EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2011/041-052
HCVAP 2011/054-056
HCVAP 2011/058-062

BETWEEN:

FAIRFIELD SENTRY LIMITED (In Liquidation)

Applicant/Respondent

and

[1] ALFREDO MIGANI & 22 others
[2] BANCO GENERAL SA/BANCA PRIVADA & 30 others
[3] BANK JULIUS BAER & CO LTD & 26 others
[4] BANK JULIUS BAER & CO LTD and others
[5] ARBITRAL FINANCE INC and 23 others
[6] BANK JULIUS BAER & CO LTD & 33 others
[7] WISE GLOBAL FUND LIMITED
[8] CREDIT SUISSE LONDON NOMINEES LIMITED

Respondents/Applicants

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice [Ag.]
The Hon. Mde. Louise Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. Jonathan Crowe, QC with him, Mr. Andrew Westwood for Fairfield Sentry Limited
Mr. Mark Hapgood, QC with him, Mr. Kissock Laing for the Harney Westwood & Riegels Respondents/Defendants
Mr. Paul Webster, QC with him, Ms. Nadine Whyte for the O'Neal Webster Respondents/Defendants
Mr. Robert Foote with him, Ms. Claire Goldstein for the Ogier Respondents/Defendants
Ms. Arabella di Iorio with her, Ms. Victoria Lord and Mr. Brian Lacey for Maples and Calder Respondents/Defendants

2012: October 3, 4.

Civil appeal – Conditional appeal for leave to appeal to Her Majesty in Council – Whether leave of court is a prerequisite where an appeal lies as of right – Whether court has an inherent jurisdiction to extend time for filing application for conditional leave to appeal.

Both the appellant (Sentry) and the respondents ("PI Defendants") had judgment determined by this Court in their favour on issues pertaining to the interpretation of Article 11 of Sentry's Articles of Association and whether the PI Defendants had given good consideration on surrendering their shares respectively. Thereafter, they made applications for conditional leave to appeal to Her Majesty in Council ("the application") against various parts of the judgment. They both claimed that their appeals lie as of right to the Privy Council as the matter in dispute was of the value of £500 or upwards and the decision given was a final one in civil proceedings.

The application made by the PI Defendants was made within twenty-one days which is the time limit prescribed under Article 4 of The Virgin Islands (Appeals to the Privy Council) Order 1967 ("the 1967 Order"); however Sentry's application was made outside the time limit. Sentry contended that the Court has an inherent jurisdiction within which time can be extended for the filing of the application; furthermore, that the PI Defendants' application was required to be served within the twenty-one day period and was accordingly also out of time. Sentry also argued that since the appeal is as of right, leave to appeal is not necessary.

Held: granting the PI Defendants' application for conditional leave to appeal; dismissing Sentry's application for leave to appeal; and ordering that Sentry pay one set of costs in respect of the PI Defendants on the application, that:

1. Article 4 of the 1967 Order stipulates that leave to appeal shall be made within twenty one days of the date of the decision appealed from and that the applicant shall give all other parties concerned notice of his intended application. The PI Defendants complied with this two-stage requirement. There is nothing in Article 4 which makes the validity of the application for leave to appeal dependant on the service of the application within twenty one days. Accordingly the PI Defendants' application for leave to appeal, it being an appeal as of right and timely, is valid.

   Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 followed; John Goddard v National Development Corporation St. Lucia High Court Civil Appeal No. 17 of 1988 (delivered 25th October 1990, unreported) not followed.

2. Although the appeal is an appeal as of right, leave of the Court of Appeal is still obligatory. The purpose of the application for leave to appeal is to confirm that the

appeal is 'as of right' and to impose such limited conditions as are permitted by law.

E. Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited [2010] UKPC 28 applied.

3. While the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by a rule it should be dealt with in accordance with that rule and not by exercising the court's inherent jurisdiction. In light of this, Article 4 gave specific directions regarding the time line for making an application for leave to appeal. As such the Court cannot invoke its inherent jurisdiction so as to arrogate to itself a power to extend the time as limited in Article 4. The application for leave to appeal must be dealt with in accordance with the terms and conditions of Article 4 of the 1967 Order.

ORAL JUDGMENT

[1] PEREIRA CJ [AG.]: This is the judgment of the Court. The appellants in civil appeals 41-52, 54-56 and 58-61 of 2011 and described for ease of reference in the proceedings below as the "PI Defendants", and Fairfield Sentry (by its liquidators), the appellant in civil appeal 62 of 2011, ("Sentry") have all made applications for leave to appeal to Her Majesty in Council against various parts of the decision of the Court of Appeal given on 13th June 2012. The Court of Appeal dismissed the appeals of the PI Defendants and also Sentry's appeal against the decision of Bannister J following trial of various preliminary issues which he had ordered.

