BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2006/019

BETWEEN:

PACIFIC WIRE & CABLE COMPANY LIMITED

Appellant/Respondent

and

[1] TEXAN MANAGEMENT LIMITED
[2] ALL DRAGON INTERNATIONAL LIMITED
[3] BLINCO ENTERPRISES LIMITED
[4] PATAGONIA LIMITED

Respondents/Applicants

[5] SHAREHOLDERS OF ALL DRAGON INTERNATIONAL LIMITED

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice [Ag.]
The Hon. Mr. Dane Hamilton, QC	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]

Appearances:

Mr. Samuel J. Husbands for the 1st and 2nd Respondents/Applicants
Mr. Paul Webster, QC and Mr. Kerry Anderson for the 3rd and 4th Respondents/Applicants
Mr. Gerard Farara QC and Mrs. Tana'ania Davis for the Appellant/Respondent

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2008: June 2;
October 6.

Civil Appeal – Civil Procedure – Leave to Appeal to the Privy Council – relevant considerations – Stay of Execution pending appeal – Part 9.7 of the Civil Procedure Rules 2000 – Virgin Islands (Appeal to Privy Council) Order No. 234 of 1967

The appellant/respondent ("Pacific") claimed, in the court below, to be the beneficial owner of shares in the respondents/applicants ("the applicants"). The applicants applied to stay the proceedings in relation to this claim on the ground that the British Virgin Islands was not the appropriate forum for the determination of Pacific's claim. The High Court granted the application. Pacific appealed arguing on appeal, as they did in the court below, that:

(i) the application of the first and second applicants should not be upheld on account of non-compliance with mandatory requirements of Part 9.7 of the Civil Procedure

Rules 2000 (CPR 2000), notably, that the application, when filed, was not accompanied by the affidavit in support; and

(ii) the application of the third and fourth applicants should not be upheld as they had failed to apply for a stay prior to the time for filing their defence and further, that they were estopped from challenging the court's jurisdiction having taken a step in the proceedings by applying to the court for an extension of time to file their defence.

Pacific's challenge was upheld in the Court of Appeal. The applicants now seek leave to appeal to the Privy Council against this decision and a stay of proceedings pending determination of the appeal by the Privy Council.

Held: granting conditional leave to appeal to Her Majesty in Council and staying proceedings:

(1) An applicant may obtain leave to appeal where the appeal does not lie as of right, when the question arising on the proposed appeal raises an issue of great general or public importance, or that there is some other good reason why leave should be granted.

Martinus Francois v Attorney General Saint Lucia Civil Appeal No. 37 of 2003 followed. Attorney General of Trinidad and Tobago v Lennox Phillip et al Civil Appeal No. 155 of 2006 approving dictum of Wolfe JA in Olasemo v Barnett Ltd. 51 WIR 191 applied.

(2) The court's discretion to grant leave must be exercised judicially which requires, as a general rule, that it act consistently in applying the test to grant leave so that it is in accordance with its own current practice, that of other courts of appeal whose discretion is exercised under equivalent rules and the practice adopted by the Privy Council in considering petitions for special leave.

(3) As a general rule, having regard to all relevant practice, where the proposed appeal raises questions which are imminently procedural, these are not suitable for review by the Privy Council, but are matters best left to the courts of the jurisdiction to decide.

Attorney General of Trinidad and Tobago v Lennox Phillip et al Civil Appeal No. 155 of 2006, Mutual Life Ltd. v Evatt [1971] AC 793 and Isaacs v Robertson 43 WIR 126, Lewis v St. Hillaire 48 WIR 134 applied.

(4) Where however a proposed appeal involves a procedural question of great general legal importance, leave may be granted to appeal to the Privy Council where the court considers that the guidance of the Privy Council would be appropriate in relation to the interpretation or application of the procedural rule, the local interpretation or application of which has a draconian effect, or, where there are some special circumstances that would render such guidance useful to the court.

Barbuda Enterprises Ltd. v Attorney General of Antigua and Barbuda 42 WIR 183, Benoy Krishna Mukherjee et al v Satish Chandra Giri (1927) LR Col LV 131, Al-Sabah v Grupo Torras S.A. (2000) (unreported) applied.

(5) The procedural issues raised by this appeal are of great general legal importance and the local interpretation accorded to these procedural rules has a draconian effect. In

Addari v Addari British Virgin Islands Civil Appeal No. 21 of 2005, Montrose Investments Ltd. v Orion Nominees and Another [2001] CP Rep 109 considered.

