EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2012/029

On appeal from the Commercial Division

BETWEEN:

CUKUROVA HOLDING A.S.

Appellant/Respondent

and

SONERA HOLDING B.V.

Respondent/Applicant

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal

On Written Submissions:

Mr. Bankim Thanki, QC, Mr. John Carrington and Mr. Ben Valentin for the Applicant
Ms. Arabella di Iorio for the Respondent

2012: December 5.

Application to strike out notice of appeal on basis that leave to appeal not first sought – Leave to appeal – Whether required – Application test – Section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act – Whether order being appealed interlocutory or final – Enforcement of arbitral award

The appellant, Cukurova Holding A.S. ("Cukurova"), filed a notice of appeal against a judgment of the learned judge in which he refused to set aside an order which, *inter alia*, granted the respondent, Sonera Holding B.V. ("Sonera"), permission to enforce an ICC arbitration award made by an arbitration tribunal sitting in Geneva. Cukurova did not apply for leave to appeal before filing the notice of appeal. Sonera subsequently applied to the Court for orders that the appellant's notice of appeal be struck out on the basis that the judgment which the appellant sought to challenge was an interlocutory judgment which

required leave to appeal by virtue of section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act, and leave of the Court was not sought by the appellant prior to filing the notice of appeal. Cukurova opposed the application to strike out the appeal, contending that the judgment being appealed was a final judgment which did not require leave.

Held: dismissing the respondent's application with costs, and ordering that the parties file and serve skeleton arguments with respect to costs within 21 days of this order, that:

1. The appellant's application to set aside the order which granted the respondent permission to enforce the ICC arbitration award raised a number of issues about the enforceability of the award, which issues were properly dealt with at a trial involving expert evidence and cross-examination of witnesses. This trial disposed of the issues and settled the matters in litigation between the parties. Moreover, the issues would have been disposed of regardless of the conclusion that the learned judge had reached. Therefore, the judgment which dismissed the appellant's application to set aside the recognition and enforcement of the foreign arbitral award was a final judgment and no leave was required to appeal it.

   Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 applied; Consolidated Contractors International Co SAL v Masri 74 WIR 235 applied; Pirate Cove Resorts Limited et al v Euphemia Stephens et al Saint Vincent and the Grenadines High Court Civil Appeal No. 11 of 2002 (delivered 5th March 2003, unreported) distinguished.

DECISION

[1] BAPTISTE JA: Cukurova Holding A.S. ("Cukurova") filed a notice of appeal against the judgment of Bannister J [Ag.] dismissing its application to set aside an order dated 24th October 2011 granting Sonera Holding B.V. ("Sonera") permission to enter judgment in the same terms and to enforce an ICC arbitration award made by an arbitration tribunal sitting in Geneva and ordering Cukurova to pay over US$71 billion.

[2] By notice of application filed on 12th October 2012, Sonera applied to the Court for orders that the notice of appeal filed by Cukurova be struck out and that Cukurova

pays costs of the application and the appeal. The grounds of the application are that:

(1) The judgment dated 19th September 2012 which Cukurova seeks to challenge is an interlocutory judgment which requires leave to appeal by virtue of section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act.[1]

(2) Cukurova has not sought leave from the Court.

(3) The appeal is therefore a nullity and should be struck out.

Cukurova opposes the application to strike out the appeal contending that the judgment is a final judgment which does not require leave.

Applicable principles and submissions

[3] Section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act provides that:

> "No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or any interlocutory judgment made or given by a judge except in the following cases–
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> (i) where the liberty of the subject or the custody of infants is concerned;
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> (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;
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> (iv) in such other cases, to be prescribed by rules of court, as may in the opinion of the authority having power to make such rules of court be of the nature of final decisions."

