TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/002

BETWEEN:

[1] DANONE ASIA PTE LIMITED
[2] JINJA INVESTMENTS PTE LIMITED
[3] NOVALC PTE LIMITED
[4] MYEN PTE LIMITED

Appellants/Respondents

and

[1] GOLDEN DYNASTY ENTERPRISE LIMITED
[2] GOLD FACTORY DEVELOPMENTS LIMITED
[3] PLATINUM NET LIMITED
[4] SUNWORLD ENTERPRISES LIMITED
[5] GREAT BASE INTERNATIONAL LIMITED
[6] BOUNTIFUL GOLD TRADING LIMITED
[7] EVER MAPLE TRADING LIMITED
[8] WINTELL ENTERPRISES LIMITED
[9] CENTRAL INERNATIONAL INVESTMENT HOLDINGS LIMITED

Respondents/Applicants

[10] TRILLION SINO INVETSMENTS LIMITED
[11] WU TIANYAO
[12] CHAN TAT HO
[13] WU YAN JIAN
[14] HE PING
[15] LIANG LE PING
[16] WU CHU KUN
[17] CHENG YI FENG
[18] MA NAM KIT
[19] CHAN CHUNG HING

Defendants

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice
The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal

Appearances:

Mr. Richard Evans and Mr. Mark Forte for the Appellants/ Respondents
Mr. Stephen Moverly Smith Q.C., Ms. Elizabeth Weaver, Mr. Christopher Young and Mr. Nicholas Fox for the Respondents/ Applicants

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2009: May 5;
September 28.

Civil Appeal – Interlocutory Orders – Interim injunction and receivership orders – leave to appeal – CPR 62.2 – whether the court has or retains jurisdiction, whether by law or its inherent jurisdiction over its own process to review any decision of a single judge – CPR 62.16(4) – importation of English Law – section 28 of the Eastern Caribbean Supreme Court (Virgin Islands) Act (SCA) – English CPR 52.3 – whether the court's power to review a single judge's decision lies in the importation of provisions of English CPR – section 27 SCA – section 27(1), (2) Court of Appeal Rules – whether leave is required to appeal an order discharging an interim injunction – section 30(4)(ii) SCA – whether discharging an order is the same as refusing an order – a purposive construction as opposed to a literal construction of section 30(4)(ii) – costs –

The genesis of this judgment is the discharge of an interim order of injunction by the trial judge which was previously granted to the appellants. The appellants subsequently filed notice of appeal and simultaneously therewith an application for a declaration that leave to appeal was not required and in the alternative, leave to appeal. This application was heard by a single judge of the court who held that leave to appeal against the order of the trial judge was not required and accordingly dismissed the application for leave. The respondents contended that leave was required and applied to set aside the order of the single judge. The questions to be answered on appeal were: (1) whether the court had jurisdiction to set aside any order made by a single judge of the court; and (2) whether leave to appeal was required in respect in an order discharging an interim injunction.

Held: dismissing the application to set aside and confirming the Gordon JA order (George-Creque JA and Rawlins CJ; and Edwards JA dissenting):

1. That the court has jurisdiction to review any decision or order of a single judge as the residual jurisdiction on any matter regarding an appeal lies, as it always has, as a matter of law and practice, with the court.

2. That Rule 27(2) of the Supreme Court Act, CPR 62.15 and CPR 62.16(4) and the jurisdiction and powers residing in the Court of Appeal by enactment, when taken together really do no more than codify to some extent and give broad recognition to the court's inherent jurisdiction.

3. The inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or

equitable to do so, in particular to ensure observance of due process of law, … to do justice between the parties and secure a fair trial between them.

(Halsbury Laws of England 4th Edition Vol. 37 para. 14)

4. That the words "re-grant", "continue", "refusal to discharge" or "dismissal" of an application to discharge, would all be encompassed in the word "grant", since the effect is that an injunction is in place. Similarly, the words "discharge" or "dismissal" of an application for an injunction would be encompassed in the word "refusal" as the effect is that no injunction is in place. That to read into the language such distinctions, merely by the use of such words, only succeeds in defeating the purpose and intention of the provision.

   (Applying the construction in Atlas Maritime Co. S.A. v Maritime [1991] 1 WLR 633.)

JUDGMENT

[1] GEORGE-CREQUE, J.A.: On 17th December 2008, the trial judge discharged an interim order of injunction which had been earlier granted to the appellants. Her judgment containing the order for discharge is the subject of a substantive appeal with which this decision is not directly concerned save to the extent that the appellants, on 12th January 2009, simultaneously filed notice of appeal to this court (without leave) and an application for leave to appeal. The application sought firstly, a declaration that leave to appeal is not required and in the alternative that leave to appeal be granted.

[2] The application was heard by a single judge of the court on paper and on 29th January 2009, Gordon J.A. [Ag.] made an order in these terms:

> "Leave to appeal against the order of the Hon. Madame Justice Rita Olivetti-Joseph dated 17th December, 2008 is not required. Accordingly, the Application for leave is dismissed."

[3] This judgment is concerned with the application to set aside the order of Gordon J.A. brought by the respondents/applicants (respondents) who contend that leave to appeal is required. From the manner in which Gordon J.A.'s order is framed the only reasonable inference to be drawn there from, is that he did not find it necessary to deal with the merits as regards leave, having declared that leave was

not required.

[4] The appellants/respondents (appellants) contend that the respondents are not entitled to a re-consideration of the Gordon J.A. order. They further contend that in any event the Gordon J.A. order is correct.

[5] Given the competing issues which are inextricably bound up each with the other, I propose to consider firstly the question as to whether as a matter of general principle the full court has or retains jurisdiction whether by virtue of law or by virtue of its inherent jurisdiction over its own process to review any decision of a single judge, and thereafter the question as to whether leave is required to appeal an order discharging an interim injunction.

The reconsideration of the Gordon J.A. order – jurisdiction

[6] An appropriate starting point in addressing this question is by an examination of the relevant provisions of CPR 2000. CPR 62.2 is headed: 'How to obtain leave to appeal' and states as follows:

> "62.2 (1) ……
> (2) The application for leave to appeal must be made in writing and set out concisely the grounds of the proposed appeal.
> (3) An application for leave to appeal made to the court may be considered by a single judge of the court.
> (4) The judge may give leave without hearing the applicant.
> (5) If minded to refuse leave the judge may direct -
> (a) that a hearing in chambers be fixed; and
> (b) whether that hearing is to be by a single judge of the court or the court."