(6) An appeal to the Privy Council is considered to be pending from the date of grant of conditional leave. For the purpose of determining whether proceedings should be stayed, the test was whether the appeal would be rendered nugatory if the decision of the court is not stayed pending appeal. In the circumstances of this case, even without a trial of the claim, the time and resources expended in preparing for a trial would themselves render the appeal nugatory, if successful.

Reid v Charles 39 WIR 313 applied.

JUDGMENT

[1] CARRINGTON J.A. (AG.): On 15th October 2007, this court upheld the appeal by Pacific Electric Wire & Cable Company Limited ("Pacific") against the order of the High Court which stayed the proceedings in the British Virgin Islands and ordered that the first four named respondents/applicants, respectively Texan Management Limited ("Texan"), All Dragon International Limited ("All Dragon), Blinco Enterprises Limited ("Blinco") and Patagonia Limited ("Patagonia") pay the costs of Pacific before this court and in the court below, to be assessed if not agreed. These four respondents/applicants ("the applicants") have applied to this court under the Virgin Islands (Appeals to Privy Council) Order 1967[1] ("the 1967 Order") for leave to appeal the decision of this court to the Privy Council. The applicants also seek orders staying the order of this court pending determination of the proposed appeal while the first and second applicants additionally seek a stay of the order of this court pending the determination of any application for special leave to appeal to the Privy Council. As the common ground of the applications is that the matter is one of sufficient great and general public importance or should otherwise be considered by the Privy Council, it would be useful to set out briefly the background to this matter.

[1] No. 234 of 1967

Background

[2] The amended claim form filed on 7th October 2005 discloses that Pacific claims that it is the beneficial owner of the shares in the respondents, which are companies incorporated in the British Virgin Islands, and also in companies whose shares are held by these respondents. Pacific therefore brought its claim in the High Court in the British Virgin Islands seeking various declarations and ancillary orders in support of its claim to these shares.

[3] Texan and All Dragon, represented by Mr. Husbands before us, applied to the High Court on 12th July 2005 for a declaration that the court should not exercise its jurisdiction to try the claim and to stay the claim on the ground that the British Virgin Islands was not the appropriate forum for the determination of Pacific's claim and for an order for security for costs. The application for the stay was made under Civil Procedure Rules 2000 (CPR 2000) Part 9.7. The application was supported by the affidavit of Lewis Shang Chu Man that was filed on 23rd September 2005. For convenience we shall refer to this application as the Texan Application.

[4] Blinco and Patagonia, represented by Mr. Webster QC and Mrs. Tavernier, in their amended application dated 4th October 2005, applied for a stay of Pacific's claim under the inherent jurisdiction of the court and alternatively a declaration under CPR 2000 Part 9.7 that the court should not exercise its jurisdiction in the matter. The alternative ground was expressly abandoned at the commencement of the hearing before the High Court. It appears that these applicants had written to Pacific on 12th July 2005 seeking its agreement to an extension of time for them to file their defence and then applied to the High Court successfully for such an extension of time. For convenience we shall refer to this as the Blinco Application.

[5] In the letter of 12th July 2005, these applicants sought the agreement for the extension of time in the following terms: "Our retainer has only been formalised within the last few days. As such we are still taking instructions from our client on the Claim Form and Statement of Claim filed in this matter. We anticipate that we will be in a position to file a defence within 21 days. Please therefore confirm by return whether you will consent

to granting us an extension of time of 21 days to file a defence on behalf of our clients." There is no evidence that Pacific had agreed to the extension of time.

[6] The application for the extension of time was supported by the affidavit of Kerry Anderson who deposed as follows:

> "5. As a result of the foregoing, the various parties involved and the difference in time zones, we have been unable to take instructions from our clients to enable us to file a defence.
> 6. We estimate that we will, however, be in a position to do so within the next 21 days and seek an Order of this Honourable Court to extend the time for filing a defence on behalf of the Companies by 21 days."

[7] The bases of both the Texan and Blinco Applications were in summary:-

(i) the claims made against the defendants were similar to those made against them in pre-existing Hong Kong proceedings;

(ii) the claims are connected to Hong Kong which is the natural forum for the causes of action raised by Pacific; and

(iii) The difficulty in compelling the attendance of witnesses who are not resident in the British Virgin Islands indicate the lack of connection of the matter to the British Virgin Islands.