[2] Three of the issues concerned the question whether certain documents were certificates within the meaning of Article 11 of Sentry's Articles of Association and are conveniently termed the "Article 11 Issue". The fourth preliminary issue concerned the question whether in surrendering shares in Sentry the PI Defendants had given good consideration for payment of redemption monies and is conveniently termed the "Good Consideration Issue". The Article 11 Issue was determined both in the court below and by this Court in favour of Sentry and the Good Consideration Issue was determined both in the court below and in this Court in favour of the PI Defendants.

The Applications – whether the appeals are as of right.

[3] It is common ground that the applications of the PI Defendants and Sentry would satisfy the criteria contained in Article 3(1)(a) of The Virgin Islands (Appeals to the Privy Council) Order 1967 ("the 1967 Order") which states, in effect, that an appeal lies as of right from a decision of the Court of Appeal to Her Majesty in Council where:

(a) the matter in dispute is of the value of £500 or upwards; and

(b) the decision is a final one in civil proceedings.

The applicants all agree (rightly) that the value of the matter in dispute is considerably in excess of £500 and that the decisions on the preliminary issues finally determined those issues between the parties. Here, we rely and adopt the dictum of Sir John Donaldson MR in White v Brunton[1] and applied by the Privy Council in Stratmore Group Ltd. v A.M. Fraser and Others[2] and cited with approval in Othniel R. Sylvester v Satrohan Singh[3] where he stated as follows:

> "Where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing."

The Timeliness of the Applications

[4] Article 4 of the 1967 Order say that:

> "Applications to the Court [meaning the 'Court of Appeal' by definition in the 1967 Order] for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision appealed from, and the applicant shall give all other parties concerned notice of his intended application."

It is accepted that the PI Defendants have made their application within the 21 day time line set out in Article 4. Sentry, admittedly, has not. In fact Sentry's application was filed on 9th August 2102, some 36 days out of time.

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[1] [1984] QB 570, p. 573.

[2] [1992] 2 AC 172.

[3] St. Vincent and the Grenadines High Court Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported).

[5] Sentry takes the point that the PI Defendants are not timely as, notwithstanding that their applications were timeously filed, they were not served within the 21 day period, which Sentry argues, was also required under Article 4 of the 1967 Order. Sentry relies on John Goddard v National Development Corporation,[4] a decision of the Court of Appeal, in which the Court of Appeal construed the similar provision and concluded that the 21 day period applied to both the making of the application and the serving of the application on the parties.

[6] Whilst it is accepted that Article 4 requires both the filing and the service of the application, we are not persuaded that Article 4, on a proper reading of it, requires that the application must also be served within the 21 day period in order, so to speak, for the application to be a valid application. Article 4 in our view makes clear that the motion or petition must be made (filed) within 21 days, but does not in turn say that it must be served within 21 days. It says nothing of the sort and were that the intent (which there are good reasons to doubt – not the least of which may involve practical difficulties of service on all the parties) then this could easily have been stated by saying 'made and served on the parties concerned, within 21 days.' In Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited[5] the Privy Council opined, in effect, in relation to rule 9.7 of the Civil Procedure Rules 2000 which required that an application under that rule was to be made within the time limited for filing a defence and which further required that it must be supported by evidence on affidavit, that, "Nor is there is anything in ECR CPR 9.7 or Part 11 which makes the validity of an application dependant on service or filing of evidence in support at the time the application is filed or served". We adopt this approach, as we consider that the situation here, as it relates to service, is analogous. In our view, the decision in John Goddard must be treated as having been decided *per incuriam.*

[4] St. Lucia High Court Civil Appeal No. 17 of 1988 (delivered 25th October 1990, unreported).
[5] [2009] UKPC 46, para. 78.

[7] As it relates to the PI Defendants then, the applications for leave to appeal to Her Majesty in Council, being timely, and having satisfied the criteria, are granted subject to the usual conditions which are contained at the end of this decision.

Whether leave of the Court of Appeal is a prerequisite where an appeal lies as of right

[8] Sentry argues and seeks a declaration to the effect that it does not require the leave of this Court where its appeal is as of right. It says that Article 3(1)(a) imposes no such requirement and, in essence, none should be read in. However, prior to the advent of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 ("the 2009 Rules") there was no doubt that even where an appeal was 'as of right' to Her Majesty in Council, it was required that leave be first sought and obtained from the Court of Appeal. There was some doubt as to this requirement after the 2009 Rules came into effect particularly having regard to the fact that the 2009 Rules revoked the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982. But Lord Mance in E. Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited[6] makes it clear, (whether the point may be said to have been conceded in that appeal, or that the Privy Council was there referring to the long established practice – traced back to the 19th Century), that where an appeal lies "as of right' it is still necessary for leave to be obtained from the court appealed from even though the granting of leave in such cases is not discretionary; that the purpose of the application for leave to appeal is to confirm that the appeal is 'as of right' and to impose such limited conditions as are permitted by law. These conditions are contained in Article 5 of the 1967 Order.