[7] It is not disputed that the Gordon J.A. order was made pursuant to CPR 62.2(3) and (4). The respondents contend that the court has the power to review or reconsider any order made by a single judge and relies on CPR 62.16(4). Broadly stated in this manner, this would also encompass the power to review decisions or orders made on procedural appeals which under CPR 62.10 are directed, as a general rule, to be heard on paper by a single judge of the court. This raises the question as to the construction to be placed on CPR 62.16 which is in the following

terms:

> "62.16 (1) A single judge of the court may make orders for -
> (a) an injunction …..
> (b) a stay of execution on any judgment ……..
> (c) an extension of time…….
> (d) the giving of security for any costs…….
> (2) The Chief Justice may designate a master or the Chief Registrar to make orders for -
> (a) extension or abridgement of any time limit ……
> (b) the giving of security for any costs …….
> (3) An order made by a master or the Chief Registrar may be varied or discharged by a single judge.
> (4) An order made by a single judge of the court, a master or the Chief Registrar may be varied or discharged by the court."

[8] The respondents also rely on section 28 of the Eastern Caribbean Supreme Court (Virgin Islands) Act[1] ("The Act") which in effect says that where this Act or rules of court contain no special provisions so far as concern the practice and procedure in relation to appeals from the High Court that the jurisdiction of the Court of Appeal shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England. Such provisions are commonly referred to as the 'importing' or 'reception' provisions found in the similar enactment in each Member State or Territory comprising the jurisdiction of the Eastern Caribbean Supreme Court.

[9] In Christenbury Eye Center v First Fidelity Trust Limited[2] Barrow J.A.[3], in dealing with the question as to whether a failed application for leave to appeal was open to review, opined that the power of review granted under CPR 62.16(4) was limited in scope to the specific types of orders which could be made under 62.16(1) and accordingly was not of general application. Barrow J.A. went on to note that in respect of leave to appeal, CPR 62.2 contained its own self-contained scheme. He went on further to hold, in essence, that those provisions within that scheme were silent as to any recourse on refusal of leave and accordingly that the

[1] Cap 80 Revised Laws of the Virgin Islands.
[2] Civil Appeal No. 14/2007 (SKN) delivered 19th November, 2008.
[3] As he then was.

reception provision was applicable. He accordingly imported the provisions contained in the English CPR 52.3 which provided for a re-hearing of an application for permission to appeal which had been considered on paper and refused.

[10] The appellants contend that the English CPR 52.3 imported in the Christenbury case does not apply to a respondent seeking in essence to set aside the granting of leave or to the instant case where the court has declared that leave to appeal is not necessary and in that sense cannot be said to be a refusal of leave.

[11] The respondents urge that Christenbury did not go far enough and that the provisions of English CPR 52.16 ought to be imported. The English CPR 52.16 sets out who may exercise the power of the English Court of Appeal and provides for a court officer who is a barrister or a solicitor and who is assigned to the Civil Appeals Office to exercise the jurisdiction of the Court of Appeal with regard to certain matters[4]. It strictly prohibits such court officers from dealing with other matters such as permission to appeal, bail pending an appeal, an injunction and a stay of proceedings[5]. The respondents specifically urge the reception of the English CPR 52.16(6) which states:

> "At the request of a party, a hearing will be held to reconsider a decision of –
> (a) single judge;
> (b) a court officer
> made without a hearing."

Interestingly, in 52.16 [UK] the following notation also appears:

> "(Section 54(6) of the Supreme Court Act 1981 provides that there is no appeal from the decision of a single judge on an application for permission to appeal)"

This would appear to suggest that no appeal lies from the grant of permission to appeal.

[12] From a comparison of those provisions appearing in 52.16 [UK] it becomes

[4] See: 2002 CPR 52.16(2) [UK].
[5] See: 2002 CPR 52.16(3) [UK].

apparent that those provisions reflect a wholly different regime than those governing our CPR, and I, for my part, would be reluctant to import the English CPR 52.16 into our practice as this may lead to inconsistency with certain provisions of our CPR as well as introduce novel features not contemplated by any provisions of our rules. CPR does not provide for court officers. The comparable provisions in our law of the English CPR 52.16 are CPR 62.16 and 2.5(2) and (3) which set out our own personnel regime in terms of who is empowered to do what, which is clearly different from the English counterpart. Further, English CPR 52.3 which governs permission to appeal must also be read in the context of English CPR 52.9 which deals with the power of the court to strike out appeals and set aside permission to appeal. The English CPR 52.9(2) says that this power will only be exercised where there is a compelling reason (for example where the appellant misled the court on the application for permission made without notice) for so doing. Also, it is normally the case that at the permission stage the respondent is not engaged and is therefore not prejudiced by the grant or refusal of leave and is not exposed to unnecessary costs. The refusal of leave would certainly be of no concern whatsoever to a potential respondent. The permission stage, it is said, serves as a useful filter in weeding out unmeritorious appeals without the heavier costs consequences flowing from an appeal in the normal course. CPR 62.2(4) provides for the granting of leave virtually in summary form. However, 62.2(5), in my view, provides for the likelihood of refusal and the procedure which should follow although not couched in mandatory terms. It says that if the judge is minded to refuse leave then he/she may direct a hearing in chambers before a single judge or by the court. When these two rules are considered together, it becomes clear that they seek to provide to an appellant who may potentially be refused leave, an avenue and opportunity for arguing fully the merits of his case for leave before the full court in keeping with the broadest principles of natural justice. To my mind, it would be a counsel of prudence for a single judge, once minded to refuse leave, to put 62.2(5) to good use. Accordingly, I do not consider that a lacunae exists warranting the importation of the English CPR 52.16. In my view, it was simply not intended by the framers of

CPR to provide for a challenge by a respondent to the grant of leave by seeking to overturn the grant of leave based on the strength of the appellant's case.

[13] The answer to the question as to whether the full court has power to review the decision of a single judge lies not in the importation of provisions of English CPR. The answer, in my view, lies in the Act and also the Court of Appeal Rules which provisions remain in full force and effect save to the extent any provision thereof has been impliedly repealed as being inconsistent or in conflict with any provisions of CPR[6].

The Act

[14] The Eastern Caribbean Supreme Court, comprised of the High Court and the Court of Appeal, was established by the Eastern Caribbean Supreme Court Order which came into effect on 27th February 1967. Section 27 of the Act sets out the jurisdiction and powers of the Court of Appeal and says among others that it has the jurisdiction and power vested in the 'former Court of Appeal'[7]. The 'former Court of Appeal' in section 2 of the Act is defined as the Court of Appeal of the Windward Islands and the Leeward Islands in existence immediately before the prescribed date (being 24th April 1967). The Windward Islands and Leeward Islands Order in Council, 1959[8] (the 1959 Order) established the Supreme Court of the Windward Islands and Leeward Islands. Section 9 of the 1959 Order states:

> "There shall be a Court of Appeal for the Colonies[9] …. which shall be styled the Court of Appeal of the Windward Islands and Leeward Islands and shall be a superior court of record."

