EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0005

BVIHCMAP2018/0008

BETWEEN:

[1] RENAISSANCE VENTURES LTD
[2] JOSEPH KATZ

Appellants/Respondents

and

COMODO HOLDINGS LTD.

Respondent/Applicant

Before:

The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Rolston Nelson, SC	Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC with him, Ms. Lauren Peaty and Dr Alecia Johns
for the Appellants/Respondents
Mr. Vernon Flynn, QC with him, Mr. Adrian Francis and Mr. Carl Moran
for the Respondent/Applicant

2018: October 8.

Civil appeal — Application for conditional leave to appeal to the Judicial Committee of the Privy Council — Whether questions involved in proposed appeal are of great general or public importance — Whether notice should be given to a respondent to a permission to appeal application

Renaissance Ventures Ltd. and Joseph Katz applied in the court below for specific disclosure of the unredacted list of Comodo Holdings Ltd.'s shareholders and certain financial records. The learned judge refused the application. The appellants then applied to this Court for leave to appeal against the learned judge's order without notice to the

respondent. Before the hearing of that application, the appellants applied to the learned judge for leave to appeal, without notice to the respondent. The learned judge denied the application. The first application for leave to appeal was heard ex parte and granted by the Full Court on 2nd March 2018.

The trial of the claim in respect of which specific disclosure was requested had been previously listed for 13th March 2018. On 6th March 2018, the appellants applied to the learned judge for an adjournment of the trial on the ground that leave to appeal had been granted and if successful on the appeal, the appellants intended to rely on any documents disclosed by the respondent. The learned judge adjourned the trial on the condition that the appellants pay the costs thrown away by the adjournment. The appellants were granted leave to appeal the costs order and both appeals were heard by the Full Court on 11th July 2018.

On the appeal, the respondent invited the Court to set aside the leave granted ex parte on the ground that the respondent was not notified of the application for leave. Had the respondent been given the opportunity to participate, it would have been in a position to impress upon the Court that the effect of granting leave would be to precipitate an adjournment of the trial, in circumstances where a freezing order against the respondent's assets had previously been granted and the adjournment would prolong the period during which the respondent's assets would remain frozen. The respondent complained further that the appellants did not disclose the existence of the freezing order to the Court and leave should be set aside on that basis as well.

The Court declined the respondent's invitation to depart from the Court's established practice as exemplified by the Court's decision in Cage St. Lucia Limited v Treasure Bay (Saint Lucia) Limited that an application for leave to appeal is heard ex parte and without notice to the proposed respondent. The Court also found that although the existence of the freezing order was not disclosed at the hearing of the substantive appeal, it was not material and provided no basis to set aside leave.

The Court allowed the appeal holding that the documents requested were directly relevant to the issues in the claim.

Comodo Holdings Ltd. then applied for conditional leave to appeal to the Privy Council on the ground that questions involved in the appeal ought, by reason of their great general or public importance or otherwise, to be submitted to Her Majesty in Council.

The questions which the respondent claimed were involved in the appeal and which were said to be of great general or public importance were: (i) whether notice should be given to a respondent to a permission to appeal application in order to allow the respondent to address issues which go to the threshold question of whether permission should be granted; (ii) whether the test of materiality on an ex parte application for permission to appeal is the same as for a freezing order and if different, what is the test; (iii) whether and in what circumstances a party should be deprived of an order for permission to appeal obtained ex parte in breach of the obligations of full and frank disclosure; (iv) whether reference to a document in evidence or a pleading: (a) has the consequence, without

more, that it has to be disclosed in un-redacted form; (b) where only part of that document is relevant and other parts are both irrelevant and confidential and sensitive to third parties — has the consequence that the document has to be disclosed in un-redacted form; and (c) in order to explain that it does not exist or is in the possession or control of another has the consequences that it should be disclosed; (vii) is the Lonrho test applicable in the Territory of the Virgin Islands and, if not, what test is applicable in relation to the disclosure of subsidiaries' documents; (viii) whether the Court of Appeal ought to have held that the decision of the learned judge below fell within the generous ambit afforded to him and whether or not the documents would otherwise satisfy the test for specific disclosure; and (ix) whether, in exercising a fresh discretion, the Court ought to have taken into account factors which went beyond the narrow issue of whether the documents satisfied the test for specific disclosure.

