

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 53 of 2023**

B E T W E E N

TROY LEVAN KELLMAN

Applicant

AND

THE BAR COUNCIL

Respondent

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

APPEARANCES: **Mr. Maurice Ginton, KC, with Ms. Meryl Ginton Counsel for the
Applicant**

**Mr. Sean Moree, KC, with Ms. Peteche Mitchell, Counsel for the
Respondent**

DATE: **18 March 2024; 29 April 2024; 22 May 2024**

*Application for conditional leave to appeal to the Judicial Committee of the Privy Council –
Jurisdiction to grant leave to the Judicial Committee of the Privy Council – Whether the Court
has an inherent jurisdiction to grant leave to appeal to the Judicial Committee of the Privy
Council - Article 104 of the Constitution - Section 54 of the Legal Profession Act - Section 23
of the Court of Appeal Act - Bahama Islands (Procedure in Appeals to Privy Council)
Order, 1964*

The applicant was a counsel and attorney of the Supreme Court whose name was struck from the Roll by the Disciplinary Tribunal. He appealed the decision of the Disciplinary Tribunal to this Court, pursuant to section 54 of the Legal Profession Act. This Court dismissed his appeal. He now seeks to appeal this Court’s decision to the Privy Council.

Held: application refused as the Court has no jurisdiction to grant leave to appeal to the Privy Council in this matter. Applicant to pay the costs of the respondent, to be taxed if not agreed.

Section 54(2) of the Legal Profession Act provides that “No further appeal shall lie from the decision of the Court of Appeal on an appeal made under this section.” The issue before the Court is whether it has the jurisdiction to grant the leave being sought.

The Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964 does not confer jurisdiction to grant leave in circumstances not prescribed by legislation. The authority to grant leave must be found in substantive legislation.

The right to grant leave to appeal to the Privy Council is found in Article 104 of the Constitution and in section 23 of the Court of Appeal Act. This case does not involve an appeal from a final decision of the Supreme Court given in exercise of its jurisdiction under Article 28 of the Constitution. In the circumstances, there is no jurisdiction conferred on this Court under Article 104 to grant leave to appeal to the Privy Council. As to section 23 of the Court of Appeal Act, the Court is satisfied that it does not have jurisdiction under that statutory provision.

Counsel for the applicant advanced the argument that this Court had an inherent jurisdiction or power to grant leave where its decision was flawed on the ground that it was a nullity or where it was infected because it was made in breach of the applicant's right to a fair trial by an impartial tribunal. The Court has no inherent jurisdiction to grant leave to appeal to the Privy Council.

Chung Chuck v R [1930] A.C. 244 mentioned

De Morgan and anor. v Director General of Social Welfare; Sears v Attorney-General of New Zealand [1998] 2 A.C. 275 applied

Eric Stubbs v R SCCrApp No. 35 of 2021 considered

Leon Smith v Bahamas Bar Council [2004] BHS J. No. 389 followed

R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119 mentioned

Taylor and anor. v Lawrence and anor. [2003] QB 528 mentioned

J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an application by an unsuccessful appellant for leave to appeal to His Majesty in Council a judgment of this Court dismissing his appeal.
2. On 22 March 2023 the applicant, who was a counsel and attorney of the Supreme Court, brought an appeal to this Court under section 54 of the Legal Profession Act. He had been struck off the Roll by a Disciplinary Tribunal established under the Legal Profession Act.
3. Section 54 of the Legal Profession Act provides:

“54. (1) Any person aggrieved by —

(a) the failure or refusal of the Bar Council to make a determination in his favour under subsection (2) of section 12;

(b) an order made by the Ethics Committee under paragraph (c) of subsection 2 of section 30;

(c) an order made by the Disciplinary Tribunal under section 38 in relation to a complaint made by or against him; or

(d) the discharge by the Council of his articles, or by the terms on which his articles are discharged by the Council, under subsection (5) of section 44 or under section 45,

may appeal on that account to the Court of Appeal; and in relation to every such appeal section 9 of the Court of Appeal Act shall mutatis mutandis apply as if the matter in respect of which the appeal is brought were a judgment or order of the Court.