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[6] See: The Attorney General of Grenada et al v Andy Redhead (Grenada) Civil Appeal 10/2007 – Per Edwards J.A. [Ag.] at para. 9.

[7] This section of the Act was not relied on by either party but the court considered it relevant to the general question under consideration, namely whether the Full Court has jurisdiction to review a decision of a single judge of the Court.

[8] The Leeward Islands Order in Council, 1959 came into force on 1st January, 1960 and established the "Supreme Court of the Windward Islands and Leeward Islands under section 3 as a superior court of record.

[9] The Colonies at the time were all those States and Territories over which the Eastern Caribbean Supreme Court now has jurisdiction. Save for the Virgin Islands, Montserrat and Anguilla, which have remained UK Territories, all the former Colonies are now independent States.

With regard to the exercise of the powers of the Court of Appeal, Section 10(5) goes on to state as follows:

> "(5) (a) Provision may be made by rules of court enabling a single judge of the Court of Appeal to exercise any power of the Court of Appeal not involving the determination of an appeal; but except in relation to an appeal with respect to which a direction given under the last foregoing subsection[10] is in force –
>
> (i) ….. in criminal matters…….; and
>
> (ii) in civil matters, any order, direction or decision made or given by a single judge in the exercise of any such power may be varied, discharged, or revoked by two judges where the order, direction or decision relates to an appeal of a class which may be heard and determined by two judges under subsection (3) of this section and by the Full Court in any other case."

Further, in relation to civil appeals, section 14 of the 1959 Order says:

> "the Court of Appeal shall have jurisdiction to hear and determine appeals from judgments in chambers and interlocutory judgments of judges of the Supreme Court, whether at first instance <u>or on appeal…</u>" (My emphasis)

[15] Accordingly, the jurisdiction vested in the former Court of Appeal by virtue of section 27 of the Act became vested in the Eastern Caribbean Supreme Court. This jurisdiction which was expressly retained by the very enactment establishing this court would take precedence over any rules of court which may admit of a contrary interpretation. The provisions of the 1959 Order giving the Full Court jurisdiction to review a decision of a single judge are, in my view, quite clear and require no further elucidation.

[16] It bears note, however, as Barrow J.A. pointed out in the peculiar circumstances of Christenbury, that CPR 62.16 was not applicable, having regard to the fact that leave to appeal is governed by its own self-contained scheme of rules under CPR 62.2. Accordingly, the observations of Barrow J.A. as to the scope of 62.16(4) may be taken to have been made obiter, since this was not decisive of the issue.

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[10] The foregoing subsection deals where the Chief Justice may direct a single Judge to hear a magisterial appeal.

The Court of Appeal Rules

[17] The respondents also relied on the Court of Appeal Rules[11]; specifically rule 27(1) and (2) which state as follows:

> "27. (1) In any cause or matter pending before the Court, a single judge of the Court may upon application make orders for -
> (a) giving security for costs….;
> (b) leave to appeal in forma pauperis;
> (c) a stay of execution on any judgment appealed from….. ;
> (d) an injunction…….;
> (e) extension of time;
> and may hear, determine and make orders on any other interlocutory application...
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by any Judges of the Court having power to hear and determine the appeal."

[18] This rule is to be compared with CPR 62.16 (set out above) which deals with the power of a single judge of the court. It becomes readily apparent that Rule 27 and CPR 62.16 appear to cover almost identical ground. However, there are some differences. The ambit of CPR 62.16 is not as wide as the tail piece to Rule 27 which encompasses "any other interlocutory application" [12]. Rule 27(2) appears to be virtually on all fours with CPR 62.16(4) save for linguistic differences. The question then is whether Rule 27 is incompatible or inconsistent with CPR 62.16. In my view they are not. The specific orders or applications referred to under CPR 62.16 are not exhaustive of the types of interlocutory applications which may come before the court. One which springs readily to mind is an application to adduce fresh evidence. Rule 27 recognizes and provides for this. Further, it is to be noted that under CPR 62.15, which deals with other interlocutory applications[13], after stating that such applications may be heard[14] by a judge, a master, a single judge

[11] The Respondents did not rely on the Court of Appeal Rules as one of the grounds in their application to set aside the Gordon J.A. Order.
[12] Under CPR other applications would be covered by 62.15.
[13] Save for leave to appeal.

[14] On the direction of the Chief Justice.

of the court, the Chief Registrar, or the registrar of the court, it is then silent as to the recourse from a decision taken by any of those persons. Rule 27(2) fills this void in CPR by providing for recourse to the court.

[19] Rule 27(2), CPR 62.15 and CPR 62.16(4) and the jurisdiction and powers residing in the Court of Appeal by enactment, when taken together really do no more than codify to some extent and give broad recognition to the court's inherent jurisdiction which as stated in Halsbury's Laws of England[15]:

> "is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure observance of due process of law, ….. to do justice between the parties and secure a fair trial between them."

The court has always retained as it must, the power to control its own process by regulating its proceedings. Neither the Court of Appeal Rules nor CPR have taken away or limited this inherent jurisdiction. Any limitation or removal of the court's jurisdiction could only be done by the use of the clearest and unequivocal of expressions in any statutory enactment. This is not the case here. Accordingly, notwithstanding that our CPR does not contain a provision similar to CPR 52.9(2) [UK], it can hardly be doubted that the court under its inherent jurisdiction could not set aside the grant of leave where a respondent is able to provide a compelling reason (such as showing that the court was misled) for so doing simply as a function of safeguarding against abuse of its process.

[20] In Royal Bank of Scotland (Trading as Natwest) -v- Caribbean Destination Management Services Limited and Anr.[16] this court in an oral judgment, ruled that it has jurisdiction to review the decision of a single judge given in a procedural appeal and heard on paper applying the basic principle in Christenbury which should be read and understood in the context in which the matter arose and not as laying down any general principle as to the limitation of the court's retained and inherent jurisdiction and powers of review enjoyed from time immemorial.

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[15] 4th Ed. Vol. 37 para. 14.
[16] Civil Appeal 10/2008 SLU (unreported) – judgment delivered on 6th March 2009.

[21] Accordingly, I hold that the court has jurisdiction to review any decision or order of a single judge as the residual jurisdiction on any matter regarding an appeal lies, as it always has, as a matter of law and practice, with the court.

[22] This leads to another matter and that is the question of the time frame within which an application for such review should be made. The Act, CPR and the Court of Appeal Rules, are silent on this. Where no time frame is specified for doing an act, the general principle is that it must be done within a reasonable time. As to what is a reasonable time will depend on all the circumstances of the case. In my view, certainty is also required here. It may very well be that guidance should be given whether by way of a practice direction or amendment of the rules of procedure to provide time lines for seeking review. CPR 62.5 requires procedural appeals to be filed within 7 days of the date of the decision being appealed. I, for my part, consider that a similar time frame as for procedural appeals (7 days) would be adequate. Any extensions required would fall to be considered in the normal course within the context of CPR 26.8 (relief from sanctions).

