SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2011/045

In the matter of part 56 of the Civil Procedure Rules 2000

and

In the matter of the Gaming Control Act Cap 13:13 of the Revised Laws of Saint Lucia, 2001

and

In the matter of the National Lotteries Authorities Act Cap 13:20 of the Revised Laws of Saint Lucia, 2001

BETWEEN:

CAGE ST. LUCIA LIMITED

Respondent

and

TREASURE BAY (ST. LUCIA) LIMITED

Applicant

and

[1] THE GAMING AUTHORITY
[2] THE ATTORNEY GENERAL OF SAINT LUCIA
[3] THE NATIONAL LOTTERIES AUTHORITY

Respondents

Before:

The Hon. Mde. Ola Mae Edwards	Chief Justice [Ag.]
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]

Appearances:

Mr. Garth St. E. W. Patterson, QC, instructed by Nicholas John & Co. for the Respondent, CAGE St. Lucia Ltd.

Mr. Anthony Astaphan, Senior Counsel, Ms. Renee St. Rose with him, for the Applicant, Treasure Bay (St. Lucia) Ltd.

Ms. Esther Greene-Ernest for the Gaming Authority with a watching brief

Mr. Dwight Lay for the Attorney-General of Saint Lucia with a watching brief

Mr. Vern Gill for the National Lotteries Authority with a watching brief

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2011: December 14;
2012: January 23.

Civil appeal – Application to review the decisions of two single judges of the Court of Appeal – Whether the respondent to an application for leave to appeal is entitled to oppose the application – Whether the respondent to an application for leave to appeal may invoke the jurisdiction of the Court of Appeal to review the decision of a single judge and consider the merits of the proposed appeal, where the single judge granted leave to appeal to the applicant without hearing the respondent – Whether the respondent whose counsel was present and heard by a single judge at a further consideration of the applicant's application for a stay of proceedings may apply to the full court for the decision granting stay to be revoked, varied or discharged

This is an action arising from an application made to a High Court judge by CAGE St. Lucia Limited ("CAGE"), to be joined as a party to judicial review proceedings which were ongoing in the court below. The parties to the High Court proceedings were Treasure Bay (St. Lucia) Limited ("Treasure Bay"), and The Gaming Authority, the Attorney General and The National Lotteries Authority. CAGE claimed a right to be made a party to the proceedings, because they included claims for injunctions and orders against CAGE which, if granted, would have a significant, negative impact on CAGE's business.

The learned judge dismissed CAGE's application and awarded costs to Treasure Bay. CAGE applied without notice to the Court of Appeal for leave to appeal that ruling and for a stay of execution and a stay of proceedings. Treasure Bay duly filed a Notice of Objection to the application for leave.

CAGE's application for leave to appeal came on before a single judge of the Court of Appeal for determination on paper and without an oral hearing. This judge was not aware of Treasure Bay's filed Notice of Objection, which had not yet formed part of the court file. CAGE's application for leave was granted, along with a temporary stay pending an *inter partes* hearing at a later date. At the subsequent date, another judge of the Court, after hearing both CAGE and Treasure Bay, made an order further staying the judicial review proceedings in the High Court pending the hearing of the appeal. Treasure Bay then

made the present application to the Full Court to vary, revoke or discharge both the orders of the single judges.

Held: dismissing the application to revoke, vary or discharge the order of Pereira J.A. which granted CAGE leave to appeal the order of Wilkinson J.; setting aside the order of Baptiste J.A. which stayed the judicial review proceedings in the court below; and making no order as to costs, that:

1. CPR 62.16(A), which gives the Court jurisdiction to vary, discharge or revoke any order, direction or decision given by a single judge, applies only to interlocutory orders made within the context of a pending appeal. In the instant case, until leave was granted, there was no appeal in existence. The order granting leave to appeal was therefore not an interlocutory order made during the pendency of an appeal.

2. An application for leave to appeal is essentially a "without notice" procedure. Applications for leave to appeal are not strictly interlocutory applications and therefore the practice of the Court of Appeal Registry serving notices requesting "compliance with applicable requirements of Practice Directions Nos. 2 and 3 of 2008" on parties named as applicants and respondents who incidentally are the parties in the court below is misleading, as it erroneously induces a respondent to file a notice of opposition and other documents, contrary to the procedure envisaged under CPR 62.2. Treasure Bay was not entitled to file a notice of objection or otherwise to oppose CAGE's application for leave to appeal.