(2) No further appeal shall lie from the decision of the Court of Appeal on an appeal made under this section.”

4. The Notice of Appeal was in the following terms:

“Take Notice that the Court of Appeal will be moved on the 10th day of _____, A. D., 2023, at 10:00 a.m. o’clock, or so soon as Counsel can be heard, by Counsel on behalf of the above-named Appellant on appeal in virtue of (sic) pursuant section 54(1)(c) of The Legal Profession Act (the ‘Act’) from the decisions of the Ethics Committee of Bar Council established pursuant to provisions of the Act, and the Disciplinary Tribunal (Madam Justice Renae McKay, Mrs. Stephanie Unwala, Mr. Alexander Maillis, and Mr. James Bain) dated 8th February 2023, for an Order that the said decisions may be set aside or varied or remitted to Bar Council or the Disciplinary Tribunal differently constituted, as the case may be.” [Emphasis added]

5. On 23 January 2024 this Court dismissed the appeal.

6. By Motion dated 13 February 2024 the applicant has sought leave to appeal that judgment to the Privy Council. The Motion is in the following terms:

“Take Notice that the Court of Appeal will be moved by the Appellant so soon as counsel can be heard by counsel for leave pursuant to provisions of The Bahamas (Procedure in Appeals to Privy Council) Order 1964 to appeal to the Judicial Committee of His Majesty's Privy Council from the decision given on the 23rd January 2024 by the Court (Barnett, P., Evans and Turner, JJA.) dismissing an appeal from an order the Disciplinary Tribunal made pursuant to section 38(10(a) of The Legal Profession Act striking the name of the appellant off the Roll as a counsel and attorney (notwithstanding that section 54(2) of the said Act, prescribing that “no further appeal shall lie from the decision of the Court of Appeal on an appeal made under this section”, on the broad ground of miscarriage of jurisdiction and predetermination on the Court’s part evident in its apparent departure from established legal precedent as also not following its own previous decision allowing an appeal arising in the same or virtually the same legal context, involving identical or virtually identical issue(s), that the said decision of the Court may be set aside and Judgment entered for the appellant, and in the interim that it be ordered pursuant to section 5(b) of the said Order the said decision and its effect be stayed either unconditionally or upon reasonable conditions (as imposed by the Court) pending hearing and final determination or other disposition of the appellant’s Privy Council appeal or further order, upon such terms and conditions as the Court in pursuance of the provisions of the aforementioned said Bahamas (Procedure in Appeals to Privy Council) Order 1964 may think fit to impose.”

7. The issue before this Court is whether it has the jurisdiction to grant leave in the circumstances of this case.
8. In our judgment, the right to grant leave to appeal to the Privy Council is found in Article 104 of the Constitution and in section 23 of the Court of Appeal Act.
9. We do not accept the submission that **“the source and extent of the Court’s jurisdiction...[is found in] sect. 5 of the 1964 Order where the Appellant submits that it is”**. Sections 4, 5 and 6 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964 (the 1964 Order) provides:

“Conditional leave to appeal

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals 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 despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

Powers of a single judge

5. A single judge of the Court shall have power and jurisdiction—

(a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

Stay of execution

6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into

execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon.”

10. The 1964 Order does not confer jurisdiction to grant leave in circumstances not prescribed by legislation. This is the effect of our decision in **Eric Stubbs v R** SCCrApp. No. 35 of 2021 following **Chung Chuck v R** [1930] A.C. 244. In that case this Court ruled that it had no jurisdiction to grant leave to appeal to the Privy Council in criminal matters as criminal matters were not included in section 23 of the Court of Appeal Act. The authority to grant leave must be found in substantive legislation.

11. Article 104 of the Constitution provides:

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

(2) An appeal shall lie as of right to the Judicial Committee of Her Majesty’s Privy Council or to such other court as may be prescribed by Parliament under Article 105(3) of this Constitution from any decision given by the Court of Appeal in any such case.”