[8] Both applications, which were opposed by Pacific, were heard by the High Court on 20th December 2005. As in his argument before this court on appeal, Counsel for Pacific relied on a number of procedural grounds in the hearing before the High Court. With respect to the Texan application, he argued that the application should be dismissed for non-compliance with mandatory requirements of CPR 2000 Part 9.7 because the application was not accompanied by the affidavit in support. The affidavit in support was filed more than two months after the application but, as Mr. Husbands pointed out in argument before this court, approximately three months before the application came on for hearing. With respect to the application by Blinco and Patagonia, Mr. Farara's argument was that these applicants had failed to apply for a stay prior to the time for filing their defence and took a step in the proceedings by applying to the court for an extension of time in which to file their defence and had thereby submitted to the court's jurisdiction. Mr. Webster's response to the latter argument was that no question of submission to jurisdiction could arise as these

companies, which were incorporated in the British Virgin Islands, were sued as of right in the British Virgin Islands.

[9] The High Court rejected these procedural arguments and considered the substantive applications for the stay of proceedings. In her judgment dated 12th May 2006, Madam Justice Charles upheld the applications and stayed the proceedings in the British Virgin Islands and ordered Pacific to pay the cost of the applications. Pacific appealed to this court against those orders and the appeal, which was heard on 6th and 7th June 2006 was upheld on what was described as the two-pronged procedural grounds argued by Pacific that have been set out above.

Leave to Appeal

[10] The applicants now seek leave to appeal to the Privy Council under section 3(2)(a) of the 1967 Order which reads:

> "Subject to the provisions of the Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases-
> (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council,…"

[11] The above provisions are to be found in similar Orders or the Constitutions of all the Commonwealth Caribbean jurisdictions from which such appeals lie and have been considered by this and other courts of the region. It is generally accepted that the first consideration must be the question that is to be involved on the proposed appeal and so it is both useful and necessary that this should be stated with some precision in applications before this court. It is also generally accepted that an applicant may obtain leave, where the appeal does not lie as of right, on any of three grounds, namely: (i) that the question arising on the proposed appeal is of great general importance; (ii) that the question arising on the proposed appeal is of great public importance; or (iii) that there is good reason why the leave should otherwise be granted. The wording of these tests has been framed in wide terms so that this court has a broad discretion to deal with each application and to consider each question of a proposed appeal on its merits. However, this discretion must be exercised judicially and, in our view, this requires that this court should, as a general rule, strive to act consistently in applying the test to

grant leave so that it is in accordance with its current practice and that of other courts of appeal whose discretion is exercised under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked. As far as possible, the court should also strive to be consistent with the practice adopted by the Privy Council itself in considering petitions for special leave to appeal, although the Board exercises a much wider discretion in relation to such petitions.

[12] In Martinus Francois v. AG[2], an application for leave from Saint Lucia, Saunders JA (as he then was) considered the circumstances which would satisfy the test of great general or public importance:

> "Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase "great general or public importance", the Court usually looks for matters that involve a really serious issue of law or a constitutional provision that has not been settled; or an area of law in dispute, or, a legal question the resolution of which poses dire consequences for the public."

[13] In Attorney General of Trinidad and Tobago v. Lennox Phillip et al[3], the Court of Appeal in Trinidad and Tobago added that there can be no issue of great general or public importance where there is no genuine dispute on the principles of law and their application to the facts, and emphasized that it is the question in the appeal that should have the quality of being of great general or public importance. In an earlier decision, Reid v. Charles and Another[4] the same court had determined that the quantum of the award from which the proposed appeal lies is not a relevant factor. In our view, the value of the claim in these proceedings ipso facto is not a relevant factor in determining whether the matter is of great general or public importance.

[14] The Jamaican Court of Appeal in Olasemo v. Barnett Ltd.[5] considered the circumstances in which leave to appeal may otherwise be given. Wolfe JA, in his dissenting judgment, indicated that this was meant to enlarge the discretion of the court to include matters which in the opinion of the court might require some definite statement of the law from the highest judicial authority of the land. He regarded it as a means whereby the Court of Appeal can in effect refer a matter to the Privy Council for

[2] Saint Lucia Civil Appeal No. 37 of 2003
[3] Civil Appeal No 155 of 2006 delivered 6 June 2007
[4] 39 WIR 313, 319c
[5] 51 WIR 191, 200

guidance on the law. In Attorney General of Trinidad and Tobago v. Phillip et al, the Trinidad and Tobago Court of Appeal approved this statement and also added that there may be justification otherwise for granting leave to appeal to the Privy Council where the Court of Appeal has any reasonable doubt as to the accuracy of its decision.