Should the Gordon J.A. order be set aside?

[23] The Gordon J.A. order is neither a grant of leave nor a refusal of leave to appeal. It is a declaration saying that no leave is required. Accordingly, the respondents' application to set aside the order cannot, in my view, be treated as a re-hearing of the application for leave since for the reasons explained above this is not an avenue open to the respondents. The respondents' application in my view ought to be treated as one grounded in the court's general and inherent jurisdiction addressed above. Accordingly, I propose to treat it as such notwithstanding the respondents' reliance to a large extent on CPR 62.16(4).

[24] It is common ground that the relief in issue was the question of interim injunctive and receivership orders. The respondents contend that leave to appeal is required on the basis that the 'discharge' of an injunction is not a 'refusal' to grant an injunction. The discharge of an order they say is of a completely different nature

and that entirely different considerations apply and that it is wrong to confuse a 'discharge' with a 'refusal'. The appellants on the other hand contend that the "discharge" of the injunction was in effect a "refusal" to continue or re-grant the injunction and as such fell within the exception – not requiring leave.

[25] This issue has caused and continues to cause considerable confusion in the law and practice in this area. The appellants in their affidavit in support[17] stated that they were not aware of any reported decision which specifically addresses this question and have invited the court to provide a clear ruling on the issue. It is not in the least passing strange that on this issue the respondents fully concur and go on further to say that it is a very important issue which is likely to arise in future cases and thus is in the interest of justice for the court to provide a clear ruling thereon. I agree. I also, have scoured various decisions of this court and have been unable to find any which specifically addresses the issue. Due to this prevailing uncertainty in the practice, legal practitioners have resorted to what is called in local parlance "loading all the bases" by filing simultaneously application for leave as well as launching their appeal (as was done in this case) so that if it turns out that leave is required, they will not be "caught out" by being out of time and if it turned out that leave was not required then they are in any event 'safe' the notice of appeal having been filed[18]. Even though it is readily accepted that this practice is undesirable and the court has frowned upon it, in my view, it would be unduly harsh to penalize a legal practitioner resorting to this practice out of an abundance of caution given the current state of uncertainty. This case affords the court the opportunity to provide the guidance and certainty required in this area.

[26] A convenient starting point then is the Act and the construction to be placed on the subparagraph 30(4) which read as follows:

> "No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order …….made or given by a judge except in the following cases-

[17] See: Affidavit of Jason Wood sworn 12th January 2009 in support of application for leave to appeal – para.5

[18] The court has ruled in numerous cases that where leave to appeal is required then the notice of appeal filed without such leave is a nullity.

(i) ……..
(ii) where an injunction or the appointment of a receiver is granted or refused, (my emphasis)
(iii) ……..
(iv) ……..”

[27] As to the construction to be placed on subparagraph (ii) the respondents rely on the case of Atlas Maritime Co. S.A. -v- Avalon Maritime Ltd. [19] where the court was called upon to construe a similar provision in the Supreme Court Act [UK] in respect of judgments and orders requiring leave. It was held that the grant or refusal of a variation in an injunction is the grant or refusal of an injunction in the varied form so that leave to appeal from an order granting or refusing such variation was not required. The dictum of Lord Donaldson of Lymington M.R. is instructive. At page 634 he stated as follows:

> “It is quite true that the paragraph does not mention variations, but it must include them because, if an application for a variation of an injunction is successful, what happens is that a new injunction in different terms is put in place. If on the other hand it is unsuccessful, what happens is that a new injunction in different terms is not put in place. In the first case it is granted and in the second case it is refused, and that is within the terminology of the paragraph.”

[28] It seems clear to me that Lord Donaldson preferred and utilized the purposive approach in the construction of the paragraph rather than sought to give the word ‘injunction’ and “grant “or “refusal” a purely literal interpretation and does not, in my view, assist the respondents’ case. I for my part consider that the purposive approach is to be preferred rather than the literal interpretation which can only lead, in my view, to even more confusion on this issue. For the sake of argument I pose these questions: Was the trial judge to have ordered that the injunction was to ‘continue’ what does this mean? Can it be sensibly argued that it is not for all practical purposes the grant of an injunction since the injunction remains in place? What would the position be were the judge on an application for an injunction (be it inter-partes or ex-parte) to say the application is “dismissed”? Surely the dismissal of the application is a refusal of the injunction since no injunction has been put in

[19] [1991] 1 WLR 633 – a decision of the Court of Appeal [UK].

place. The discharge of an injunction is nothing more than having the injunction set aside. The effect is that the injunction which was put in place ought not to have been put in place – in essence refused. The discharge of it in effect cancels it out. Accordingly, the injunction would have been refused. Clearly the word "discharge" is appropriate in such a circumstance as it presupposes and rests on the basis that an injunction is in place which ought to have been refused. If an injunction is not in place then there is nothing to discharge. I must confess to having considerable difficulty in trying to treat a 'discharge' as being something wholly different from a 'refusal' when the effect is the same - that is, there is no injunction in place. If following an ex-parte hearing an injunction is thereafter 'continued' or re- granted, the substantive effect is that an injunction is in place.

[29] The focus should be placed, not on the words used but on the substantive effect or rather the purpose achieved by the use of the words. What is of importance in my view is the nature of the relief obtained or not obtained irrespective of the various formulae of words chosen to express that result. I fully endorse and adopt the approach and the words of Lord Donaldson in Atlas Maritime as being the approach which this court should adopt in construing this provision of the Act.

[30] To my mind the words 're-grant', 'continue' "refusal to discharge" or 'dismissal' of an application to discharge, would all be encompassed in the word "grant" since the effect is that an injunction is in place. Similarly, the words 'discharge' or 'dismissal' of an application for an injunction would be encompassed in the word "refusal" as the effect is that no injunction is in place. I agree with the appellants that to read into the language such distinctions, merely by the use of such words, calls for an exercise in linguistic gymnastics which only succeeds in defeating the purpose and intention of the provision.