   Jolly v Jay [2002] All E.R. (D) 104 cited.

3. The application of Treasure Bay which called into question the order of the single judge, Pereira J.A., was effectively appealing the order in circumstances which were prohibited by English law, regardless of whether the exercise of the Court's discretion had been referred to as a reconsideration, review, or appeal. The English Civil Procedure Rules 52.9(2) and 52.16(6)(a) provide no authority for saying that the Court of Appeal has jurisdiction to permit a respondent to challenge the grant of unlimited permission to appeal.

4. With no Notice of Appeal having been filed subsequent to the order granting CAGE leave to appeal, there was no appeal pending before the Court of Appeal when the order which stayed the judicial review proceedings was made. Consequently, this court had no jurisdiction to make that order, which would be a nullity.

   Rule 62.16(1)(b) Civil Procedure Rules 2000 applied.

DECISION

[1] MITCHELL, J.A. [AG.]: This is an application to the Full Court to review the decisions of two single judges of the Court concerning an application for leave to appeal in judicial review proceedings. The facts are not important at this stage, but they may be summarised in this way. CAGE St. Lucia Limited ("CAGE"), a company which was not a party to the judicial review proceedings between Treasure Bay (St. Lucia) Limited ("Treasure Bay") and the respondent government authorities, applied to a High Court judge to be joined as a party to the judicial review proceedings. CAGE claimed a right to be made a party to the proceedings because the proceedings, although they are for judicial review of the actions of public authorities, include claims for injunctions and orders against CAGE which, if granted, would impact on CAGE's business. CAGE urged that it would suffer catastrophic loss, including the closure of its business, if the reliefs claimed in the judicial review proceedings were granted.

[2] CAGE applied to be joined as a party to the proceedings under Part 19 of the Civil Procedure Rules 2000 ("CPR") which governs the "addition and substitution of parties" in the High Court. In particular, CPR 19.3(2) provides that:

> "(2) An application for permission to add, substitute or remove a party may be made by –
>
> (a) an existing party; or
>
> (b) a person who wishes to become a party."

Part 56 CPR governs judicial review proceedings. It does not contain any rule for joining a party to the judicial review proceedings. Instead, CPR 56.11(2)(a) provides that at the first hearing of the claim:

> "(2) … the judge may –
>
> (a) allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard whether or not served with the claim form."

Additionally, CPR 56.13(1) provides that:

> "(1) At the hearing of the application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form."

[3] The judge dismissed CAGE's application under Part 56 CPR to be joined as a party to the judicial review proceedings and awarded costs of $7,500.00 in favour of Treasure Bay. She held that CAGE was sufficiently entitled to be heard at the trial pursuant to Part 56 CPR and that there was no power to join CAGE to the judicial review proceedings as a party under CPR 19.3. CAGE applied to the Court of Appeal for leave to appeal that ruling and for a stay of execution and a stay of proceedings. This application was served by CAGE on Treasure Bay. Treasure Bay duly filed a Notice of Objection to these Court of Appeal proceedings.

[4] CAGE's application for leave to appeal came on before a single judge for determination on paper and without an oral hearing. She was not aware of Treasure Bay's filed Notice of Objection which had not as yet made its way to the court file. She granted CAGE's application for leave, and granted a temporary stay pending an *inter partes* hearing at a later date. At the subsequent date, another judge of the Court, after hearing both CAGE and Treasure Bay, made an order further staying the judicial review proceedings in the High Court pending the hearing of the appeal. It is these two orders that Treasure Bay has applied to the Full Court to review. Treasure Bay's application to the Full Court is to vary, revoke or discharge the orders of the single judges of the Court previously described.

[5] The order made in the High Court by the learned trial judge was an interlocutory order. That is why CAGE applied for leave to appeal. Applications for leave to appeal are governed by CPR 62.2 as amended. This provides:

> "62.2 (1) Where an appeal may be made only with the leave of the court below or the court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought.

(1A) Where an application for leave has been refused by the court below, an application for leave may be made to the court within 7 days of such refusal.

(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 considering an application under Rule 62.2(3) may give leave without hearing the applicant.

(5) However if the judge considering an application under Rule 63.2(3) is minded to refuse leave he or she must direct –

(a) that a hearing be fixed; and

(b) whether that hearing is to be by a single judge or the court."

