THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0003

BETWEEN:

[1] MARINOR ENTERPRISES LIMITED
[2] MICHAEL ASTAPHAN

Applicants

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD.
formerly known as Barclays Bank Plc

Respondent

BEFORE:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Hugh Marshall with Ms. Noelize Knight Didier for the Applicants
Mr. Alick Lawrence, SC with Ms. Rose-Anne Charles for the Respondent

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2016: July 4;
July 6.

Leave to appeal – Application for leave to appeal to Caribbean Court of Justice interlocutory judgment of Court of Appeal refusing permission to amend grounds of appeal – s. 106(2)(a) of Constitution of Commonwealth of Dominica – Whether application of s. 32(3) of Eastern Caribbean Supreme Court (Dominica) Act raises question of 'great general or public importance'

Held: refusing the application for leave to appeal to the Caribbean Court of Justice and ordering that the applicants bear the costs of the application to be assessed by a master unless agreed within twenty-one days, that:

The application of section 32(3) of the Eastern Caribbean Supreme Court (Dominica) Act[1] does not require clarification and does not pose any important question of law or a legal question, the resolution of which poses dire consequences for the public. The language of the section is clear – it means what it says and should be applied as intended. Accordingly,

[1] Chap. 4:02, Revised Laws of Dominica 1990.

the test for the grant of leave to appeal to the Caribbean Court of Justice under section 106(2)(a) of the Constitution of the Commonwealth of Dominica is not satisfied.

Dipcon Engineering Services Limited v Gregory Bowen, The Attorney General of Grenada [2004] UKPC 18 followed.

ORAL JUDGMENT

[1] PEREIRA, CJ: This is the judgment of the Court. The applicants seek leave to appeal to the Caribbean Court of Justice the judgment of the Court of Appeal delivered on 4th April 2016, in respect of an interlocutory application made to the Court belatedly, to amend their grounds of appeal contained in a notice of appeal filed in respect of a judgment delivered after trial in a mortgage claim brought by the respondent ("FCIB"). The substantive appeal is still pending. A detailed background summary of the mortgage claim leading to the substantive appeal and the application to amend the grounds of appeal can be found in the judgment of the Court rendered on 4th April 2016 and need not be recited for present purposes.

[2] Of relevance to the present application is the fact that the applicants had sought on two occasions, prior to the trial of the mortgage claim, to amend their defence and counterclaim. On both occasions, their application to amend was refused. The applicants did not appeal either of the refusals. The applicants, however, sought to amend their notice of appeal in the substantive claim to, in essence, challenge the prior orders refusing permission to amend their defence and counterclaim. This course, the applicants say, is open to them by virtue of the power of the court contained in section 32(3) of the Eastern Caribbean Supreme Court (Dominica) Act[2] ("the Act"). Section 32(3) of the Act is in these terms: 'The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal'. The applicants rely

[2] Chap. 4:02, Revised Laws of Dominica 1990.

heavily on a statement made by the Court in the case of Attorney General of Grenada v David and Others[3] where Gordon JA, stated:

> "[4] Unfortunately, learned counsel did not did not address himself to s 35(3) of the Eastern Caribbean Supreme Court Act, Cap 336 which reads as follows: [the equivalent of section 32(3) of the Act].
>
> "[5] It seems to me that the effect of sub-s (3) is to permit the Court of Appeal to re-examine any interlocutory order given earlier in the appeal before the court whether the same has been appealed against or not and, in the particular circumstance, permits this court to re-examine the order of the single judge."

[3] As Mr. Lawrence, SC, on behalf of FCIB, pointed out, the David decision must be viewed in the context of its own peculiar facts and is distinguishable. Gordon JA was making this statement in reference to a decision given by a single judge of the Court of Appeal who had dismissed an application for leave to appeal on the basis that if the decision from which leave to appeal was sought was other than a final decision, then there was no jurisdiction in the Court to hear the matter and that if it was final then no leave to appeal was required. The provision was raised by the Court itself, and importantly the Court was there faced with an issue as to jurisdiction.

[4] In the present case, on the application to amend the grounds of appeal, the Court held that the wording of section 32(3) is clear; that this subsection does not confer any power on the Court separate and apart from the powers conferred by section 32(1);[4] and more to the point, does not provide any freestanding basis for amending a notice of appeal; that subsection (3) merely ensures that the Court, in exercising

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[3] (2008) 72 WIR 155. It is useful to point out that the Full Court would not have been sitting 'on appeal' from a single judge of the Court of Appeal, but the Full Court would have had jurisdiction to review an interlocutory order made by a single judge.

[4] s. 32(1) of the Act states as follows:

32. (1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to –

(a) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;

(b) draw inferences of fact;

(c) direct the High Court to enquire into and certify its findings on any question which the Court of Appeal thinks fit to be determined before final judgment in the appeal.

the plenitude of powers granted under section 32(1), is not restricted in any order it considers making, by virtue of any interlocutory orders made therein. The application to amend the notice of appeal was refused on this basis and others not germane to this present application.

[5] It is common ground that the decision of the Court refusing the application to amend the notice of appeal is an interlocutory order and thus must satisfy the requirement of section 106(2)(a) of the Constitution of the Commonwealth of Dominica[5] ("the Constitution") which is in these terms:

> "(2) An appeal shall lie from decisions of the Court of Appeal to the Caribbean Court of Justice with the leave of the Court of Appeal -
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> (a) in respect of decisions in any civil proceedings where in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Caribbean Court of Justice …"

[6] As to what may constitute a question of 'great general or public importance' has been the subject of much judicial authority across the region. Reference need be made only to Martinus Francois v The Attorney General,[6] a decision of the Eastern Caribbean Court of Appeal, for the authoritative pronouncement on the approach to be adopted by the Court in construing the phrase 'great general or public importance'. There it was stated that:

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

[5] As amended by s. 8 of the Constitution of Dominica (Amendment) Act, 2014 (Act No. 4 of 2014, Laws of Commonwealth of the Commonwealth of Dominica).
[6] SLUHCVAP2003/0037 (delivered 7th June 2004, unreported).