[31] The appellants, quite rightly in my view, made reference to the mischief which the provision seeks to address. I can do no better than state it in the manner the appellants have stated it in paragraph 12(iv) of their skeleton arguments which I take the liberty of adopting and making my own:

> " …. Each of the exceptions to the general rule that leave is required in respect of interlocutory orders can be recognized as an exception on the grounds of public policy. In the case of injunctions, appointments of a receiver and liberty of the subject or custody of an infant…, there are good public policy reasons for saying that the freedom of parties (necessarily impacted by each of these orders) overrides the administrative benefits of a leave stage such that leave ought not to be required. What therefore is of concern is the fundamental nature of the order under challenge. An injunction and receivership order by its nature restricts the freedom of a respondent. It is this qualitative nature that renders it an exception to the requirement to obtain leave. Against this background, a pedantic consideration of whether in any particular case the order is a grant or re-grant, or a continuation (and to those I add 'or a discharge') has no place.."

Case law

[32] In Pendragon International v Bacardi International Ltd. et al[20] on an appeal from an order of the trial judge continuing an injunction granted ex parte (and dismissing the application to discharge), Hugh Rawlins J.A. (as he then was) made the following observations at paragraph 5 of his judgment which in my view is highly relevant to this issue notwithstanding it was made obiter:

> "…. Rule 62.5(c) requires an appellant to file an appeal which is not a procedural appeal or an appeal for which leave is required, within 42 days of the date when the judgment appealed against was served on the appellant. It is common ground that this is not a procedural appeal. Injunctive proceedings are expressly excluded from that definition by rule 62.1(2)(e)(ii) of CPR 2000. It is also common ground that this is not an appeal for which leave to appeal is required. This is because section 29(4)(b) of the Eastern Caribbean Supreme Court (Anguilla) Act specifically exempts injunctive proceedings from the leave requirement in respect of interlocutory judgments and orders."

This was clearly a recognition of the nature of the order (rather than the manner in which the order was made in terms of whether it was granted or refused), as determinative of the question of the requirement of leave.

[33] In Morgan & Morgan Trust Corporation Ltd. v Fiona Trust & Holding Co. et

[20] Civil Appeal No. 3/2007 (Anguilla).

al[21] the appellant sought valiantly to persuade the court that a search order[22] was in essence an injunction or was an order sui generis injunctive relief, and thus placed him within the exception of the provision requiring leave to appeal. Barrow J.A. rejected the argument that the search order amounted to an injunction and concluded that since it was not an injunction, leave to appeal was required. This is once more another example of the tacit recognition of the nature of the order for the purposes of the requirement of leave.

[34] No further case law from this region could be found dealing with the point although appeals from interlocutory injunctions regularly find their way to this court. Presumably, this is because it is a 'given' or is tacitly understood that an appeal from an order in respect of injunctive relief does not require leave.

[35] From the foregoing it has no doubt become clear that I am not in agreement with the construction of section 30(4)(ii) of the Act being urged by the respondents. I hold, for the reasons advanced above, that the said provision must be given a purposive construction and that an appeal from an order in respect of injunctive relief or a receivership order whether by way of a grant, refusal, re-grant, continuance or discharge does not require leave. I would uphold the declaration made in the Gordon J.A. order and dismiss this application.

Conclusion

[36] Accordingly, the declaration made in the Gordon J.A. order is confirmed and the respondents' application to set aside the said order is dismissed. Costs shall be costs in the appeal.

[21] Civil Appeal No. 24/2005 (BVI)
[22] Formerly called an Anton Piller order.

[37] Finally, I am grateful to counsel on both sides for the invaluable assistance rendered to the court. It is hoped that this fulfills the purpose for which it was intended and that the uncertainty generated by this issue in the past will abate.

Janice George-Creque
Justice of Appeal

[38] EDWARDS, J.A.: I disagree with some of the reasoning and conclusions in the judgment of my learned sister Creque J.A. and so I have decided to express my views and conclusions in this judgment. An interim freezing order and a receivership order were granted to the appellants against the respondents 1 to 8 on an ex parte application on 9th November 2007 in claim BVIHCV 2007/0262 with a returnable date 29th November 2007. On the return date the appellants by further applications sought to continue the freezing injunction and receivership order against respondents 1 to 8; and also sought similar orders against respondent 9. On the return date the respondents 1 to 8 made an application to set aside the receivership order but did not proceed with it. The respondents 1 to 8 also did not oppose the continuation of the freezing injunction. The appellants' application was granted against respondent 9; the injunction was continued against respondents 1 to 8; and the orders were made without prejudice to the respondents to make an application to set it aside.

[39] On 21st December 2007 the respondents 1 to 8 filed an application to set aside the freezing injunction, and thereafter began negotiations which were facilitated by the judge who suspended the receivership orders only. In March 2008 the receivership orders were re-instated after the parties were unable to resolve their dispute. On 4th July 2008 the 9th respondent also filed an application to discharge the injunction.

[40] For reasons not clear the application to discharge the freezing injunction was never heard, although the injunction remained in force. Mr. Smith Q.C. told us in

the course of his oral submissions that the order made on 9th November 2007 continued until further order so there was no need to reconsider the ex parte injunction order. On the other hand learned counsel Mr. Evans told the court that the appellants' application filed on 27th November 2007 to continue the ex parte injunction was also before the court on 1st December 2008 despite the absence of any reference to it in the order of Olivetti J. On 1st August 2008 the appellants filed contempt proceedings against the respondents which apparently revived their applications to discharge. Following a hearing spanning 5 days from 1st December 2008 the learned judge on 17th December 2008, discharged both the injunction and the receivership orders.

[41] It is not necessary to describe the legal proceedings in this court which subsequently followed, since this is disclosed in the judgment of my learned sister Creque J.A. I shall not repeat the arguments of counsel for the parties which are set out in the judgment of Creque J.A. except where I consider it necessary to explain my reasoning and conclusions. Before us on 5th May 2009 were 7 applications including the respondents' application filed on 16th February 2009 to set aside the order of Gordon J.A. of 29th January 2009. We heard this application first while adjourning the others, and reserved our decision, promising to make available to counsel for the parties any other relevant cases on the issues decided by our court, and any other decisions; and give directions to counsel regarding submissions on them. No such directions have been given as far as I am aware.

Issues

[42] Having regard to the submissions of counsel for the parties, the application throws up 3 issues in my view: (1) whether this court is bound to follow its decision and reasoning in Christenbury Eye Center v First Fidelity Trust Limited[23] in deciding whether the court has jurisdiction to set aside the order of Gordon J.A.; (2) whether an appeal lies without the leave of the court from the order discharging the injunction and receivership orders; (3) whether the full court should set aside

[23] Civil Appeal No. 14/2007 (SKN) delivered 19th November 2008.

the order of Gordon J.A.

The Decision in Christenbury – Issue (1)

[43] In proceeding to examine the decision in Christenbury I adopt the approach of Lord Halsbury LC in Read v Bishop of Lincoln[24] when faced with having to decide whether the Privy Council should be bound by its previous decisions. Lord Halsbury LC said:

> "Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the Law."