[6] There is no provision in CPR 62.2 on an application for leave to appeal for notice of the application to be served on the proposed respondent. Compare this with CPR 62.7 which governs notices of appeal. This provides expressly that the notice of appeal must be served on all the parties. However, there has apparently grown up a practice in the court office of serving all parties with a Notice that the application will be considered by a single judge on a particular date. The notice requests the parties to comply with Practice Directions 2 and 3 of 2008, which relate, among other things, to the filing of submissions. This practice no doubt ensures that parties are made aware of applications that affect their interest. It also provides an encouragement for parties to the proceedings to object to applications for leave to appeal at this early stage.

[7] Applications for leave to appeal are generally in the nature of *ex parte* or without notice proceedings. There is no provision in the Rules for the respondent or any other person to be given notice of the application for leave. The approach adopted by the English Court of Appeal in **Jolly v Jay**[1] commends itself. There, the court observed:

[1] [2002] All E.R. (D) 104; [2002] EWCA Civ 277.

> "Unless directed to do so by the court, a respondent should only file submissions at the stage of an application for permission to appeal if they are addressed to the point that the appeal would not meet the relevant threshold test or tests, or if there is some material inaccuracy in the papers placed before the court, such that the court might reasonably be led to grant permission when it would not have done so if it had received accurate information. If the respondent wishes to advance submissions on the merits of the appeal, the appropriate time to do so is at the appeal itself, if the matter gets that far. In general it is not desirable that respondents should make submissions at the permission stage, since it is essentially a 'without notice' procedure, and this may well lead to delay in dealing with the permission application and take up the resources of the appeal court unnecessarily."

So, without deciding the issue, it appears that applications for leave to appeal are intended by the Rules to be a "weeding out" process, to ensure that unmeritorious appeals are not filed. They should not normally be intended to be contested at such an early stage. Respondents and other parties will have their opportunity to make their points and to object to the appeal when the appeal comes on for hearing.

[8] Part 52 of the UK Civil Procedure Rules governs appeals to the UK Court of Appeal, while our rule is CPR 62.2. In the Eastern Caribbean, the previous CPR 62.16(4) which provided that an order made by a single judge of the court may be varied or discharged by the court has been deleted and replaced by the Amendment Rules of October 2011 previously referred to. The new CPR 62.16(A) reads:

> "62.16(A) Any order, direction or decision made or given by a single judge 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 and by the full court in any other case."

The jurisdiction of the Full Court to review an order made by a single judge of the court is based on the inherent jurisdiction of the court. The court as a matter of law and practice has always had jurisdiction to review any decision of a single judge on any matter relating to a pending appeal. CPR 62.16(A) applies only to

interlocutory orders made within the context of a pending appeal. The language of the Rule speaks to an order made or given by a single judge which "relates to an appeal". The order granting leave to appeal was not an interlocutory order made during the pendency of an appeal.[2] Until leave was granted, there was no appeal in existence. It was therefore an order made prior to an appeal. The law on the mounting of a challenge to the grant of leave to appeal to the Court of Appeal remains as it was before. As George-Creque J.A. said in Danone Asia Pte. Ltd. and Others v Golden Dynasty Enterprise Ltd. and Others:[3]

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

[2] Christenbury Eye Center and Others v First Fidelity Trust Limited and Others, Saint Christopher and Nevis HCVAP 2007/014, (delivered 19th November 2008, unreported) per Barrow J.A. at para. 5.

[3] Territory of the Virgin Islands HCVAP 2009/002 (delivered 28th September 2009, unreported) at para. 12.

> 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 [sic] 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."

[9] The application before us is Treasure Bay's application to set aside the two previously described orders of single judges of the Court, granting CAGE leave to appeal and staying the judicial review proceedings in the court below. There is no provision in CPR 2000 that is equivalent to CPR 52.9 [UK], which expressly confers jurisdiction on the English Court of Appeal to set aside an order granting permission to appeal. Treasure Bay was not entitled to file a notice of objection or otherwise to oppose CAGE's application for leave to appeal. An application for leave to appeal is essentially a "without notice" procedure. It might be better if in future the court office did not automatically send notice to respondents of applications for leave to appeal, as this procedure is not only not authorised by the Rules, but might send the wrong signal to respondents.

[10] I have had the opportunity to read the judgment of my learned sister Edwards J.A., and in particular the order which concludes her judgment, with which I respectfully agree.

Don Mitchell
Justice of Appeal [Ag.]

