privy Council pursuant to Article 104(2). Mr. Eneas contended that Mr. Miller's resort to Article 104 is misguided because as is apparent from the Writ and Statement

of Claim, the Supreme Court's Article 28 jurisdiction which would have triggered Article 104(1) was never engaged in the court below.

50. Mr. Eneas further submits that the Dismissal Ruling of the judge in the court below was interlocutory in nature and accordingly required leave to appeal of the Supreme Court or of this Court pursuant to section 11(f) of the Court of Appeal Act before it could be appealed to this Court. He pointed out that Mr. Miller failed to obtain leave to appeal in the court below in the first instance, and had subsequently renewed his application for leave to appeal before this Court which refused leave on 29 July 2021.

51. Mr. Eneas contends that it is evident from the language of Article 104 of the Constitution itself that in reality there is still no appeal before the Court of Appeal from a final decision of the Supreme Court given in exercise of Article 28; nor is there any decision given by this Court 'in such a case' in respect of which conditional leave to appeal to the Privy Council can be granted. We agree.

52. With the greatest respect to Mr. Miller, the authorities which he laid over on this issue do not assist his assertion that he has an appeal *"as of right"* to the Privy Council under Article 104 of the Constitution. Quite simply, his intended appeal to Her Majesty in Council does not engage Article 104 of the Bahamas Constitution since the learned judge's Dismissal Ruling was not 'a final decision of the Supreme Court given in exercise of the jurisdiction conferred on her by Article 28 of the Constitution'. More importantly, the intended appeal does not qualify as an appeal *"as of right"* from a decision given by the Court of Appeal 'in any such case' within the meaning of Article 104(2).

53. The Court of Appeal's written Judgment of 29 July 2021 refusing Mr. Miller leave to appeal to the Court of Appeal is a judgment, order or decision given in the exercise of the statutory discretion conferred by section 11(f) of the Court of Appeal Act to grant or refuse leave to appeal from an interlocutory ruling in the court below. It is a judgment, order or decision of this Court given following the hearing of a renewed application to this Court for leave to appeal an interlocutory ruling made in the court below. Such a judgment, order or decision is not appealable to Her Majesty in Council under the clear and unambiguous terms of Article 104(2) of the Constitution.

54. Notwithstanding our view that Mr. Miller has no appeal *"as of right",* under Article 104(2), out of an abundance of caution, we should state that between paragraphs 23-31 of our Refusal Judgment we had previously examined the prospects of success of his various contentions regarding the alleged infringement of his fair hearing rights under the Constitution and have already found them to have no realistic prospects of success. Moreover, they raise no arguable points of law and raise no issues or points of law which require the attention of the Privy

Council at this time. In short, Article 104(2) of the Constitution is not the appropriate foundation upon which Mr. Miller's application for conditional leave can be sustained.

55. Section 23: Next, turning to his Motion and to section 23 of the Court of Appeal Act, Mr. Miller then sought to convince us that he has an appeal *"as of right"* to the Privy Council under the first limb of section 23(1) since the value of the property in dispute in his Supreme Court civil action (i.e. the $19,000 sales deposit referred to earlier) exceeds the $4,000 financial threshold.

56. He says that his Motion for leave was filed within the 21-day time-frame stipulated in section 3 of the 1964 Order and further submits that we should exercise our discretion under the second limb of section 23(1) to grant him conditional leave because his intended appeal raises an arguable case and raises an issue of general public importance requiring consideration by the Privy Council.

57. In support, Mr. Miller cites a plethora of authorities which are attached to his written Submissions. These include: **Gaydamak and anor v. UBS Bahamas Ltd and anor** [2006] UKPC 8; **Calderon v. Calderon** [1992] 43 WIR 43; **Dwight Major and anor v. Attorney General et al** SCCivApp. No. 34; **Swart and others v. Metaxides and anor** [2014] 1 BHS J. No. 93; **Bre X Minerals**; **Lockhart**; **Levine**; **Siddiqui and others v. Athene Holding Ltd** [2019] 95 WIR 342; **Callenders & Co (a firm) v. The Comptroller of H.M. Customs** SCCivApp. No. 63 of 2012; **Responsible Development for Abaco Ltd v. The Rt. Hon. Perry Christie** SCCivApp. No. 248 of 2017.