12. This case involves disciplinary proceedings under the Legal Profession Act and the actions of the Ethics Committee and the Disciplinary Tribunal under that Act. It involves an appeal to this Court of Appeal under section 54 of that Act. It does not involve any appeal from a final decision of the Supreme Court given in exercise of its jurisdiction under Article 28 of the Constitution. In the circumstances, there is no jurisdiction conferred on this Court under Article 104 to grant leave to appeal to the Privy Council. At the hearing of this application, counsel for the applicant appears to have conceded that the application did not fall within Article 104. This is found in the following exchange:

“THE PRESIDENT: Let us look at 104, which deals with appeals to the Court of Appeal and to Her Majesty in Council. Do you have it?

MR. GLINTON, KC: I know it. I am with you.

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

It does not fall within that, does it? I mean, this is not --

MR. GLINTON, KC: No, no, no, my Lord. That is my point. It does not fall within --

THE PRESIDENT:

"(2) An appeal shall lie as of right to the Judicial Committee to Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under Article [28] of this Constitution from any decision given by the Court of Appeal in any such case."

-- which refers back to 104, so it does not seem to me that 104 is relevant to this appeal.

MR. GLINTON, KC: And, my Lord, that is why I wanted you -- that is precisely my point. I am not relying on that..."

13. See also the following:

"MR. GLINTON, KC: ... How do you deal with it? It does not come under 104(1) or (2)..."

14. As to section 23 of the Court of Appeal Act, we are satisfied that we have no jurisdiction under that statutory provision. That section provides:

"23. (1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.

(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.”

15. Again, this application for conditional leave is not an application with respect to **“any judgment or order of the court upon appeal from the Supreme Court in a civil action”**. This is an appeal from the decision of the Disciplinary Tribunal or the Ethics Committee created under the Legal Profession Act. It is not upon appeal from a decision of the Supreme Court.

16. Counsel for the applicant appears to have conceded that point as well. That is found in the following exchange:

“THE PRESIDENT: Where is the jurisdiction to grant leave? That is what I am struggling with. Forget 54(2). Where does the Court of Appeal get jurisdiction to grant leave? I thought it was only under 23 or 104.

MR. GLINTON, KC: Oh, no, no. That is in the ordinary case where things are ordinary and everything is in order.”

17. Counsel for the applicant advanced the argument that this Court had an inherent jurisdiction or power to grant leave where its decision was flawed on the ground that it was a nullity or where it was infected because it was made in breach of the applicant’s right to a fair trial by an impartial tribunal. However, counsel also made it clear that the application was not one to reopen the appeal. It was one to grant leave to appeal to His Majesty in Council. This is clear from the following exchange:

“EVANS, JA: The question that I want to put to you, while I can still remember it, is that based on what you have said so far, is this not really and possibly a situation where you are seeking to ask this court to re-open an appeal, because –

MR. GLINTON, KC: No, no.

EVANS, JA: -- we understand that you are saying that possibly that it is a nullity or it was a procedural error, which would normally be the case where the court would be asked to re-open and revisit. That is why I was asking you whether you necessarily was filing for leave to appeal

or whether there was another application that was possible.

MR. GLINTON, KC: My Lord, I came prepared to answer that question and I thought by supplying you with the authorities and the submissions beforehand you would have seen it. I will take you to it. This is not asking you -- and I know there is much of that in that case that preceded this one; it is none of that. I am not asking you to re-open anything. There is nothing to re-open. All I am pointing out is that, as a result of the decision you made - - not that the court was not entitled to make a decision on the appeal. Obviously, if a party appeals, the court has to make a decision, but it is in the nature of the decision, and in this particular case the court was dealing with a matter where it had been drawn in inadvertently simply because one of the interested parties, but not one of the named parties, happened to be a retired former judge, and, and it was never pointed out as a matter of record that, as a result of the operation of the doctrine of necessity, it could not be helped because we know that there are instances, Privy Council decisions -- I have supplied the court with two of them actually. One was Pinochet No. 2 and the other one was the case out of New Zealand -- where the Act itself said this is, in fact, as you have done it. Then you have to perform your function. You are the Appellate Court.