[11] EDWARDS, C.J. [AG.]: I have had the opportunity to read the judgment of my brother Mitchell J.A. [Ag.]. I agree with his statement of the facts as to what took place in the court below, and his conclusions at paragraph 9 of his decision on the result of the application as it affects the Order granting leave to appeal. My brother has not addressed Treasure Bay's application as it relates to the Order granting stay of the judicial review proceedings. Consequently, I state my own views concerning the application we heard. There is no need for me to repeat facts that my brother has established in his decision except where it is necessary.

[12] We heard arguments on 12th December 2011, on the application of Treasure Bay (St. Lucia) Limited ("Treasure Bay") made under CPR 62.16. This application seeks to revoke vary or discharge two orders made by single judges on the application of CAGE St. Lucia Ltd ("CAGE") for leave to appeal the interlocutory order made by Wilkinson J. on 7th November 2011, and a stay of the judicial review proceedings in the High Court pending the determination of the appeal. The application of Treasure Bay was not supported by any affidavit evidence.

[13] The application of CAGE for leave to appeal and stay was filed on 17th November 2011. The Order of Pereira J.A. made on 29th November 2011 without a hearing, granted leave to CAGE to appeal and a stay of execution of proceedings in the court below until 1st December 2011, when the application for stay was scheduled for further consideration.

[14] The Order of Baptiste J.A. granting stay pending the determination of the appeal was made on 1st December 2011 after hearing counsel for CAGE and Treasure Bay, and counsel for The Gaming Authority and The National Lotteries Authority. The 2nd respondent, the Attorney General, was unrepresented.

The Preliminary Jurisdiction Point

[15] At the hearing before us, learned Queen's Counsel Mr. Garth Patterson raised the preliminary point concerning the jurisdiction of the Court to review the two orders

made by single judges. Where Mr. Patterson's argument succeeds on this point, that would dispose of Treasure Bay's application concerning the Order of Pereira J.A. only, in my view. The question regarding stay is a different matter. The application of Treasure Bay in relation to the Order of Baptiste J.A. granting stay should be determined by us regardless of the outcome of the jurisdiction point taken by Mr. Patterson, QC, in my view.

The Legislation and Rules Governing Stay

[16] Section 15(a) and (b) of the Eastern Caribbean Supreme Court (Saint Lucia) Act[4] states that:

> "(a) this Act shall not disable the High Court or the Court of Appeal, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it; and
> (b) any person, whether a party or not to any such cause or matter who would formerly have been entitled to apply to any court to restrain the prosecution thereof ... may apply to the High Court or to the Court of Appeal, as the case may be, by motion in summary way, for a stay of proceedings in the cause or matter, either generally, or so far as may be necessary for the purposes of justice, and the High Court or the Court of Appeal shall thereupon make such order as shall be just." (My emphasis).

[17] CPR 62.16 as amended states:

> "62.16.(1) A single judge of the court may make orders for –
> (a) …
> (b) a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal." (My emphasis).

CPR 62.16 (A) states:

> "62.16 (A) Any order, direction or decision made or given by a single judge 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 and by the full court in any other case."

[4] Chap. 2.01, Revised Laws of Saint Lucia 2008.

The Submissions

[18] Mr. Patterson, QC, in his submissions and oral arguments before us, contended, among other things, that on the authority of Danone Asia Pte. Ltd. and Others v Golden Dynasty Enterprise Ltd. and Others,[5] the procedure granting leave to appeal under CPR 62.14 was a special procedure prescribed by our rules which did not permit Treasure Bay to participate at the stage when the application was being considered by the single judge unless specifically directed by the judge. Mr. Patterson, QC submitted further that since the application for leave was not an interlocutory application made while an appeal was pending, the Court had no jurisdiction under the new rule in CPR 62.16A to vary or discharge the orders of the single judges.

[19] Learned Senior Counsel Mr. Astaphan submitted that on the authority of Christenbury Eye Centre and Others v First Fidelity Trust Limited and Others,[6] and the inherent jurisdiction of the court, the procedure under the English CPR 52.9 and 52.16(6) should be applied despite the decision in Danone where our Civil Procedure Rules are silent on the matter.[7]

[20] The English CPR 52.9 permits a respondent who was not present at the hearing for which permission to appeal was given to apply for an order that permission to appeal be set aside in whole or in part or for imposition or variation of conditions upon which the appeal may be brought where there is a compelling reason for doing so. It states:

> "52.9 The appeal court may -
> (1) (a) strike out the whole or part of an appeal notice;
> (b) set aside permission to appeal in whole or in part;
> (c) impose or vary conditions upon which an appeal may be brought.

