GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 22 OF 2004

BETWEEN:

[1] GREGORY BOWEN

[2] ATTORNEY GENERAL OF GRENADA

Appellant/Respondent

and

DIPCON ENGINEERING SERVICES LIMITED

Respondent/Applicant

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal
The Hon. Ms. Ola Mae Edwards — Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Wildman for the Appellant/Respondent
Mrs. Celia Edwards for the Respondent/Applicant

2005: December 7, 8.

JUDGMENT

[1] RAWLINS, J.A.: This judgment is concerned with an application for leave to appeal to Her Majesty in Council. A brief background would provide a helpful precursor to the determination of the application.

The background

[2] This case has a relatively long litigation history. The initial claim was instituted in 1996. The present application was brought by Dipcon, who had entered into a contract with the Government in 1994. Under that contract, Dipcon agreed to develop a quarry and to supply aggregates and other material to the Government. Complications arose in relation to a parallel lease agreement into which the Government had entered for the lease of land, which was earmarked for the quarry works. The result was that the Government did not deliver up possession of land to Dipcon for a considerable period. The Government subsequently terminated the contract with Dipcon, who brought an action against the Government for breach of contract. Dipcon eventually obtained default judgment upon which damages were assessed. This aspect of the case was litigated up to the Privy Council.

[3] The Government subsequently instituted an action against Dipcon in which it claimed damages on the ground that Dipcon had itself also breached their contract. The Master struck out the Government's action on the ground that it was *res judicata.* In a judgment delivered on 27th June 2005, this Court allowed an appeal by the Government against the Master's decision thereby reinstating the Government's action. Dipcon has now applied for leave to appeal to Her Majesty in Council against that judgment. The Government opposes the application.

The application

[4] Dipcon's application was brought by way of a Notice, which was filed on 6th July 2005, and was supported by an affidavit, which was deposed by Christopher Penny. Paragraph 4 of the affidavit states that Dipcon wished to appeal to Her Majesty in Council pursuant to Section 104 of the Constitution of Grenada and all other laws appertaining thereto. It further states that Dipcon's Solicitors have been instructed to file a Notice of Motion for leave to appeal to Her Majesty in Council

pursuant to section 4 of the West Indies Associated States (Appeal to the Privy Council) (Grenada) Order 1967.[1] However, no Notice of Motion was filed.

[5] In paragraph 5 of the affidavit, Mr. Penny deposed that the matter in dispute in the appeal is of a value greater than EC $1,500.00. In paragraph 6 of the affidavit, Mr. Penny deposed that in light of the instructions, which Dipcon gave its Solicitors to appeal the decision of this Court, Dipcon believes that it is reasonable and that it is in the interest of both parties that the status quo should be preserved pending the hearing of the appeal.

[6] Solicitors for Dipcon lodged a draft order in the usual form for conditional leave to appeal to Her Majesty in Council. Before this Court, Ms. Edwards, learned Counsel for Dipcon, submitted that the Master's decision, which this Court reversed, was made on Dipcon's application to have the claim by the Government dismissed. She pointed out that Dipcon had prayed for it to be dismissed on the ground that the Government's claim was an abuse of the process of the court. She did not urge this court to find that the decision was a final decision. However, she urged the court to grant Dipcon's application for leave pursuant to section 104(1)(a) of the Constitution of Grenada.

The applicable law

[7] The pivotal provision is section 104(1)(a) of the Constitution of Grenada. It states:

> "104(1) Subject to the provisions of Section 37(7) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases: (a) where the matter in dispute on appeal to Her Majesty in Council is of the value of $1500.00 or upwards or where the appeal involved directly or indirectly a claim to or question respecting property or a right of the value of $1500.00 or upwards, final decisions in any civil proceedings."

[1] Statutory Instrument No. 224 of 1967.

[8] Ms. Edwards, learned Counsel for Dipcon, submitted that when this provision is interpreted the words at end of it, "final decisions in civil proceedings", should not be read in conjunction with the words that precede them. It is her view that this must be the natural result of the comma that precedes those words. If Ms. Edwards is correct, Dipcon would be entitled to have leave to appeal to the Privy Council as of right because the matter in dispute is of a value that is more than $1,500.00 Eastern Caribbean Currency. The appeal involves the claim to a question that involves property or a right of the value of more than $1,500.00.