[44] The full court had to determine whether it had jurisdiction to discharge the order of a single judge of the Court of Appeal refusing to grant leave to the appellant to appeal an interlocutory order. The court unanimously held:

> "1. The power of the full court under rule 62.16(4) to vary or discharge an order of a single judge was confined to the orders mentioned in rule 62.16, namely, orders for an injunction, a stay of execution, an extension of time and the giving of security for costs.
>
> 2. The single judge having refused leave, there was no appeal in existence; therefore there was no jurisdiction in the Court of Appeal, at that point in time, to do anything because there was no appeal.
>
> 3. No specific provision in CPR 2000 or in other legislation relating to the power of the full court to reconsider an application for leave to appeal had been brought to the court's attention. In those circumstances the court would resort to section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act which required it to exercise its jurisdiction in accordance with the practice and procedure for the time being in force in England. Rule 52.3 (4) and (5) of the English Civil Procedure Rules, which permit a person seeking leave to appeal to request a reconsideration at a hearing when leave to appeal has been refused without a hearing, seemed applicable in the circumstances."

[24] [1892] AC 644.

[45] In arriving at its conclusion the court considered rule 62.16(4)[25] of the Civil Procedure Rules and observed that:

> "The rule speaks to the powers that the specified officials of the court of appeal may exercise. No general powers are conferred; rather specific powers are conferred…The provision in paragraph (4) of rule 62.16, for the full court to vary or discharge an order made by a single judge, seems necessarily to be directed to the order mentioned in paragraph (1) of the rule. The power to vary or discharge is not given in a stand alone rule but is given in a paragraph in a rule that deals with specific orders that may be made and hence, as a matter of context, that may be required to be varied or discharged."

[46] Having examined rule 62.2 which is the only rule in CPR 2000 regulating the power to grant leave the court concluded that CPR 2000 makes no provision for dealing with the situation. Though I agree with this conclusion, I respectfully wish to differ with the tenet that the absence of such provision in the CPR 2000 triggers section 29 of the Supreme Court Act[26] which reads:

> "Practice and procedure in the Court of Appeal
>
> 29. The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Act and rules of court and <u>where no such special provisions are contained in this Act or rules of court</u> such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England –
> (a) in relation to criminal matters, in the Court of Appeal (Criminal Division);
> (b) in relation to civil matters, in the Court of Appeal (Civil Division)."[27]
> (My emphasis)

[47] Though the Supreme Court Act contains no special provision relating to the practice and procedure for leave to appeal, the court, in my view, omitted to consider whether there were other civil rules of the court apart from CPR 2000 which may regulate the specific procedure and practice under consideration. The

[25] See paragraph 7 of the judgment of Creque J.A.
[26] For St. Christopher and Nevis.
[27] See the equivalent provision in section 28 of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80.

Court of Appeal Rules 1968[28] as amended also contain rules regulating the practice and procedure of the Court of Appeal and the High Court. Although some of these original rules were revoked by the Rules of the Supreme Court (Revision) 1970,[29] there are existing rules remaining intact which seem to apply to the practice and procedure of the Court of Appeal and which obviously co-exist with the Civil Procedure Rules 2000.

[48] Rule 27 of the 1968 Court of Appeal Rules is one such rule in my view which was never expressly repealed by the 1970 Rules. Rule 27 contains sub-rules similar to CPR 62.16; and its girth extends further since it also applies to all other interlocutory applications to the Court of Appeal. Rule 27 of the 1968 Rules provides:

> "In any cause or matter[30] pending before the Court, a single Judge of the Court may upon application make orders for –
> (a) giving security for costs to be occasioned by an appeal;
> (b) leave to appeal in *forma pauperis*;
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
> (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
> (e) an extension of time; and may hear, determine and make orders on any other interlocutory application.
> (2) Every order made by a single judge of the Court in pursuance of this rule may be discharged or varied by any Judges of the Court having power to hear and determine the appeal." (My emphasis.)

[49] Learned Queen's Counsel Mr. Smith invoked Rule 27 of the 1968 Court of Appeal Rules in support of his application; which for reasons discussed in the judgment of Creque J.A. (which I endorse) cannot in any event be accommodated by the English CPR rules 52.3 or 52.16. Rule 27 in my view would permit the order of Gordon J.A. to be discharged or varied by the full court notwithstanding that Gordon JA dismissed the application for leave and did not determine the

[28] Made pursuant to section 17 of the West Indies Associated States Supreme Court Order 1967.
[29] See Schedule 3 page 275 of these Rules which were the precursor rules to CPR 2000.
[30] …" The definition of "cause" and "matter" under the Supreme Court Acts for the various OECS Member States is as follows: "cause" includes any action, suit or other original proceeding between a plaintiff and defendant… "matter" includes every proceeding in court not in a cause.

application on its merits. It would also accommodate the present application of the respondent before us.

[50] The question arose at the hearing as to whether Rule 27 was impliedly repealed, which arguably could exist in the absence of an expressed repeal. Learned counsel Mr. Evans relied on such an observation made by a single judge of Appeal Edwards J.A. (then acting) in the case of Attorney General of Grenada and others v Andy Redhead[31]. Mr. Evans argued strenuously that rule 27(2) is a general power which did not cross over into or survive the enactment of CPR 62.16.

[51] In dealing with the subject of "Implied Amendment" in the textbook Statutory Interpretation by F A R Bennion[32] it is stated:

> "An indirect amendment may or may not identify the enactment amended. Either way it produces the need to *conflate* the two texts and arrive at the combined legal meaning…. Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency."

[52] At page 254[33] the author states under the caption "Implied repeal":

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriors contrarias abrogant* (later laws abrogate earlier contrary laws. This is subject to the exception embodied in the maxim *generalia specialibus non derrogant*….A like principle applies to the abrogation of a common law rule…. The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with or repugnant to, the provisions of an earlier [A]ct that the two cannot stand together"[34]

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[31] Civil Appeal No. 10 of 2007 (Grenada) (unreported Judgment) delivered 17th June 2007 at para. 7.
[32] Fourth Edition (2002) (Butterworths) at page 243.
[33] Op. cit.
[34] See West Ham Church Wardens and Overseas v Fourth City Mutual Building Society [1862] 1 QB 654 at page 658.

[53] It cannot, in my view, be argued with any conviction that the absence of the existing "tail piece" in Rule 27(1) and the provisions in Rule 27(2), from the provisions in CPR 62.16 amounts to a contradiction between the 1968 Court of Appeal Rules and CPR 2000 as an omission may not necessarily result in a repugnant contradiction. Applying the implied repeal test to these Rules, I can see no anomalous result in relying on the omitted provisions of Rule 27, in light of the lacuna existing in CPR 2000. I would therefore conclude that the provisions in CPR 62.16 are not so inconsistent with or repugnant to, the omitted provisions contained in Rule 27 that the omitted provisions cannot stand.