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[5] Territory of the Virgin Islands HCVAP 2009/002 (delivered 28th September 2009, unreported).
[6] Saint Christopher and Nevis HCVAP 2007/014 (delivered 19th November 2008, unreported).
[7] See Eastern Caribbean Supreme Court (Saint Lucia) Act section 24, which states that the Court shall exercise its jurisdiction as nearly in conformity with the law governing the practice and procedure in England for the time being in force where no special provisions are contained in this Act and rules of court.

(2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.

(3) Where a party was present at the hearing at which permission was given he may not subsequently apply for an order that the court exercise its powers under sub-paragraphs (1)(b) or 1(c)."

[21] The English CPR 52.16(6) states:

> "(6) At the request of a party, a hearing will be held to reconsider a decision of–
> (a) single judge; or
> (b) a court officer,
> made without a hearing."

[22] Mr. Patterson, QC's response to Mr. Astaphan SC's submission was that Danone had already established that under our CPR 62.2 there was no need to look to the English CPR 52.9 and 52.16(6) to determine whether this Court had the jurisdiction to entertain Treasure Bay's application to review the Order granting leave to appeal, and the Order granting a stay of the judicial proceedings. Mr. Patterson, QC urged us to apply our practice under CPR 62.2 which has adopted the English approach stated in Jolly v Jay[8] and dismiss Treasure Bay's application.

The Decision in Danone

[23] On the peculiar paradoxical facts existing in Danone, there was a valid Notice of Appeal pending before the Court of Appeal which was filed on 12th January 2009 at the time the respondents filed their application challenging the single judge's decision that no leave was required. That decision was made on 29th January 2009 by a single judge. The application of the respondent in Danone was seeking to set aside the decision of the single judge made upon an application for leave to appeal that was filed on the same day as the Notice of Appeal out of an abundance of caution. It turned out in hindsight that Gordon J.A. [Ag.] having

[8] [2002] All E.R. (D) 104; [2002] EWCA Civ 277.

ruled as he did, afforded confirmation that the Notice of Appeal previously filed was valid. The jurisdictional issue raised in Danone sought to identify the source of the Court's jurisdiction to review the decision of a single judge made on an application for leave to appeal. In a manner of speaking, that application for leave to appeal warranted to be treated as an interlocutory application incidental to a pending appeal since it was filed when there was a Notice of Appeal before the Court also. Within that context, the Court considered among other rules and statute, the rule governing obtaining leave to appeal in our jurisdiction – CPR 62.2. In determining the construction to be placed on CPR 62.16, the Court considered the English CPR 52.3, 52.9 and 52.16, which were previously canvassed and held in Christenbury to be applicable to our jurisdiction in the absence of domestic Rules. The Court held at paragraph 13 in Danone that 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 lies in the Eastern Caribbean Supreme Court (Virgin Islands) Act[9] and also the Court of Appeal Rules 1968 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.

[24] In the case before us, no notice of appeal has ever been filed and served since the Order of Pereira J.A. on 29th November 2011. Unlike the situation in Danone therefore, neither CAGE's application for leave to appeal nor Treasure Bay's instant application is an interlocutory application incidental to a pending appeal. It is for this reason it would seem, that Senior Counsel Mr. Astaphan is urging us to reconsider whether the English CPR 52.9 and 52.16 are applicable where no notice of appeal exists. That is my understanding of Mr. Astaphan SC's submissions. There was no affidavit evidence as to what compelling reason Treasure Bay was relying on, save for the Notice of Intention to Oppose CAGE's

[9] Cap. 80, Revised Laws of the Virgin Islands 1991 (formerly, the West Indies Associated States Supreme Court (Virgin Islands) Ordinance).

application filed on 24th November 2011, which stated that CAGE served its skeleton arguments on Treasure Bay's solicitors on 23rd November 2011.

The Issues

[25] Treasure Bay's application raises issues concerning: (i) whether the respondent named in an application for leave to appeal may invoke the jurisdiction of this court to review the decision of a single judge and consider the merits of the proposed appeal, where the single judge granted leave to appeal to the applicant without hearing the respondent; and (ii) whether the respondent whose counsel was present and heard by a single judge at the further consideration of the applicant's application for stay may apply to the Full Court for the decision granting stay to be revoked, varied or discharged.