[4] I agree with Cukurova's submission that the meaning of section 30(4) is clear and the parties are agreed as to its effect. While a party who intends to appeal from a

[1] Cap. 80, Revised Laws of the Virgin Islands 1991.

final order or from an interlocutory order which falls within the exceptions set out in section 30(4) does not require leave to appeal, a party who intends to appeal from all other interlocutory orders or judgments must first seek leave to appeal. The failure to seek leave will result in the striking out of the appeal as a nullity: see, for example, TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company et al[2]; Oliver McDonna v Benjamin Wilson Richardson.[3]

[5] It is also beyond contention that the applicable test in determining whether an order is interlocutory or final is the application test. Thus in Oliver McDonna v Benjamin Wilson Richardson, Barrow JA said at paragraphs 19:

> "The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order but is an interlocutory order."

In TSJ Engineering Consulting Ltd v Al-Rushaid Petroleum Investment Company, Rawlins CJ said, at paragraph 8:

> "A determination whether an order is final or interlocutory is made by our courts on the "application test". An order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application is decided. If the issues of liability on the claim are finally determined whether the outcome on an application is in favour of either party to the claim, the order would be final. The order would however be interlocutory, for example, if a ruling on the application in favour of the claimant would determine the issues of liability in favour of the claimant whereas a ruling in favour of the defendant would re-open the issue of liability for continued litigation. In determining whether an order is final or interlocutory, the court should consider the nature of the application and order and the circumstances that gave rise to them."

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[2] Territory of the Virgin Islands High Court Civil Appeal No. 13 of 2010 (delivered 27th July 2010, unreported), at [8] and [11].

[3] Anguilla High Court Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported), per Barrow JA, at [27]-[28].

In Nigel Hamilton-Smith et al v Alexander M. Fundora,[4] Edwards JA said, at paragraph 11:

> "… it is well established in a plethora of decisions that our courts apply the "application test" to determine whether or not the order or decision is interlocutory. The observations of Vaughan Williams LJ in Herbert Reeves reflect our preferred approach. The "application test" looks at the outcomes that were possible on the application. The test is whether a decision on the application had it been decided in favour of the appellant or the respondent would have brought an end to the proceedings.[8] [*Barrow JA in Oliver McDonna v Benjamin Richardson Civ App No. 3 of 2005 (Anguilla)*] A final order must generally be one which ends the litigation and leaves nothing for the court to do but execute the judgment."

[6] Sonera contends that Cukurova's appeal is an interlocutory appeal and in the absence of leave to appeal it should be struck out as a nullity. The basis for this contention is the proposition, described as being "well established", that an order setting aside or refusing to set aside another judgment or order is an interlocutory order. Sonera's argument appears to be based on a passage in the judgment of Byron CJ in Pirate Cove Resorts Limited et al v Euphemia Stephens et al,[5] citing a section of the 1998 edition of the English White Book which indicated that, for the purposes of the rules as they then were in England in 1998, an order setting aside or refusing to set aside another judgment or order was deemed to be an interlocutory order.

[7] Sonera argues that Cukurova's application in the present case sought an order setting aside the judgment enforcing the an arbitration award (the "Final Award"). The application was brought within Sonera's claim (Claim No. BVIHC (Com) 119/2011). On a straightforward application of the principle set out in the Pirate Cove case, an order refusing to set aside another judgment, whether that other judgment is final or interlocutory, is an interlocutory order.

[8] With respect to Pirate Cove, however, Cukurova submits that despite making the observation relied upon by Sonera, Byron CJ expressly stated that it was the

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[4] Antigua and Barbuda High Court Civil Appeal No. 31 of 2010 (delivered 31st August 2010, unreported).
[5] Saint Vincent and the Grenadines High Court Civil Appeal No. 11 of 2002 (delivered 5th March 2003, unreported).

application test that governed the issue.[6] Further, the Court did not have to decide whether the application test as commonly understood or the approach set out in the 1998 English White Book should be applied, holding that the Order in the case would have been interlocutory "whatever test is used"[7].

The nature of the Set-Aside Application

[9] In any event, Cukurova submits, whatever test is applied, it is plain that the judgment is a final judgment. The "Set-Aside Application" was an application to set aside an order that permitted Sonera to enforce the Final Award. That order was made ex-parte. It did not determine any issues between the parties. It simply entitled Sonera to enforce its award, subject to Cukurova's right to apply under the Arbitration Act 1976 to have the initial order set aside. It is only upon such an application that issues between the parties as to enforceability can be raised, considered and determined.