Now, the fact that there are only five of you and you cannot reconstitute three when you do it, that is not my business, but it was never made out that out of necessity this court had to hear a decision and that decision was likely, more likely than not actually, to touch upon matters which would clearly show that there was an interest, that you were interested as judges in the decision; not pecuniary interested, interest in the way that is explained in the Pinochet 2.

If you will allow me to get there and before I get there, I am going to deal with you with the case of D'arcy Ryan and one or two others, but to answer the President's concern, it is that we must come back here because it is a case in which the appellant is entitled *ex debito justitiae* to have that decision set aside, not re-open; there is nothing to re-open, and all of the cases, all of the cases show that that is the proper procedure. You do not go elsewhere. You go back to the court, because essentially they had acted without jurisdiction.”

18. In the circumstances, we are satisfied that the **Taylor and anor. v Lawrence and anor.** [2003] QB 528 and in **R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No. 2)** [2000] 1 AC 119 line of authorities are of no assistance.

19. At the hearing, the Court pressed counsel as follows:

“THE PRESIDENT: If you can find any authority where any court has held that a Court of Appeal had the inherent power to grant leave to appeal to the Privy Council or had power outside of any statutory provision or whether that statute is a constitutional provision or a provision in the Constitution or a provision in ordinary legislation, if you can find any authority that tells us that the court has a jurisdiction outside of those provisions to grant leave to appeal to the Privy Council --

MR. GLINTON, KC: And that is fair enough, my Lord, and I could only reply in this way, and I appreciate that I am on a time limit here, but if your Lordships would be prepared to entertain the answer to that question on the papers and so as to afford me a few days to do some research in that area, I might be able to assist better. I cannot do it now, because I am not presently armed with all material that I should have...”

20. We have considered the supplemental submissions of counsel for the applicant. In our judgment, we have no inherent jurisdiction to grant leave to appeal to the Privy Council. Indeed, to find such an inherent jurisdiction enabling us to grant conditional leave would be inconsistent with the express provision of section 54(2) of the Legal Profession Act which provides: **“(2) No further appeal shall lie from the decision of the Court of Appeal on an appeal made under this section.”**

21. In our judgment, this issue was resolved by the Privy Council itself in **De Morgan and anor. v Director General of Social Welfare; Sears v Attorney-General of New Zealand** [1998] 2 A.C. 275. In that case the Employment Contracts Act of New Zealand provided in 135(1):

“(1) Where any party to any proceedings under this Act is dissatisfied with any decision of the [Employment Court] ... as being erroneous in point of law, that party may appeal to the Court of Appeal against the decision; ... (5) The determination of the Court of Appeal on any appeal under this section shall be final and conclusive.”

22. The Privy Council held that in light of the express words of the statute, the Privy Council had no jurisdiction to entertain appeals from the Court of Appeal. It said:

“In the present cases the New Zealand legislature has, on the true construction of the statutes, provided that the decision of the Court of Appeal shall be final. Since the Court of Appeal is the ultimate Court of Appeal locally situate in New Zealand, the only possible intendment of such words is to exclude the only remaining right of appeal, i.e. appeal by special leave to the Privy Council. That being so, and there being no challenge to the powers of the New Zealand legislature to pass such legislation, the statutes effectively exclude any appeal to the Privy Council.”

23. In our judgment, section 54(2) of the Legal Profession Act excludes any appeal to the Privy Council from a decision of this court on any appeal under section 54(1) of that Act. This was held by this Court (differently constituted) in **Leon Smith v Bahamas Bar Council** [2004] BHS J. No. 389 where Sawyer P. noted:

“8 Also, once this court had dismissed that appeal there was no statutory right of appeal to any other body. Section 54(2) of the Act reads:-

‘(2) No further appeal shall lie from the decision of the Court of Appeal on an appeal made under this section.’

The appellant therefore had exhausted his rights of appeal under the Act.”

24. There can be no inherent jurisdiction in this Court if jurisdiction is expressly excluded by statute. In all the circumstances, we have no jurisdiction to grant leave to appeal to the Privy Council. We must refuse the application. The applicant must pay the costs of the Bar Council, to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Evans, JA

The Honourable Mr. Justice Turner, JA