[9] However, Mr. Wildman, learned Counsel for the Government, does not agree with the interpretation that Ms. Edwards suggested. He submitted that the final words of section 104(1)(a) of the Constitution must be read as qualifying the preceding word. He cited two cases as authorities for his submission. One is the case Administrator-General for Jamaica v Neville Sewell and Jamaica Omnibus Ltd.[2] The other case is Leeward Isles Resorts Ltd. v Charles Hickox.[3] I shall consider this last-mentioned case first.

[10] Leeward Isles Resort Ltd. was the petitioner in the last mentioned case. The company petitioned the Privy Council for leave to appeal against the decision of this court. At first instance, Saunders J., as he then was, gave a decision on a preliminary issue between the parties in April 2003. This Court dismissed an application, which the petitioner brought against the decision of Saunders J. Leeward Isles Resort Ltd. sought leave to appeal to the Privy Council on the ground that it was entitled to appeal as of right pursuant to the provisions of the Constitution of Anguilla Order, 1982 and the Anguilla (Appeals to the Privy Council) Order 1983. This Court dismissed the application on the ground that the matter did not fall within either provision because the decision of Saunders J., and by extension, the subsequent decision of this Court were not final decisions.

[2] [1969] 11 J.L.R. 310 (Hereafter referred to as 'the Neville Sewell case').
[3] Anguilla Civil Appeal No. 2 of 2001.

[11] It is important to look at the 2 provisions on which the refusal of this Court to grant leave in Leeward Isles Resorts Ltd. was made. They are similar provisions. Section 72(1)(b) of the Constitution of Anguilla Order, 1982, permits an appeal as of right from:

> "final decisions in any civil proceedings where the matter in dispute on the appeal is of the value of EC$2,500 or upwards or where the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of EC$2,500 or upwards."

Section 3(1)(a) of the Anguilla (Appeals to the Privy Council) Order, 1983, also permits an appeal as of right from:

> "final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or a question respecting property or a right of the value of £300 sterling or upwards."

[12] It is my view that Leeward Isles Resorts Ltd. does not provide any assistance in the interpretation of section 104(1)(a) of the Constitution of Grenada. This is because the drafters of the Anguilla provisions adopted a clear and modern drafting style. By placing the words, "final decision in any proceedings", at the very beginning of the provisions, they left no doubt that they qualify the words which come subsequently. Leeward Isles Resorts Ltd. might, however, provide some assistance in distinguishing between a final and procedural or interlocutory appeal. On 3rd December, 2003, the Privy Council dismissed the petition by Leeward Isles Resorts Ltd. for special leave to appeal on the ground that the decision which it sought leave to appeal was not a final decision.

[13] The Neville Sewell case provides some assistance in the interpretation of section 104(1)(a) of the Constitution of Grenada. This is because it involved the interpretation of section 110(1)(a) of the Constitution of Jamaica, which is identical to section 104(1)(a) of the Constitution of Grenada. The only difference is that the value of the claim provided in the Jamaica provision is £500, whereas the value of

the claim or the value of the matter in the Grenada constitutional provision is EC $1,500.00.

[14] In **Neville Sewell**, the Jamaica Omnibus Services Ltd.,[4] which was the second respondent, sought leave to appeal to Her Majesty in Council against the decision of the Court of Appeal of Jamaica which overruled a decision of the High Court, thereby permitting the renewal of a Writ by the Administrator General to stand. The Court of Appeal subsequently dismissed the company's application for leave to appeal to Her Majesty in Council by virtue of section 110(1)(a) of the Constitution of Jamaica. This was on the ground that the decision against which the company sought to appeal was not a final decision. Section 110(1)(a) of the Constitution of Jamaica was thereby interpreted in the same manner as the Anguilla provisions. It follows that section 104(1)(a) of the Constitution of Grenada is to be similarly interpreted.