[9] The nature of such applications was considered by the UK Supreme Court in Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan.[8] In that case, the Supreme Court considered the nature of the exercise that an enforcing court must undertake when presented with a challenge to the enforceability of a particular award (in the context of an argument that a particular tribunal had exceeded its jurisdiction). As per Lord Mance:

> "24. … . Arbitration of the kind with which this appeal is concerned is consensual – the manifestation of parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them. Of course, it is *possible* for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability – that is a question arising as to

[6] See para. 10 of the judgment.
[7] See para. 11 of the judgment.
[8] [2010] UKSC 46.

> whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such an agreement is not simply rare, it involves specific agreement … and, absent any agreement to submit the question of arbitrability itself to arbitration, 'the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently'"… .
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> …
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> 26. An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction …"

Cukurova submits that at the enforcement stage, if a party raises issues as to the enforceability of an arbitration award, an enforcing Court determines those issues like any other, i.e. independently and on evidence.

[10] In this case, Cukurova raised a number of issues as to the enforceability of the Final Award. These were the subject of the Set-Aside Application. It was common ground that the Court was required to determine those issues independently and upon evidence in accordance with the principles set out in Dallah. It did so. There was a trial of the relevant issues, involving expert evidence and cross-examination. That trial resulted in the judgment, which disposed of the issues. The judgment settled the matters in litigation between the parties and it would have done so whichever conclusion Bannister J had reached.

[11] I agree with Cukurova's contention that there is no parallel in this case to the situation that faced the Court in Pirate Cove. In Pirate Cove, the Court was dealing with an appeal concerning an order that related to the precise manner of enforcement of a judgment that had been entered by consent.[9] In that context, the

[9] See paras. 2-5 of the judgment.

conclusion that the relevant order would have been interlocutory "whatever test is used" is readily understandable. But the same logic cannot apply in the instant case because, as set out above, (1) it was only the Set-Aside Application that raised the substantive issues between the parties as to the enforceability of the Final Award, (2) the Court determined those issues in the same way that it would have determined any other substantive issues (i.e. via a trial), and (3) the Court's decision would have determined the issues whichever way it had gone.

[12] Cukurova relies on Consolidated Contractors International Co SAL v Masri[10] in support of its position and argues that it provides a far better parallel than Pirate Cove, to the case at bar. I agree. In Consolidated Contractors, the appellant sought to challenge an order of the judge dismissing an application to set aside the registration in Bermuda of various monetary judgments in favour of the respondent. The issue for the court was whether the judge's order was interlocutory, from which an appeal lay only with leave of the court, or final, where appeal was of right.

[13] The Court of Appeal in Bermuda held that:

> "… the appellant's application to set aside registration of the English judgments, had been one proceeding, which had been bound to end in finality, in whatever manner the judge had decided to conduct it. If he had decided to direct a full trial of that issue, whether as a preliminary or discrete issue, by himself or by another judge, the outcome of determination of that issue would necessarily have amounted to a final order in the application. … Accordingly, the judge's dismissal of the appellant's application to set aside the registration of the English judgments in the respondent's favour had been a final order, and thus the appellant did not require permission to appeal to the Court of Appeal … ."

[14] The parallel with the instant case is clear: just as an order dismissing an application to set aside the registration of a foreign judgment is a final order, the judgment (which dismissed Cukurova's application to set aside the recognition and enforcement of a foreign arbitral award) is a final judgment and does not require leave to appeal.

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[10] 74 WIR 235.

Disposition and order

[15] For all the above reasons Sonera's application is dismissed with costs. It is ordered that the application by the Respondent/Applicant (Sonera) by Notice of Application dated 12th October 2012 for an order that Cukurova's appeal be struck out is dismissed with costs. The parties are to file and serve skeleton arguments with respect to costs within 21 days of this order.

Davidson Kelvin Baptiste
Justice of Appeal