[15] The Trinidad and Tobago Court of Appeal, however, added a caveat that the Privy Council has indicated that where the question to be decided on the proposed appeal is imminently procedural, this should be best left to the courts of the jurisdiction to decide. The preference of the Privy Council not to deal with matters of procedure has been raised in several opinions from the Board. In Mutual Life and Citizens' Assurance Co. Ltd. and Another v. Evatt,[6] Lord Diplock in delivering the opinion of the Board pointed out that:

> "Special leave was granted because, as has been common ground at the hearing before their Lordships and in the courts below, what is really at issue between the parties upon the demurrer does not depend upon the procedural niceties of the system of pleading followed in New South Wales but upon a question of substantive law of outstanding importance to the development of that branch of the law of tort which was expounded in the speeches in the House of Lords in Hedley Byrne & Co. Ltd v. Heller & Partners Ltd…".

[16] Similarly in Isaacs v Robertson[7] a 1984 decision, Lord Diplock again stated with respect to the application of Order 34:

> "But these are matters of practice and procedure under a rule of the Supreme Court of St. Vincent which has no counterpart in the rules of the Supreme Court of England. They are best left to be developed by the courts of the country concerned, with whose decisions as to the operation of the rule this Board would be reluctant to interfere."

[17] On the other hand in Barbuda Enterprises Ltd v. Attorney General of Antigua and Barbuda[8], which was decided in 1993, the Privy Council dealt with an appeal that concerned the interpretation and application of a provision of the relevant rules of court that their Lordships described as having draconian effect. The Board proceeded to construe Order 34 and other related rules of the Supreme Court. In Lewis v. St. Hillaire[9] a 1996 decision, the Privy Council once again embarked upon the construction of Order 34 but at page 147g referred to the dicta from Isaacs v. Roberts

[6] [1971] AC 793, 799G
[7] 43 WIR 126, 130b
[8] 42 WIR 183
[9] 48 WIR 134

that the general preference would be to have points of procedural law resolved by the courts of the country concerned and that the Board would be reluctant to interfere with the decisions of the Court of Appeal in such cases. The statistics show that the decisions of the Court of Appeal were upheld in two of these cases.

[17] Mr. Farara cited to us as well the judgment of the Privy Council in Benoy Krishna Mukherjee et al v. Satish Chandra Giri[10] where the Board stated that:

> "…they think it right to add that, as a general rule, and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Judicial Committee. Not only are the practice of the Court and the manner in which experience has shown that it is wise to apply it, be better known to the High Courts in India than they can be to their Lordships …"

[18] We were also referred to Al-Sabah v. Grupo Torras S.A., a decision of the Privy Council in 2000[11] on an application for special leave, where the Board stated:

> "Normally all such questions of case management are matters for the courts concerned and are not suitable for any further review before their Lordships' Board. The directions and orders which may be made cover a spectrum of possibilities and have to take into account all the prevailing local circumstances. In the absence of some error of principle or other special factor, leave should not ordinarily be granted for any further appeal."

[19] It is significant that in this case the Board expressly stated that it did not endorse everything said by the Court of Appeal and considered some of its statements to be inappropriate but nevertheless refused special leave to appeal.

[20] In our view, these authorities show that it is appropriate for leave to be granted to appeal to the Privy Council where the question on the proposed appeal involves a matter of great general or public importance that is procedural rather than substantive in nature if this court considers that the guidance of the Privy Council would be appropriate in relation to the interpretation or application of the procedural rule and the interpretation or application advanced by the local courts have a draconian effect or that there are some other special circumstances that would render such guidance useful to the local courts. There should be less reluctance to grant leave where the

[10] [1927] LR Col LV 131, 134
[11] Available at http://www.privy-council.org.uk/files/other/al-sabah%20RTF.rtf

procedural rule has an equivalent in England. We now turn to the applications made by the parties.

[21] This court held, in respect of the Texan Application that the proper interpretation of CPR 2000 Part 9.7 is that the statutory requirement of an application under that Part is not satisfied unless there is affidavit evidence that accompanies the notice of application, so in effect, there is no notice in the absence of such evidence. This meant that the learned judge in the High Court had no discretion to dismiss the procedural challenge by Pacific in the circumstances.