Issue (i) – The Registry Notice

[26] The general practice obtaining in the Court of Appeal Registry is for a notice to be served on the parties to an application for leave to appeal which states that the application would come up for consideration before a single judge on the scheduled chamber date. This Notice requests the parties to "ENSURE COMPLIANCE WITH APPLICABLE REQUIREMENTS OF PRACTICE DIRECTIONS NOS. 2 & 3 OF 2008". These Practice Directions give standard directions to parties as to how to proceed for interlocutory applications under Part 62. They include directions for a respondent served with an interlocutory application to file a notice indicating whether the application is opposed within 7 days of service of the Notice of Application; as well as evidence and skeleton arguments within 14 days of such service. On 24th November 2011, Treasure Bay filed a Notice of Opposition to the application for leave to appeal.

[27] A practice exists in the Court of Appeal Registry to serve the notice previously mentioned in all notices of application before the Court of Appeal, including applications for leave to appeal, on parties named as applicants and respondents

who incidentally are the parties in the court below. Despite a well intentioned reason, this practice is misleading in the case of applications for leave to appeal which are not strictly speaking interlocutory applications, as it erroneously induces a respondent to file a notice of opposition and other documents contrary to the procedure envisaged under CPR 62.2. This Registry practice should desist in my view for all applications for leave to appeal, unless the Chief Justice or a single judge makes an order for an oral hearing and specifically directs that the respondent attend and participate in the manner the order directs. Where such an order is made there would be no need for the Registry to issue such a notice in any event, since a copy of the order, inviting the respondent to participate in the manner directed in the order, would have to be served on the parties.

The English Law Governing Permission to Appeal

[28] I find it necessary to carry out this review despite the observations in Danone as to the unsuitability and inapplicability of the UK regime to our jurisdiction. That decision, though binding on this Court, stands on its own peculiar facts as I have pointed out before. The English law contains provisions and rules, only some of which were considered at length in Danone. The other provisions which were not considered provide helpful assistance in appreciating the scope of the English CPR 52.9 and 52.16 and the conclusions of the Court in Danone on the construction of CPR 62.2, in my humble view.

[29] My learned brother Mitchell J.A. [Ag.] has already reviewed our rule governing permission to appeal – CPR 62.2 – and I agree with his views as to the effect of CPR 62.2.

[30] The English Rules governing the English procedure for permission to appeal, which are comparable to our amended CPR 62.2, are UK CPR 52.3, and Practice Direction 52 paragraphs 4.4 to 4.18. The relevant sub-rules of CPR 52.3 are sub rules (2) to (5) which I set out below for convenience:

"(2) An application for permission to appeal may be made –

(a) to the lower court at the hearing at which the decision to be appealed was made; or
(b) to the appeal court in an appeal notice.

(3) Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court.

(4) Subject to paragraph (4A), where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

(4A) Where the Court of Appeal refuses permission to appeal without a hearing, it may, if it considers that the application is totally without merit, make an order that the person seeking permission may not request the decision to be reconsidered at a hearing.

(4B) Rule 3.3(5) will not apply to an order that the person seeking permission may not request the decision to be reconsidered at a hearing made under paragraph (4A).

(5) A request under paragraph (4) must be filed within 7 days after service of the notice that permission has been refused."

[31] Practice Direction 52, paragraph 4.4(4) states that a decision about adding a party to a claim (which is the type of decision that Wilkinson J. made in the present proceedings) is a case management decision. Practice Direction 52, paragraph 4.5 states that in dealing with an application for permission to appeal from a case management decision the court dealing with the application may take into account whether: (1) the issue is of sufficient significance to justify the costs of an appeal; (2) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision; and (3) whether it would be more convenient to determine the issue at or after trial.

[32] Practice Direction 52, paragraph 4.8 states that:

> "4.8 There is no appeal from a decision of the appeal court to allow or refuse permission to appeal to that court (although where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request that decision to be reconsidered at a hearing). See section 54(4) of the Access to Justice Act and rule 52.3(2), (3), (4) and (5)." (My emphasis).

Section 54 (4) of The Access to Justice Act 1999 (UK) as amended states:

> "(4) No appeal may be made against a decision of a court under

this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)"[10] (My emphasis).

[33] Practice Direction 52, paragraph 4.11 states that applications for permission to appeal may be considered by the appeal court without a hearing. Paragraph 4.12 provides that:

> "4.12 If permission is granted without a hearing the parties will be notified of that decision and the procedure in paragraphs 6.1 to 6.6 will then apply."