Held: dismissing the application; awarding costs of the application to the appellants to be assessed, if not agreed within 28 days; ordering that an interim payment of US$50,000.00 be made towards those costs on or before the expiry of 28 days; and ordering that the stay granted by this Court in paragraph 2 of its order dated 25th July 2018 be continued until 12th November 2018, that:

1. Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by the Court of Appeal but is either unsettled, in the sense that there are differing views, or conflicting dicta, or some genuine uncertainty surrounding the principle itself, or is considered to be far-reaching in its effect, or given to harsh consequences, or for some other reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of the Board. Where the real question on the proposed appeal is the way this Court has applied settled and clear law to the facts of the case or whether a judicial discretion was properly exercised, leave will ordinarily not be granted. However, where an applicant fails to establish that the question which he wishes to pursue is of great general or public importance, this Court may yet grant leave if satisfied that there are good grounds which would otherwise justify referral to the Board. Further, the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt. Where the question said to arise was "eminently procedural" in nature, it would be appropriate to grant leave where the interpretation or application advanced by the local courts has a draconian effect or there are some other special circumstances that would render such guidance useful to the local courts. Leave would be more readily granted where the procedural rule has an equivalent in England.
   Section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 SI 1967/234 applied; Martinus Francois v The Attorney General

SLUHCVAP2003/0037 (delivered 7th June 2004, unreported) followed; Pacific Wire & Cable Company Ltd. v Texan Management Ltd. BVIHCVAP2006/0019 (delivered 15th October 2007, unreported) followed.

2. Rule 62.2(4) of the Civil Procedure Rules 2000 ("CPR") is clear. If a single judge may give leave to appeal without hearing the applicant, it is implicit that he may do so without hearing the proposed respondent either. The fact that the draftsman disposed of the need to hear the applicant is a clear indication that it is only the applicant who is engaged in the process at that time and the proposed respondent is not yet involved, by notice or otherwise. It is therefore clear that CPR 62.2 by necessary implication excludes the audi alteram partem rule. Further there is nothing in context which suggests that CPR 11.8, which requires notice of all applications for court orders to be given to each respondent, is intended to deal with applications to the Court of Appeal.

   Rules 62.2 and 11.8 of the Civil Procedure Rules 2000 applied; Cage (St. Lucia) Limited v Treasure Bay (St. Lucia) Limited SLUHCVAP2011/0045 (delivered 23rd January 2012, unreported) followed.

3. This Court's long-standing practice enunciated in Cage (St. Lucia) Limited v Treasure Bay (St. Lucia) Limited that applications for leave to appeal are to be heard ex parte and without notice to the proposed respondent, except where the court otherwise directs, is in no way unclear, uncertain, unsettled, unfair or draconian so as to justify submission to the Privy Council for guidance. While the question of whether a proposed respondent is entitled to be heard on an application for leave to appeal may be of great importance to the respondent, it is not for that reason alone a question of great general or public importance or which otherwise ought to be submitted to Her Majesty in Council for consideration.

4. The question whether the Court of Appeal ought to have held that the decision of the learned judge fell within the generous ambit afforded to him is not one of great general or public importance because such a question concerns only the application by the court of settled legal principles to the particular facts of the case. None of the other questions which the respondent wished to pursue on the proposed appeal to the Privy Council arose on the appeal, either because the particular principle of law was not put in doubt or the issue was not decided or raised on the appeal and accordingly they did not constitute issues of great general or public importance which ought to be referred to the Privy Council for resolution.

REASONS FOR DECISION

[1] MENDES JA [AG.]: On 8th October 2018, we dismissed the respondent's application dated 24th July 2018 for conditional leave to appeal to the Judicial Committee of the Privy Council against the judgment of this Court given on 13th

July 2018. We ordered the respondent to pay the appellants' costs of the application to be assessed, if not agreed, within 28 days and we ordered further, without any objection as to payment and by consent as to amount, that an interim payment of US$50,000.00 be made towards those costs, on or before the expiry of 28 days. On the respondent's intimation of its intention to apply to the Privy Council for special leave to appeal, we ordered, lastly, that the stay granted by this Court in paragraph 2 of its order dated 25th July 2018, be continued until 12th November 2018. We promised to give written reasons for our orders and we do so now.

[2] On 22nd February 2018, Adderley J refused the appellants' application for specific disclosure of the un-redacted list of the respondent's shareholders and certain financial records. On 26th February 2018, the appellants applied to this Court for leave to appeal against the learned judge's order without notice to the respondent. Before that application could be heard, the appellants applied to Adderley J on 28th February 2018 for leave to appeal, again without notice to the respondent, but leave was denied. The appellants' application for leave to appeal was heard ex parte by the Full Court on 2nd March 2018. This Court granted leave to appeal on that day.