58. For his part, counsel for the intended respondents, Mr. Eneas submitted that the COA Refusal Judgment of 29 July 2021 is not one which can be appealed to the Privy Council pursuant to section 23 of the Act. In his oral and written submissions he made the following points:

> **"5.1 The intended Respondents contend that the refusal by this Court to grant to the intended Appellant leave to appeal to the Court of Appeal is not a matter which can be appealed to the Privy Council pursuant to section 23 of the Court of Appeal Act … by reason of the following matters:**
>
> > **(i) As a matter of construction there is no jurisdiction to grant leave to appeal to the Privy Council under section 23 where there is no "judgment or order of the Court of Appeal upon appeal from the Supreme Court";**

> **(ii) A refusal of leave to appeal by the Court of Appeal is final and not an appealable "judgment or order of the Court" within the meaning of section 23 of the Court of Appeal Act; and**
>
> **(iii) The legislative intention of limited review would be rendered nugatory and reduced to an absurdity if appeals were to lie to the Privy Council against refusals of the Court of Appeal to grant leave to appeal."**

59. Mr. Eneas referred to the four categories of appeal identified in this Court's decision in **Blue Illusions** to which we alluded earlier. He submitted that Mr. Miller's application for leave does not fall within any of the accepted avenues of appeal from which leave to appeal to the Privy Council may be granted under section 23. He further contended that a refusal by this Court to grant leave to appeal to the Court of Appeal is not a "judgment or order" which is appealable to Her Majesty in Council within the meaning of section 23. He relied on the House of Lords authorities of **Lane and anor v. Esdaile and anor** [1891] AC 210 and **Re Poh** [1983] 1 All ER 287; as well as the New Zealand Court of Appeal decision of **Collier v. Elders Pastoral Ltd** (1991) 3 PRNZ 478 where **Lane** was applied.

60. We have considered the contending submissions. It is obvious that the intended appeal from this Court's decision does not qualify under the first limb of section 23 as an appeal *"as of right"* from a "judgment or order" of this 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.

61. Mr. Miller's Motion is clearly an attempt to appeal from this Court's Judgment of 29 July 2021 given in the exercise of a discretion conferred under section 11(f) of the Court of Appeal Act refusing him leave to appeal from the judge's Dismissal Ruling of 19 November 2020. We are persuaded by the language of section 23, as well as by the authorities cited by Mr. Eneas, that a refusal by the Court of Appeal of leave to appeal to the Court of Appeal, is not a "judgment or order" upon appeal from the Supreme Court which is appealable to Her Majesty in Council within the meaning of section 23.

62. We are satisfied that Mr. Miller has no appeal *"as of right"* within the contemplation of the first limb of section 23. Additionally, it is also clear that his intended appeal from this Court's Refusal Judgment of 29 July 2021 does not qualify under the second limb of section 23 as a *"with leave"* appeal from a decision of this Court "in other proceedings" arising from the

Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

63. As we have found, the language of section 23 of the Court of Appeal Act does not confer a right of appeal to the Privy Council against this Court's judgment or order of 29 July 2021 made pursuant to section 11(f) refusing him leave to appeal to the Court of Appeal. Accordingly, there is, in reality, "no provision of any law relating to such appeal" which would ground Mr. Miller's application for conditional leave within the meaning of section 4 of the 1964 Order. In the result, Mr. Miller's application for conditional leave to appeal to Her Majesty in Council has no legal basis and cannot be sustained. Quite simply, we have no jurisdiction to grant him the leave he seeks.

64. As Mr. Miller is unrepresented, he is advised of his right to apply to the Privy Council directly seeking special leave, or, as it is also referred to, permission to appeal.

Disposition and Order

65. For all the above reasons, the Motion for conditional leave to appeal to Her Majesty in Council is dismissed. The intended respondents shall have their costs of the application to be taxed, if not agreed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA

The Honourable Madam Justice Bethell, JA