Paragraphs 6.1 to 6.6 deal with the procedure after permission to appeal has been granted. Paragraph 4.13 states that:

> "4.13 If permission is refused without a hearing the parties will be notified of that decision with the reasons for it. The decision is subject to the appellant's right to have it reconsidered at an oral hearing. This may be before the same judge."

[34] Practice Direction 52, paragraph 4.14 provides that:

> "4.14 A request for the decision to be reconsidered at an oral hearing must be filed at the appeal court within 7 days after service of the notice that permission has been refused. A copy of the request must be served by the appellant on the respondent at the same time." (My emphasis).

Finally, paragraphs 4.15 and 4.16 state:

> "4.15 Notice of a permission hearing will be given to the respondent but he is not required to attend unless the court requests him to do so.
>
> "4.16 If the court requests the respondent's attendance at the permission hearing, the appellant must supply the respondent with a copy of the appeal bundle (see paragraph 5.6A) within 7 days of being notified of the request, or such other period as the court may direct. The

[10] Section 60 of the Access to Justice Act 1999 amended section 58 of the Supreme Court Act 1981 by substituting a provision which states that: "58. – (1) Rules of court may provide that decisions of the Court of Appeal which– (a) are taken by a single judge…in proceedings incidental to any cause or matter pending before the civil division of that court; and (b) do not involve the determination of an appeal or of an application for permission to appeal, may be called into question in such manner as may be prescribed." (My emphasis).

costs of providing that bundle shall be borne by the appellant initially, but will form part of the costs of the permission application." (My emphasis).

[35] Practice Direction 52, paragraphs 4.22 to 4.24 state that:

> "4.22 In most cases, applications for permission to appeal will be determined without the court requesting –
> (1) submissions from, or
> (2) if there is an oral hearing, attendance by the respondent.
>
> 4.23 Where the court does not request submissions from or attendance by the respondent, costs will not normally be allowed to a respondent who volunteers submissions or attendance.
>
> 4.24 Where the court does request –
> (1) submissions from; or
> (2) attendance by the respondent,
> the court will normally allow the respondent his costs if permission is refused." (My emphasis).

[36] It would seem therefore that the English Rules – CPR 52.9 and 52.16(6)[11] – that Senior Counsel for Treasure Bay is relying on are to be viewed and interpreted not in isolation, but within the framework of the statute law and other rules and Practice Directions governing permission to appeal in England. Once this is done, it invariably leads to the conclusion that even the English law seems to prevent Treasure Bay from making this present application which is inviting the court to review the decisions of Pereira J.A. and Baptiste J.A. as it would do for an interlocutory appeal decision, or an interlocutory order of a single judge made while an appeal is pending.

[37] The application of Treasure Bay which calls into question the decisions of the single judges, is effectively appealing the orders in circumstances which are prohibited by English law in my view, regardless of whether you refer to the Court's exercise of its jurisdiction as a reconsideration, or review, or appeal. The

[11] See paras. 20 and 21 above where these Rules are set out.

English CPR 52.9(2) and 52.16(6)(a)[12] which were canvassed and considered in Christenbury and Danone cannot validly be singled out from the rest of the applicable English law and Rules and relied on by Treasure Bay's Senior Counsel to justify review. These Rules provide no authority for saying that this Court has jurisdiction to permit a respondent to challenge the grant of unlimited permission to appeal, whether it be by way of an application to review, or discharge or to reconsider the single judge's decision giving permission.

[38] It appears to me however that CPR 52.9(2) [UK] would probably operate for a respondent only within the confines of the limited permission procedure which is dealt with by the English Practice Direction 52 paragraphs 4.18 to 4.21, or where the respondent is allowed by the court to participate for a compelling reason.[13] The decision of Pereira J.A. granting leave did not limit the issues which were to be the subject of the appeal. Neither did Pereira J.A. give directions in any Order for Treasure Bay to participate in the determination of the application for leave. In such circumstances, were a Registry Notice to be issued, it would mislead a respondent's counsel to believe that the respondent had a right to be heard and therefore it would be misguided.

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[12] CPR 52.16(6)(a) [UK] states: "At the request of a party, a hearing will be held to reconsider a decision of – (a) single judge…made without a hearing."

[13] "4.18 Where a court under rule 52.3(7) gives permission to appeal on some issues only, it will – (1)refuse permission on any remaining issues; or (2) reserve the question of permission to appeal on any remaining issues to the court hearing the appeal.