[9] We accordingly, hold that notwithstanding that Sentry's appeal lies as of right, Sentry is still required to obtain the leave of this Court, within the time permitted under Article 4 of the 1967 Order and would refuse the declaration sought.

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[6] [2010] UKPC 28.

Power to extend the 21 day time limit

[10] Sentry says that this Court may extend the 21 day period given in Article 4 of the 1967 Order and in essence cure its delay, by invoking the Court's overriding objective to do justice between the parties by use of the Court's inherent jurisdiction. They also rely on a footnote in Alfa Telecom Turkey Limited v Cukurova Finance International Limited et al[7] where Edwards JA indicated that Article 4 appeared to now be modified by Rule 11(2) of the 2009 Rules which specifies 56 days. But this cannot be the case, as Article 4, speaks to applications to this Court whereas Rule 11(2) of the 2009 Rules speaks to applications to the Judicial Committee of the Privy Council ("JCPC"). She could only be taken to have been referring to the fact that although applications to this Court must be made within 21 days, nonetheless, where application is made to the JCPC the longer time limit applies. Accordingly, this does not assist Sentry.

[11] As to the resort to the inherent jurisdiction, whereas there is no doubt that the Court retains an inherent jurisdiction as was said in the cases of Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al[8] and Trade and Commerce Bank (Through Richard Fogerty, Its Joint Official Liquidator) v Island Point Properties S.A. et al,[9] by this Court, it remains the case that the inherent jurisdiction of the Court cannot be prayed in aid to flout a clear provision. In Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited[10] the Privy Council had this to say:

> "… the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: Raja v Van Hoogstraten (No 9) [2008] EWCA Civ 1444, [2009] 1 WLR 1143. That decision concerned the court's power

[7] Territory of the Virgin Islands High Court Civil Appeal Nos. 18 and 24 of 2010 (delivered 20th July 2011, unreported).
[8] Territory of the Virgin Islands High Court Civil Appeal No. 2 of 2009 (delivered 28th September 2009, unreported).
[9] Territory of the Virgin Islands High Court Civil Appeal No. 12 of 2009 (delivered 13th August 2010, unreported).
[10] [2009] UKPC 46, para. 57.

> under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae*. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction."

We adopt this approach. Article 4 is clear. It lays down a time line of 21 days for the making of an application and gives no power to this Court to extend that time, and we do not consider that it would be correct to invoke the inherent jurisdiction of this Court so as to arrogate to itself a power to extend the time as limited in Article 4, where neither in Article 4 nor in any other provision contained in the 1967 Order is such a power (save where specifically permitted) given, and thereby engage a procedure to arrive at a different outcome to that contemplated by Article 4. This power appears to be reserved to the JCPC under the 2009 Rules. This Court has no power to extend the time under Article 4 of the 1967 Order.

[12] Accordingly, we are constrained to conclude that Sentry's application, having been made out of time, must be dismissed, and we so order. Sentry shall bear the costs of the PI Defendants on its application, (limited to one set of costs in respect of all). Having so concluded, there is no need to delve into the question of extension of time considerations.

[13] The Court makes the following orders:

1. That Sentry's application for leave to appeal to Her Majesty in Council is hereby dismissed. Sentry shall bear one set of costs in respect of the PI Defendants on the application. Costs to be assessed unless agreed within fourteen days.

It is also ordered that:

2. The applications of the appellants in civil appeals 41-52, 54-56 and 58-61 of 2011 (PI Defendants) for conditional leave to appeal to Her Majesty in

Council are hereby granted and that the appeals be consolidated. Leave is hereby granted by way of a single order, on the following conditions:

(a) The appellants do collectively pay into Court the sum equivalent to £500 sterling pursuant to section 5(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (Statutory Instruments 1967 No. 224) such payment to be made within 90 days from today's date for the due prosecution of the appeals and the payment of all such costs as may become payable by the appellants in the event of their not obtaining an order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the appellants to pay the costs of the appeal (as the case may be).

(b) The appellants shall apply to this Court within thirty (30) days of receipt of the Certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed to the satisfaction of the Registrar and that the appellants have otherwise complied with this Order, for an order for final leave to appeal to Her Majesty in Council.

(c) The appellants shall prepare the record of appeal and shall transmit the same to the Registrar of the Supreme Court of the Virgin Islands within sixty (60) days of the determination by Her Majesty in Council of Sentry's application to Her Majesty in Council for special eave to appeal, or of Sentry abandoning its application (whichever happens later) upon final leave to appeal being granted and shall include a copy of the orders granting conditional leave and final leave.

3. The costs in the applications shall be costs in the appeals to Her Majesty in Council