COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp & CAIS No. 110 of 2010

SCCivApp & CAIS No. 114/2010

Lockhart and Munroe
(A Firm) (As Escrow Agents)

Plaintiffs

AND

1. Mitsui Sumitomo Insurance (London Management) Limited
2. EBR Holdings Limited (In Receivership)
3. EBR Resort Hotel Limited
4. EBR Properties Limited
5. Emerald Bay Residence Club Limited
6. EBR Marina Limited
7. Emerald Bay Water Company Limited
8. The Receivers

(1) Appellants

9. Aero General Aviation, Ltd. ("Aero") (As assigned to Mountain Lake Development Corporation ("MLDC")

(2) Respondents

Before:	The Honourable Mrs. Justice Allen, P. The Honourable Mr. Justice Blackman, J.A. The Honourable Mr. Justice John, J.A.
Appearances:	Mr. Brian Simms, Q.C. with Ms. Simone Fitzcharles for Appellants Mr. Brian Moree, Q.C. with Mr. Sean Moree for Respondents
Date:	4th June 2012; 17th July, 2012

JUDGMENT

Judgment delivered by the Honourable Mrs. Justice Allen, President:

1. This is an application by the appellants made pursuant to *section 23 of the Court of Appeal Act,* for leave to appeal to the Privy Council, the decision of this Court made 6 September 2011, affirming the decision of Turner J. that the appellants should be the plaintiffs, and the respondents, the defendants, in the interpleader action brought in the Supreme Court by the stakeholders, Lockhart and Munroe (a firm), pursuant to *Order 17 rule 5 of the Rules of the Supreme Court.*

2. The application turned on whether the Court of Appeal's judgment was appealable to the Privy Council as of right, or alternatively, whether the appeal is interlocutory in nature and is subject to the discretion and leave of the Court.

Background

1. The facts of the case are set out in the judgment of the full court delivered by Blackman J.A. on 6 September 2011, and are adopted in full. However, the relevant circumstances surrounding the appeal itself shows that initial leave was sought from Turner J, to appeal his ruling of 12 October 2010.

4. Further, on 11 November 2010, ex-parte leave to appeal was sought from then Justice of Appeal Sir George Newman who ordered a stay of the proceedings below and an inter-partes application before the full panel for

permission to appeal. On 28 February 2011, the full court was informed that Counsel agreed to dispense with numerous applications to challenge the decisions of both Turner J. and Newman J.A. Accordingly, the Court granted leave to appeal, which was not objected to by Counsel for the appellants or the respondents.

Final Order or Interlocutory Order

5. Suffice it to say, that in light of the above sequence of events, the issue of whether the interpleader action was interlocutory in nature should not even arise. That is, it is obvious that Counsel for the appellants fully appreciated that an appeal of the order of Turner J. was interlocutory in nature, and that leave to appeal was necessary, as otherwise, he would have proceeded in the normal way and commenced the appeal by Notice of Motion.

6. *Section 10 of the Court of Appeal Act,* empowers the court to hear civil appeals emanating from the Supreme Court. *Section 10* reads:

> ***"Subject to the provisions of this Part of this Act and to the rules of court, the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, and for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the court shall, subject as aforesaid, have all the powers authority and jurisdiction of the Supreme Court."***

7. Exceptionally, restrictions on the hearing of civil appeals from the Supreme Court are outlined in *section 11 of the Court of Appeal Act* and, Counsel for the appellants obviously thought that was the applicable provision when he proceeded to seek the leave of the court under paragraph (f) of that section, which specifically provides that the leave of the Supreme Court or the

Court of Appeal from any interlocutory order or judgment made by a Justice of the Supreme Court is required unless one of the exceptions stated therein applies.

8. Lord Esher, M.R. in the leading case of **Salaman v. Warner and Others** [1891] 1 Q.B. 734, formulated the *'application test'* for distinguishing between a final order and an interlocutory order. The learned judge at page 735 said that:

> ***"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of Standard Discount Co. v. La Grange, and which on the whole I think to be the best rule for determining these questions; the rule which will be most easily understood and involves the fewest difficulties." (See also: Salter Rex & Co. v. Ghosh [1971] 3 WLR 31 and White v. Brunton [1984] Q.B. 570).***

9. Undeniably, based on the test in the case of ***Salaman***, the affirmation of the decision of Turner J. by the Court of Appeal does not finally dispose of the matter in litigation, and as such, the matter being appealed must be interlocutory in nature. Indeed, whether the reverse decision was made by the lower court or by this Court on the question of who should be plaintiff and who should be defendant, the substantive matter, namely, who was entitled to the deposit of Three Million dollars would still be outstanding.

10. In the premises, the real issue for consideration is whether an interlocutory appeal from the Court of Appeal to the Privy Council is as of right. or alternatively subject to the discretion and leave of the Court.

Appeal to the Privy Council as of Right or Discretionary Leave of the Court of Appeal Required

11. The starting point for discussion must be *Articles 104 and 105 of the* Constitution of the Commonwealth of The Bahamas ("the Constitution"). *Articles 104 and 105 of the Constitution* read:

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

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

12. Suffice it to say, the aforementioned articles make it clear that appeals as of right to the Privy Council pertain only to breaches of fundamental rights and freedoms delineated in *Article 28 of the Constitution,* but that Parliament may provide for other appeals to the Privy Council.

13. Accordingly, Parliament enacted *section 23 of the Court of Appeal Act* to provide for appeals not falling within the ambit of *Article 28* of the Constitution. *Section 23* reads:

"(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."