4.19 If the court reserves the question of permission under paragraph 4.18(2), the appellant must, within 14 days after service of the court's order, inform the appeal court and the respondent in writing whether he intends to pursue the reserved issues. If the appellant does intend to pursue the reserved issues, the parties must include in any time estimate for the appeal hearing, their time estimate for the reserved issues.

4.20 If the appeal court refuses permission to appeal on the remaining issues without a hearing and the applicant wishes to have that decision reconsidered at an oral hearing, the time limit in rule 52.3(5) shall apply. Any application for an extension of this time limit should be made promptly. The court hearing the appeal on the issues for which permission has been granted will not normally grant, at the appeal hearing, an application to extend the time limit in rule 52.3(5) for the remaining issues.

4.21 If the appeal court refuses permission to appeal on remaining issues at or after an oral hearing, the application for permission to appeal on those issues cannot be renewed at the appeal hearing. See section 54(4) of the Access to Justice Act 1999."

[39] I would say at this point that there is much similarity between our interpretation of our CPR 62.2 and the operation of the relevant English Rules I have reviewed, than has been previously realised.

[40] I therefore agree with the observations of George-Creque J.A. (as she then was) at paragraph 12 of her decision in Danone where she stated that 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, (and if I might add) or based on the fact that the respondent was denied the opportunity to be heard.

[41] Our practice of restricting the respondent's participation under CPR 62.2 would not qualify as being arbitrary in my view. We are seeking to promote proportionate, cost-effective and expeditious resolution of large case loads of cases in the Court of Appeal with limited resources, in keeping with the overriding objective, and mindful of the constitutional guarantees to all litigants. The purpose for denying the respondent the opportunity to participate is because at this point only interlocutory questions and procedural matters are at stake in the process for eliminating what would be unmeritorious interlocutory appeals were they allowed to go forward. Making the grant of leave to appeal final in those circumstances would not prejudice the substantive rights of the respondent. Treasure Bay will have the opportunity to canvass all of the points made concerning the merits of the appeal at the substantive hearing of the appeal.

Issue (ii) – Re Application for Stay

[42] The law previously considered at paragraphs 16 and 17 above is quite clear as to when the Court of Appeal may stay proceedings in the lower court. In the absence of a timely Notice of Appeal filed subsequent to the Order granting leave to appeal there was no appeal pending before this Court when the Order staying the judicial review proceedings was made. What was then pending before the Court of Appeal was only the application for stay incidental to CAGE's intention to appeal.

Consequently, it would seem that this Court had no jurisdiction to make that order, which would be a nullity. I would set aside this order granting stay. The judicial review proceedings are scheduled to proceed in the court below on 19th January 2012.

[43] It appears that the filing of Treasure Bay's application for review of the single judge's orders may have created intervening circumstances which possibly brought about CAGE's failure to file the Notice of Appeal within 21 days of the date that leave was granted as mandated by the amended CPR 62.5(1)(b). Learned Senior Counsel Mr. Astaphan did ask us at the hearing to give directions which would put the proceedings on track for a speedy hearing of the appeal. That can only be done where a filed Notice of Appeal exists. Both counsel should have been aware at the hearing that the Notice of Appeal was not filed. That was never addressed by either counsel.

[44] However I do not think that we can grant an extension of time as part of our order based on my speculation as to the reason for the delay when there was no application before us to do so at the hearing. In the event the judicial review proceedings come up for hearing on 19th January 2012 and there is a valid appeal pending before this Court, the learned judge undoubtedly has the discretion to consider in the interest of justice the implications for the parties were the appeal to succeed, before deciding to proceed with the hearing.

Conclusions

[45] The result of the application would be as follows:

Order

1. The application to revoke vary or discharge the Order of Pereira J.A. which granted the respondent CAGE St. Lucia Ltd. leave to appeal the Order of Wilkinson J. made on the 7th November, 2011 is dismissed.

2. The application to revoke vary or discharge the Order of Baptiste J.A. which stayed the judicial review proceedings in the lower court is granted and that Order is set aside.

3. The respondent and the applicant, each having partly succeeded in the result of the application, there be no order as to costs.

Ola Mae Edwards
Chief Justice [Ag.]

I have read the judgments of my learned colleagues and I am in full agreement with the judgment of Justice of Appeal Edwards.

Gertel Thom
Justice of Appeal [Ag]