[54] In any event I agree with the reasoning and conclusions of my learned sister Creque J.A. at paragraphs 14 and 15 of her judgment. In that regard, the omitted provisions of Rule 27 can be seen as expressly giving effect to the jurisdiction and power vested in the Court of Appeal which originally existed in section 10(5)(a)(ii) of the Windward Islands and Leeward Islands Order in Council 1959 (repealed); and which was inherited from the former Court of Appeal, pursuant to section 27 of the Supreme Court Act.

[55] The rule of *stare decisis* (the doctrine of precedent) dictates that where an enactment has been the subject of judicial decision by a superior court, the court should follow that decision when subsequently ascertaining the legal meaning of that enactment and should not depart from it unless it can distinguish the earlier case; or where the earlier decision contains a fundamental error. "The need for legal certainty demands that [the court] should be very reluctant to depart from recent fully - reasoned decisions unless there are strong grounds to do so.[35] However, having identified the law which was apparently overlooked in Christenbury, in my humble view this provides special justification to depart from the rule of *stare decisis*; and apply the relevant statutory law including Rule 27 instead of the Christenbury decision advocated by respondents' counsel.

[35] Per Lord Slym speaking for the majority in Lewis v Attorney General of Jamaica [2001] 2 AC 50 page 75.

Does an appeal lie without the leave of the Court? – Issue 2

[56] The relevant enactment which falls for interpretation is section 30(4) and (5) of the West Indies Associated States Supreme Court Act Cap 80 and must be set out in its entirety since in the interpretation and/or construction of statutory provisions the primary rule is that the relevant provisions should be interpreted according to the intent expressed in the words within the statutory context. In Attorney General of Antigua and Barbuda v The Barbuda Council[36] Byron C.J. (as he the was) said, in adopting the expression of principle pronounced by Sir Vincent Floissac, C.J. in the Dominica case of Charles Savarin v John Williams[37]:

> "In order to resolve the fundamental issue in this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications there from and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."

[57] Section 30(4) and (5) state:

> "(4) No appeal shall lie without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given except in the following cases –
>
> (i) where the liberty of the subject or the custody of infants is concerned;
>
> (ii) where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
>
> (iv) in such other cases to be prescribed by the rules of court, as may be of the nature of final decisions."
>
> (5) Where an appeal has been brought under the provisions of this section and is pending in the Court of Appeal a judge of the High Court may hear and determine such applications incidental to the appeal and not involving the decision thereof as may be prescribed by rules of court but an order made on any such application may be discharged or varied by the Court of Appeal."

[36] Civil Appeal No. 7 of 2001 (Unreported Judgment) delivered 27th May 2002; at para. 10.
[37] Civil Appeal No. 3 of 1995

[58] As a general rule, only final decisions judgments and orders are appealable as of right; and section 30(4) sets out the exceptions to the general rule for interlocutory judgment or orders. The language of section 30(4)(ii) seems to me to be straightforward, unambiguous and clear. Section 30(4)(ii) in its plain language expressly covers an interlocutory order that granted or refused an injunction; and an interlocutory order made in which the appointment of a receiver is granted or refused. Section 30(4) was intended to carve out the limited exceptions to the final decisions, judgments and orders rule. The presence of section 34(4)(iv) also connotes that the legislators intended that the category of exceptions be enlargened only by rules of court. I would conclude from all of these provisions that a statement of purpose and intent exists within the provisions of the Supreme Court Act and I consider it my duty to accept the purpose decided on by the legislators.

[59] Learned counsel Mr. Evans referred to the word "discharged" in section 30(5) as an indication that a discharge order is not precluded; and submitted in essence that the court should take the approach in Atlas Maritime Co. S.A. v Avalon Maritime Ltd. (No. 2)[38] and look at the nature of the order and the stage of the proceedings in determining the matter. In my view section 30(5) renders no assistance in determining the plain meaning of section 30(4)(ii) as section 30(5) is a different rule dealing with the power of the court to hear applications relating to a pending appeal.

[60] An uncritical acceptance and application of the reasoning in Atlas Maritime to the facts in the instant case may result in a strained interpretation of section 30(4)(ii) of the (BVI) Supreme Court Act in my view; since the judgment does not reflect that the court construed the words in the English Act (which are identical to the BVI section 30(4)(ii)) in their ordinary natural and precise meaning, or that the learned Justices of Appeal regarded the meaning of the words as not clear, not

[38] 1 WLR 12th July 1991.

plain, and ambiguous. I cannot discern from this judgment within what permissible bounds of interpretation the court sought to give effect to Parliament's purpose.

[61] Bennion on **Statutory Interpretation**[39] at page 810 states that a purposive construction of an enactment is one which gives effect to the legislative purpose by (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose; or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose. In **Stock v Frank Jones (Tipton) Limited**[40] their Lordships had much to say about interpreting a statute to give effect to the legislative purpose. Viscount Dilhorne's comments at page 234G were:

> "It is now fashionable to talk of a purposive construction of a statute, but it has been recognized since the 17th century that it is a task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that made it'. If it were the case that it appeared that an Act might have been better drafted, or that amendment to it might be less productive of anomalies, it is not open to the court to remedy the defect. That must be left the legislature."

[62] The facts in **Atlas Maritime** must also be distinguished from those in the present matter. **Atlas** did not deal with the setting aside of an injunction previously granted but with the variation in an injunction. On those facts the court treated the grant of the variation as a new injunction apparently in a varied form. It is reasonable to infer from the sparse facts in the judgment that the variation did not reassert the court's prior order but obviously changed the command of the earlier injunction and therefore modified it. To that extent the Court was prepared to regard the variation of the injunction as fitting squarely within section 18(1)(h)(iii) of the English Supreme Court Act 1981. No other cases have been identified by counsel or research which considered and/or applied and/or followed this decision. The decision appears to be isolated and of limited application in my view.

[63] Mr. Evans rejected Queen's Counsel's contention that a distinction should be made as to whether the order arose from an inter partes or ex parte hearing which

[39] See Fn 10
[40] [1978] 1 WLR 231.

Mr. Smith submitted was of some significance. Mr. Evans also referred to paragraph 94 of the judgment of Olivetti J. in support of his submission that the order in question was an order refusing to grant a new injunction on new evidence. Finally, he sought to buttress his position by relying on the observations of a single judge of the Court of Appeal Rawlins J.A. (as he then was) in **Pendragon International Limited and others v Bacardi International Limited**[41].