[22] The questions for the proposed appeal are set out in paragraph 11 of the affidavit of Annabel Gillham filed on 2nd November 2007. These appear in the main to be the proper interpretation of Part 9.7 especially with respect to the filing and service of evidence contemporaneously with the application; whether the term "application" must include the evidence filed in support of the application; whether the court's inherent jurisdiction to stay proceedings based on forum non conveniens has been abolished; and the interpretation and application of CPR 2000 Part 26.9.

[23] Mr. Husbands submitted that the decision of this court was contrary to that of the English first instance decisions in Carmel Exporters (Sales) Ltd. v. Sea Land Services Inc.[12], where Robert Goff J. held that the failure to serve affidavits within the time limited by the court was an irregularity that could be cured by the court but did not nullify the application and Sawyer v. Atari Interactive Inc.[13] where Lawrence Collins J. held that time could be extended for service of his defence to allow a defendant to contest jurisdiction. Mr. Farara did not respond to these authorities but rested on his more general submission that the leave should not generally be granted where matters of procedure are involved as the local courts are best suited to determine matters of their own procedure.

[24] In our view, the particular jurisdiction that is invoked by an application under CPR 2000 Part 9.7 in the Territory where such challenges are prevalent takes the interpretation given to Part 9.7 by this court out of the realm of mere procedural niceties. The

[12] [1981] 1 WLR 1068
[13] [2005] EWHC 2351

interpretation in fact gives a draconian effect to any perceived non-compliance with that Part. In those circumstances the guidance of the Privy Council as to the correct interpretation of this Part is desirable especially as the English decisions on their equivalent rules to which we have been referred cannot be easily reconciled with this court's judgment on this application. We therefore hold that the questions on the proposed appeal do give rise to matters that are of great general legal importance for this Territory. We are prepared to hold alternatively that the desirability of some guidance on the interpretation of the rule amounts to good reason why leave should otherwise be granted in the circumstances.

[25] With respect to the Blinco Application, this court held that the critical question was whether these applicants had made their application to dispute jurisdiction out of time and should therefore be treated as having accepted that the court had jurisdiction to try the claim. This court interpreted CPR 2000 Part 9.7(3) as referring strictly to the period stated in the rules for filing of a defence without consideration of any period by which the time for filing a defence may have been extended by the agreement of the parties or by order of the court.

[26] The questions for the proposed appeal are set out in the affidavit of Willa Liburd filed on 5th November 2007. In essence, the question that these respondents wish to raise is whether it is mandatory to file an application for a stay on the ground of forum non conveniens under the inherent jurisdiction of the court within the time prescribed for applications made under CPR 2000 Part 9.7 and if so, whether the time limit for such applications is referable to that under CPR 2000 Part 10.3, without consideration of any extension of time for filing a defence to which such rule refers.

[27] Mr. Webster submitted that the prevailing practice following the earlier decision of this court in Addari v. Addari[14] was that such an application stood on its own and was not subject to any restriction with respect to time of making the application set out in the CPR 2000 and that in any event the reference to CPR 2000 Part 10.3 must be to the entirety of that rule and not merely to the sub-clause stating the time limited for filing a defence without extension. He further submitted that this court incorrectly applied the

[14] Civil Appeal No. 21 of 2005

decision of Montrose Investments Ltd. v. Orion Nominees and Another[15] in its interpretation of CPR 2000 9.7 as the reference in the English rules to the period for filing the defence was more limited than the equivalent reference under the CPR 2000. Mr. Farara countered by submitting that there was no inconsistency between this court's decision in the instant matter and that in Addari v. Addari in that this court did not deny the existence of its inherent jurisdiction to grant a stay but merely clarified the circumstances in which a stay would be considered. He pointed out that the applicants had not sought an extension of time to apply to challenge the jurisdiction of the court. It is significant that the judgment of this court, while adopting the reasoning of Montrose Investments v. Orion Nominees, was at pains to point out at paragraph 42 of the judgment that the provisions of CPR 2000 Part 9.7 were not clear and expressed its view that this decision would clarify the interpretation of the rule.

[28] We are of the view that the question which these applicants wish to have heard on the proposed appeal which involves a determination of the limits of the inherent jurisdiction of the court is also a matter on which the courts of the jurisdiction can benefit from a definite statement from their highest appellate court. It is admittedly an area where the law has not been clear and the circumstances of its operation are such that we consider it to be of great legal importance to the Territory that the question be determined by the Privy Council. We would therefore also grant leave to appeal to these applicants.