[15] In **Neville Sewell**, it seemed obvious that the decision which the company sought leave to appeal to the Privy Council was not a final decision in a civil proceeding. This was, however, an issue, which the Jamaican Court of Appeal considered at some length. Edun JA (Ag.), who delivered the judgment, analyzed the relevant authorities and distilled three principles by which the Court said that a determination could be made whether an order is final or interlocutory. The Court stated[5] that a decision is a final decision if, whichever way it is given, it will, if it stands, finally dispose of the matters in dispute in the claim in the case. The second principle, which the Court stated was that a decision will be final, if given one way it will finally dispose of the matter, although if it is given in the other way it will not. This is not a very clear statement. The third principle was where an order, as made, finally disposes of the matter, then it is a final order, but if not, it will be an interlocutory order. This is quite similar to the first stated principle.[6]

[4] Hereinafter referred to as 'the company'.
[5] At page 113g-h of the judgment.
[6] These principles are in keeping with what has been referred to as 'the order test', which this Court has not adopted.

[16] It is perhaps helpful to add another proposition, which comes out of the decision by the English Court of Appeal in the case of White and Bruton.[7] Sir John Donaldson stated[8] that if on the determination of a preliminary issue in a final hearing, any issue that is joined between parties is determined, then, that would also be a final determination although the entire or all of the issues before the court have not been determined.

[17] In the jurisdiction of this Court, however, the question what is a final decision has been the subject of various decisions. These include Othniel Sylvester v Satrohan Singh[9]; Pirate Cove Resorts Limited and Another v Euphemia Stephens and Others[10]; Maria Hughes v The Attorney General of Antigua and Barbuda,[11] Astian Group Limited and Another v TNK Industrial Holdings Limited,[12] and Pentium (BVI) Limited and Another v The Bank of Bermuda.[13] This last case involved an application for leave to appeal to the Privy Council.

[18] The seminal statement of principle was made in Othniel Sylvester by Byron JA, as he then was. He stated and accepted the "application test"[14] as the test that is to be applied in this jurisdiction, and repeated it in Pirate Cove Resorts Limited,[15] in the following terms:

> "Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. …
>
> Under the order test an order is final if it finally determines the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it did not determine

[7] [1984] 2 All E.R. 606.
[8] At page 607.
[9] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18th September 1995, Byron JA., as he then was.).
[10] St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003, Sir Dennis Byron, CJ.).
[11] Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004. Gordon, JA (Ag.), as he then was.).
[12] British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004, Gordon, JA.).
[13] British Virgin Islands Civil Appeal No. 14 of 2003 (12th January 2005, Alleyne JA., as he then was.).
[14] See page 4 of the Judgment.
[15] At paragraph 9 of the Judgment.

any issues in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order."

[19] The application test accepts that a claim could be totally and effectively disposed of on an interlocutory application, without there being a determination on any of the issues which arise on that claim. The case could thus be disposed of, and yet the order is not a final order because none of the issues on the claim has been determined. These then are the guiding principles, which are applicable in determining the present matter.

The present matter

[20] Mr. Wildman submitted that the decision of this Court, from which Dipcon seeks leave to appeal, was not a final decision because it did not determine any of the issues between the parties. I agree. The issue between the parties, which arises on the Government's claim, is whether Dipcon breached its contract with the Government. That issue was not determined by the decision of this Court for which leave to appeal is sought. This Court's decision was based on the preliminary issue whether the claim by the Government should be dismissed because it is an abuse of the process of the court on the ground that it was *res judicata*. That, it seems clear, was not a final decision and on that basis leave to appeal would not have arisen under section 104(1)(a) of the Constitution of Grenada. Dipcon was therefore not entitled to leave to appeal under this provision.

[21] The question then arises whether Dipcon's application could be saved under section 104(2)(a) of the Constitution of Grenada. This subsection permits this Court to grant leave to appeal to the Privy Council in any civil proceedings, where in the opinion of this Court , the question involved in the appeal is of great general or public importance or otherwise. In Neville Sewell, the Court of Appeal of Jamaica also canvassed this issue. It held that the matter did not fall under

section 110(2)(a) of the Constitution, which is identical to section 104(2)(a) of the Constitution of Grenada.

[22] The difficulty with the application of section 104(2)(a) of the Constitution of Grenada in the present matter is that there is no Notice of Motion before the Court, which sets out the public importance of the issue involved. Such evidence could even have been adduced in the affidavit of Mr. Penny, and that evidence could have been considered. In the absence of it the application cannot be saved.

[23] In the premises, therefore, the application by Dipcon Engineering Services Limited for leave to appeal to Her Majesty in Council is dismissed with the applicant to pay to the respondent $2,500.00 agreed costs.

Hugh A. Rawlins
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]