[64] At paragraphs 4 to 5 of his background facts Rawlins J.A. stated:

> "[4] In the judgment, which the application sought to appeal, the learned judge made an order continuing interim injunctions that were issued against the applicants on 30th January 2007 and extended on 12th February 2007 until trial or further order. The judge also held that the requirements of Part 7.5 of the CPR 2000 for permission to serve the claim and other documents out of the jurisdiction on the 2nd and 3rd applicants had been complied with.
>
> [5] … It is common ground that this is not a procedural appeal. Injunctive proceedings are expressly excluded from that definition by rule 62.1(2)(e)(ii) of the CPR 2000. It is also common ground that this is not an appeal for which leave to appeal is required. This is because section 29(4)(b) of the Eastern Caribbean Supreme Court (Anguilla) Act specifically exempts appeals against Injunctive proceedings from the leave requirement in respect of interlocutory judgments or orders."

[65] This statement of Rawlins J.A. is unhelpful to the respondents in my view since it was *obiter* and not the *ratio decidendi* of the case. **Pendragon** raised the sole issue as to whether an application for extension of time for filing an appeal should be granted. **Pendragon** was also distinguished on a similar basis by Barrow J.A. a single judge in **Teliasonera Finland OYJ and Alfa Telecom Turkey Limited**[42] when faced with the submission of the respondent's counsel who argued that Rawlins J.A. in **Pendragon** shared the view of the parties that an order refusing an injunction cannot be the subject of a procedural appeal. Two of the issues for determination in **Teliasonera** were whether an appeal against the refusal of an injunction is a procedural appeal; and whether an appeal against refusal of an injunction stands on the same footing as an appeal against the grant of an

[41] Anguilla Civil Appeal No. 3 of 2007 (Unreported Judgment) delivered 23rd November 2007.
[42] (BVI) Civil Appeal No. 28 of 2007 (Unreported Judgment) delivered by a single judge Barrow J.A. on 18th December 2007 at para. 8.

injunction for the purposes of Rule 62.1(2)(e)(ii) of CPR 2000. Teliasonera is instructive as to how Barrow J.A. approached the interpretation of Rule 62.1(2)(e) where both counsel accepted that the definition of "procedural appeal excludes an order granting an injunction , but respondent's counsel was submitting that since an order granting an injunction cannot be the subject of a procedural appeal, "the suggestion that an order *refusing* an injunction must be a procedural appeal, is absurd." Before stating Barrow J.A.'s response it is useful to set out this rule:

> "procedural appeal" means an appeal from a decision of a judge, master or registrar which does or registrar which does not directly decide the substantive issues in a claim but excludes –
> (d) an order granting or refusing an application for the appointment of a receiver; and
> (e) the following orders under Part 17 –
> …
> (ii) an interim declaration or injunction;"

[66] In response Barrow J.A. said at paragraphs 5 of his judgment:

> "That is an unhelpful formulation. There is no suggestion that an order refusing an injunction must be a procedural appeal. Rather, it is the fact that an order granting and an order refusing an interlocutory injunction both fall within the opening words that define a procedural appeal – an appeal from an order that does not decide the substantive issues – but the definition goes on to exclude an order granting an injunction. There is no similar exclusion of an order refusing an injunction. I see nothing absurd in that distinction. It is a conventional way of drafting that is recognized in the venerable maxim of legal interpretation: *inclusion unius exclusion alterius;* meaning that if only one of a number of relevant things is included in a reference this is to be interpreted as a deliberate exclusion of the other things…."

[67] A similar approach to interpreting Rule 61(2)(d) and section 33(2)(g)(ii) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336[43] was also applied in Capital Bank International Limited v The Honourable Attorney General[44] by a single judge Edwards J.A. (Ag.) (as she then was). Although she did not expressly identify the "expressio unius" rule of interpretation, its application is easily recognizable from her conclusions. Edwards J.A. (Ag.) was determining

[43] The Statutory equivalent of section 30(4) (ii) of the BVI Act Cap. 80 set out in paragraph 20 above of the present judgment.
[44] Grenada HCVAP2008/004 (unreported judgment) delivered 14th May 2008

whether leave is required to appeal against an order denying an application to set aside an order appointing a receiver. The order appointing the receiver was made on the 15th February 2008 without notice, upon a fixed date claim filed on the 14th February 2008. The application to set aside the appointment of the receiver was made on 18th February 2008 and the order appealed against was made on the 4th March 2008. It was held that:

(1) The decision refusing to set aside an order appointing a receiver was an interlocutory order and the appeal against this order fell within the category of procedural appeals, not having been excluded under CPR 62.1(2); and

(2) An order granting or refusing the appointment of a receiver is excepted from the leave requirement under section 33(2)(g)(ii) of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336. An order refusing to set aside the appointment of a receiver does not however fall within this exception and would require leave. Edwards J.A. (Ag.) reasoned at paragraph 10 of her judgment that the respondents' fixed date claim was the application upon which the order granting the appointment of a receiver was made and not the appellant's application filed on the 18th February 2008.

[68] Regrettably, counsel for the parties have not had the opportunity to address these decisions Teliasonera and Capital Bank as these 2 cases were not mentioned at the hearing or referred to counsel for their submissions. I wish to apologise to them for this inadvertence. However, the decision and the arguments in these cases only reinforce the conclusion that I had already reached on the basis of their written skeleton submissions and the oral arguments of both sides in the case.

[69] I therefore conclude, differing from my learned sister Creque J.A., that the plain or literal language of section 30(4)(ii) contains no express legislative intent to include an order setting aside an injunction in the category of interlocutory orders that are

excepted from requiring leave to appeal. The provision suggests that such a deliberate omission is not inconsistent with an intention to enlargen the exceptions only by rules of court based on the criteria set out in section 30(4). This is an obvious piece of legislation beckoning the application of the principle of construction *expressio unius est exclusio alterius.* Consequently, I would rule that the orders made by Olivetti J on the 17th December were interlocutory orders requiring the leave of the court to appeal.

Should the Court discharge the order of Gordon J.A.? – Issue 3

[70] Having regard to the conclusions reached at paragraphs 6 to 18 above I would discharge the order of Gordon J.A., declare the notice of appeal filed to be a nullity, and determine the application for leave to appeal along with the application for a stay of the order of Olivetti J.

Ola Mae Edwards
Justice of Appeal

[71] RAWLINS, C.J.: I have had the privilege of reading the judgments of my sisters, George-Creque J.A. and Edwards J.A. I agree with the decision of George-Creque J.A. for the reasons which she has proffered and with the resulting order which she proposes. Accordingly, the Order in this judgment is as follows:

(1) The declaration made by Gordon J.A. [Ag.] in the Order dated 29th January 2009 is confirmed;

(2) The respondents' application to set aside the said Order dated 29th January 2009 is dismissed.

(3) Costs shall be costs in the appeal.

Hugh A. Rawlins
Chief Justice