[29] We wish to make it clear that although leave has been granted with respect to both applications, this is not meant to detract from the requirement for consistency to which we earlier made reference and the general rule in respect of the hearing of procedural matters to which the Privy Council has frequently referred. In our view, the special circumstances of the frequent use of these procedural provisions in this Territory, the consequences of their application upon the resources of the court and the lack of clarity of the relevant rules which this case has highlighted have had the effect of tipping the scales in favour of the grant of leave in the circumstances.

Stay of Proceedings

[15] [2001] CP Rep 109

[30] We now turn to the question of the stay pending determination of the appeal by the Privy Council. Both applicants seek a stay of execution of the order of the court pending determination of the appeal. The Texan applicants alternatively sought a stay pending a determination of leave to appeal. In the light of my finding above, we do not need to deal with this aspect of their application.

[31] It is trite that at this stage the court grants only conditional leave to appeal to the Privy Council. The 1967 Order section 5 outlines the conditions that may be imposed upon the grant of conditional leave, namely the payment of good and sufficient security in the sum of £500 within a period not exceeding 90 days and the setting of the time for procuring the preparation and dispatch of the record to England. Section 6(b) provides that where there is a pending appeal a single judge of the Court of Appeal may make such order or give such directions as he considers the interests of justice or circumstances of the case require. In Reid v. Charles[16] the Court of Appeal of Trinidad and Tobago concluded that an appeal is pending from the grant of conditional leave. We agree with that reasoning.

[32] Section 7 of the 1967 Order deals with the issue of a stay of execution pending appeal and provides as follows:

> "Where the decision 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 decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just …"

The decision of this court required the applicants to pay costs of the appeal and in the court below. The effect of the lifting of the stay on the basis of forum non conveniens was that the court's obligation to manage the case would arise. The defendants would be under a positive duty pursuant to CPR 2000 Part 1 to assist the court in the case management process and to file their pleadings, effect discovery and generally do all acts preparatory to and inclusive of the trial of the claim. We therefore find that the effect of the order made by this court that the stay of proceedings had been lifted and the claim reinstated was to require the defendants to do several acts. We find therefore

[16] at pages 322c-323c

that the statutory jurisdiction for the grant of a stay under section 7 has been established.

[33] Mr. Husbands has advanced the submission that if an order is not made to stay the decision of this court pending appeal, the appeal would be rendered nugatory. Mr. Farara contended that it is important and desirable for the claim to proceed pending the appeal so that time is not lost if the appeal is unsuccessful. He suggested that the steps towards trial should proceed and the likely trial window would be at the same time as that for the appeal. He concluded that it is not likely that by the time a Privy Council appeal is heard, a trial would already have been held, rendering the appeal nugatory.

[34] We cannot agree with Mr. Farara's submission on this point. We are of the view that it would not be an appropriate use of the court's or the parties' resources to prepare for a trial which may not occur. It should be borne in mind that the High Court was persuaded to grant the stay of proceedings and this court did not address the merits of the substantive appeal in the light of its findings on the procedural grounds. In our view, even without a trial of the claim, the time and resources expended in preparing for a trial would themselves render the appeal nugatory, if successful. We note that Pacific has not made any attempt to offer security for costs that may thus be wasted by the defendants for such preparation, if they are successful on appeal. In the circumstances, we are prepared to grant a stay of paragraphs 2 through 4 of the Order of this court of 15th October 2007.

[35] The Order that we propose is therefore as follows:-

1. The applicants shall have conditional leave to appeal to Her Most Excellent Majesty in Council from the decision of the Court of Appeal delivered on 15th October 2007 in the matter upon the following conditions:-

    (a) The applicants shall each within 30 days from the date of this Order enter good and sufficient security in the sum of £500 sterling for the due prosecution of the appeal and the payment of all such costs that may become payable by any of them in the event of it not obtaining an order granting it final leave to

appeal or of the appeal being dismissed for want of prosecution, or of the Privy Council ordering it to pay the costs of the appeal; and

(b) The applicants shall within 8 weeks from the date of this Order take necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England.

2. Paragraphs 2, and 4 of the Order of this court dated 15th October 2007 are hereby stayed pending the hearing and determination of final leave to appeal and should such leave be granted such stay shall continue pending the disposal or determination of such appeal.

3. The costs of and incidental to these applications shall be costs in the appeal to Her Majesty in Council.

[36] This is a judgment of the court.