14. In **Bre-X Minerals (Trustee of) v. Walsh Estate** [2000] BHS J. No. 250, this Court (differently constituted) had occasion to interpret *Articles 104 and 105 of the Constitution* and *section 23 of the Court of Appeal Act.* Indeed, that Court had to consider the very same issues faced by this Court in this application, albeit in the context of an injunction. The decision therefore provides useful guidance.

15. Then President of the Court of Appeal, George, clarified the circumstances in which the leave of the Court was required, and beginning at paragraph 5, of the judgment, the learned judge said:

> ***"Although we agree with Mr. Davis that, as a matter of draftsmanship, section 19 makes no distinction between final judgments and interlocutory orders (the instant case being an appeal from an interlocutory order), we share the view advanced by Mr. Moree that it would be remarkable and inconsistent with the entire scheme of appeals in a hierarchy of courts that a party at the interlocutory state 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.***
>
> ***The effect of Articles 104 and 105 of the Constitution and section 19 of the Court of Appeal Act is to create four avenues of appeal to the Privy Council. In respect of two of these routes – appeals founded on the fundamental rights chapter of the Constitution and appeals from final decisions of the Court in other matters – the role of this Court is limited to ensuring that the procedural preconditions as set out in the Rules governing such appeals are observed. Where, however, the appeal is from a judgment given in interlocutory proceedings, or is a final judgment in civil proceedings where the subject matter is valued at less than $4000, this Court has a duty to be satisfied by the appellants 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 priety are respected, when appeals arose from interlocutory proceedings, this Court has an effective function to perform as a gate valve on that conduit and the appellants, as here, have the onus of satisfying this Court that they should pass through.

We articulate these guidelines now as it appears that this Court has not previously done so, in specific terms. However, as we have indicated, in this case there is general agreement that the opportunity ought to be grasped to have the issues here definitely pronounced upon by the Judicial Committee."

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".***

17. As stated before, the ruling of Turner J. that the appellants should be made the plaintiffs and the respondents should be made the defendants, was affirmed by this Court, and so the matter in dispute appealed to this Court did not have to do with the substantive issue of who was entitled to the funds held by the stakeholders, which has yet to be determined and is still alive in the court below.

18. Therefore, in accordance with the reasoning in ***Bre-X Minerals***, it is my opinion that the appellants would not be entitled as of right to appeal the order of this Court to the Privy Council, as the appeal does not entail a monetary claim or the equivalent thereto as required by *section 23 of the Court of Appeal Act*. Instead, the appeal falls within the description of *'any other proceedings'* which *section 23 of the Court of Appeal Act* clearly states requires the leave of the Court.

19. It is further my opinion that the case of ***Strathmore Group Ltd. v. Fraser*** [1992] 3 NZLR 385, relied on by Counsel for the appellants, may be distinguished from this case, as the ruling on the preliminary issues in that case led to an appeal to the Court of Appeal, which finally determined the issues in the entire case thereby eliminating the need for a trial in the lower court. Needless to say, this case, unlike the case of ***Strathmore*** did not finally dispose of the claim of the appellants, but is of an interlocutory nature as described in the case of ***Salaman*** cited above.

20. Additionally, the reliance of Counsel for the appellants on the case of ***Tigerair, Inc. v. Sumrall*** [1983] BHS J. No. 2, does not advance his client's case, as Chief Justice Blake in that case determined that an appeal as of right required that the amount sought to be recovered, or the value of the property in dispute, must have been valued at a thousand pounds or more, and with leave in any other proceedings.

21. At paragraphs 9 and 10 of ***Tigerair***, Blake C.J. held:

> ***"...In my judgment section 18(2) applies to the decisions of the Court of Appeal in civil proceedings as a consequence of appeals from the judgments or orders of the Supreme Court in the exercise of its appellate or revisional jurisdiction under section 17(1) of the Act.***

> ***10. It is trite law if the words of a statute are clear and unambiguous they are to be taken as indicative of what must have been the intention of Parliament. Where there is nothing to modify, alter, or qualify the language which a statute contains, the words must be construed in their ordinary and natural meaning. In my judgment the language of section 18(1) of Cap. 34 is clear and unambiguous. It provides that an appeal shall lie to Her Majesty in Council from any judgment or order of the Court of Appeal upon appeal from the Supreme Court in any civil action in which the amount in dispute is of a thousand pounds or more, and with leave in any other proceedings. The judgment or order of the Court of Appeal may be in respect of an appeal against an interlocutory judgment or order of the Supreme Court. The sole criterion for an appeal as of right is the amount sought to be recovered or the value of the property in dispute. I can find no justification for inserting the word "final" between the word "any" and the words "judgment" in the second line of section 18(1), alternatively for inserting the words "any final judgment of" between the word "from" and the words "Supreme Court" in the third line of the subsection. If that is what Parliament intended they would have said so. A court should not add words to a statute where the effect of so doing would amount to legislation and not construction."***

22. In my view, even if the ***Tigerair*** case was considered applicable to the construction of what is now *section 23 of the Court of Appeal Act*, the appellants would nonetheless require the leave of this Court as the sole criterion emphasized in ***Tigerair*** would not be met.

23. For the reasons stated above, the present appeal is not in the category of appeals as of right and the exercise of the discretion of this Court is required.

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 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.

Honourable Mrs. Justice Allen,
P.

I agree.

Honourable Mr. Justice Blackman,
J.A.

I also agree.

Honourable Mr. Justice John,
J.A.