This pronouncement has stood the test of time and has informed the approach of the Court in many subsequent decisions in construing this phrase.[7]

[7] The Jamaica Court of Appeal in respect of a similar phrase in its laws, and predating this Court's decision in Martinus Francois, in Dr. Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams[8] held that the principle which guides the court in deciding whether to grant leave is that it is not enough that a difficult question of law arose, it must be an important question of law; further, the question must be one not merely affecting the rights of the particular litigants, but a decision which would guide and bind others in their commercial and domestic relations.

[8] The applicants say that the question of how section 32(3) of the Act is to be applied (accepting that the language used therein is clear) raises a question of great general or public importance which warrants being referred to the Caribbean Court of Justice for guidance and clarification presumably, as to the scope of its application. Counsel buttresses this by submitting that the court itself, in reserving its decision following the hearing of the application to amend, 'concluded that this matter is of importance to the administration of justice in the region'. The digest of the Court's proceedings, however, records the Court as stating that 'the arguments put before it required proper consideration and a reasoned decision'.

[9] With the utmost respect to counsel Mr. Marshall, having regard to his skillful arguments, the Court is not persuaded that the question raised as to the application of section 32(3) involves any question or issue of great general or public importance in the sense as described in Martinus Francois and subsequent decisions construing the phrase 'great general or public importance'. The provision, in our view, is a procedural one and certainly does not pose a difficult question of law, far

[7] See: Daryl Sands Controller of Bank Crozier Limited v Garvey Louison Liquidator of Bank Crozier Limited (In Liquidation) et al GDAHCVAP2007/0001 (delivered 16th September 2008, unreported); Pacific Wire & Cable Company Limited v Texan Management Limited et al BVIHCVAP 2006/0019 (delivered 6th October 2008, unreported); Pentium (BVI) Limited et al v The Bank of Bermuda BVIHCVAP2003/0014 (delivered 12th January 2005, unreported).
[8] (1992) 29 JLR 79.

less an important question of law. It does not involve an area of law in dispute or an area of law which is unsettled. Indeed, during the hearing of this application the Court drew to the parties' attention the decision of the Privy Council in Dipcon Engineering Services Limited v Gregory Bowen, The Attorney General of Grenada,[9] an appeal arising from a decision of the Court of Appeal in Grenada, and allowed the parties an opportunity to review the decision. Briefly, what happened there and in the context of this application was that the Government of Grenada, having failed in an application to set aside a default judgment, did not pursue an appeal against that refusal. Later, following the assessment of damages the Government then appealed against the assessment. In that notice of appeal, the Government also complained in respect of the judge's earlier refusal to set aside the default judgment. The Court of Appeal was persuaded by the arguments put forward by Mr. Henriques, QC on behalf of the Government that an assessment of damages could be challenged on the ground that the default judgment was improperly obtained. He argued that on an appeal to the Court of Appeal it was open to the appellant on such an appeal to call into question any previous interlocutory ruling or order which he wishes to dispute; that it was unnecessary at that stage to bring a specific appeal against the interlocutory ruling refusing to set aside the default judgment. On appeal to the Privy Council the Board roundly rejected this argument and held that on an appeal against an assessment of damages a previous refusal to set aside the default judgment cannot be challenged without that refusal itself being appealed.

[10] Notwithstanding that in Dipcon no specific provision of the Grenada Supreme Court Act was mentioned, it is clear that what the Government sought to do and persuaded the Court of Appeal to do, is precisely what the applicants seek to do by praying in aid subsection 32(3) of the Act. It matters not that Dipcon dealt with the circumstance of a refusal to set aside a default judgment, as distinct from the circumstance here where the applicants sought to amend their grounds of appeal against the substantive judgment to challenge the orders of refusals of the

[9] [2004] UKPC 18.

amendments of their defence and counterclaim. The principle is the same. It is one thing for the Court of Appeal on the consideration of an appeal to not be constrained by a previous interlocutory order in fashioning an order which is best suited to the justice of the case. It is quite another thing for a party to disregard the procedure for appealing an interlocutory order and seek by a side wind to utilise the powers given to the Court for redressing that failure.

[11] Accordingly, we are of the view that the application of section 32(3) is not in any way unsettled nor does it require clarification. It simply does not pose any important question of law or a legal question the resolution of which poses dire consequences for the public. The language is clear and in our view means what it says and should be applied as intended.

[12] Further, the manner in which subsection 32(3) falls to be applied may be illustrated by a simple example: A issues a claim against B. In B's absence A applies for and obtains summary judgment against B. B upon finding out applies to set aside the summary judgment citing lack of opportunity to be heard. B's set aside application is refused. B then appeals to the Court of Appeal against the refusal to set aside. There can be no doubt that the Court of Appeal in those circumstances would be entitled to examine the circumstances leading to the interlocutory summary judgment order although there was no appeal from that order, in considering the appropriate order to make in respect of the appeal against the order of refusal to set it aside the interlocutory summary judgment order.

[13] For the above reasons this Court holds that the applicants have not satisfied the test under section 106(2)(a) of the Constitution for the grant of leave to appeal this Court's interlocutory judgment refusing the applicants permission to amend their notice of appeal in reliance on section 32(3) of the Act. The application for leave to appeal to the Caribbean Court of Justice is accordingly denied.

[14] The applicants shall bear the costs of this application to be assessed by a master unless agreed within twenty-one days.