[3] The trial of the claim in respect of which specific disclosure was requested had been previously listed for 13th March 2018. On the application for leave, counsel for the appellants informed the Court that the grant of leave would in all likelihood result in the adjournment of the trial. In fact, on 6th March 2018, the appellants applied to the trial judge to adjourn the trial on the ground that leave to appeal had been granted and if successful on the appeal, the appellants intended to rely on any documents disclosed by the respondent in compliance with any order the Court of Appeal might make. That application was heard on 9th March 2018. The respondent resisted the adjournment, pointing out that when granting leave to appeal this Court did not think it fit to stay the trial. Nevertheless, the trial judge

adjourned the trial on the condition that the appellants pay the costs thrown away by the adjournment ("the costs order").

[4] On 24th April 2018, the appellants were granted leave to appeal against the costs order. Both appeals came on for hearing before the Full Court on 11th July 2018 and an oral judgment was delivered two days later ordering the respondent to make specific disclosure of the respondent's profits and loss accounts, balance sheets and any and all financial information relating to the conclusion that the respondent does not make a profit, information currently redacted in disclosure already made relating to the respondent's share registers and records used to create the respondent's 2012 share register. This Court ordered further that the costs thrown away by the adjournment of the trial and the costs of the application for the adjournment be reserved for determination at the trial.

[5] In so ordering, the Court found that both the financial information and the un-redacted list of shareholders were directly relevant to the appellants' case, within the meaning of rule 28.1(4) of the Civil Procedure Rules 2000 ("CPR"). With regard to the financial information which the respondent claimed was kept in the respondent's subsidiaries, the Court found that the respondent had access to the information kept at the subsidiaries which it owned and controlled and it followed that the respondent controlled the financial information for the purposes of CPR 28.

[6] The Court found further that since the documents that the appellants wanted to be disclosed were all referred to in the respondent's pleadings and witness statements, they were all liable to be disclosed in accordance with CPR 28.16.

[7] On the appeal, the respondent invited the Court to set aside the leave granted ex parte on the ground that the respondent was not notified of the application for leave. Had the respondent been given the opportunity to participate, it would have been in a position to impress upon the Court that the effect of granting leave would

be to precipitate an adjournment of the trial, in circumstances where a freezing order against the respondent's assets had previously been granted and the adjournment would prolong the period during which the respondent's assets would remain frozen. The respondent complained further that the appellants did not disclose the existence of the freezing order to the Court and leave should be set aside on that basis as well.

[8] The Court declined the respondent's invitation referring to the Court's established practice, derived from the Court's judgment in Cage St. Lucia Limited v Treasure Bay (Saint Lucia) Limited,[1] that an application for leave to appeal is heard ex parte and without notice to the proposed respondent who was at liberty to pursue any dissatisfaction with the grant of leave at the hearing of the substantive appeal. The Court also found that although the existence of the freezing order was not disclosed at the hearing of the leave application, it was not material and there was accordingly no warrant to set aside leave on this basis either.

The application for conditional leave

[9] The respondent's application for conditional leave to appeal to the Privy Council was based entirely on section 3(2)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967[2] which permits appeals to Her Majesty in Council, with leave of this Court, "where in the opinion of the Court 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 Her Majesty in Council …" . The questions which the respondent claimed were involved in the appeal and which were said to be of great general or public importance were as follows:

(a) Whether notice should be given to a respondent to a permission to appeal application in order to allow the respondent to address issues which go to the threshold question of whether permission should be granted. This Court of Appeal in Cage St. Lucia Limited v

[1] SLUHCVAP2011/0045 (delivered 23rd January 2012, unreported).
[2] SI 1967/234.

Treasure Bay (St. Lucia) Limited[3] expressly approved the English Court of Appeal's guidance in Jolly v Jay and Another[4] and, without any notice at all, a respondent is unable to address the threshold question. The need for notice is all the more important when the consequence of permission to appeal may lead to the adjournment of a trial and/or the consequences of the appeal will not be dealt with at the appeal itself;

(b) Whether the test of materiality on an ex parte application for permission to appeal is the same as for a freezing order and, if different, what is the test;

(c) Whether and in what circumstances a party should be deprived of an order for permission to appeal obtained ex parte in breach of the obligations of full and frank disclosure;

(d) Whether reference to a document in evidence or a pleading has the consequence, without more, that it has to be disclosed in un-redacted form;

(e) Whether reference to a document in evidence or a pleading in order to explain that it does not exist or is in the possession or control of another has the consequence that it should be disclosed;

(f) Whether reference to a document in evidence or a pleading – where only part of that document is relevant and other parts are both irrelevant and confidential and sensitive to third parties – has the consequence that the document has to be disclosed in unredacted form;

[3] ibid.
[4] [2002] ECWA Civ. 277.

(g) Is the Lonrho test[5] applicable in the Territory of the Virgin Islands and, if not, what test is applicable in relation to the disclosure of subsidiaries' documents;

(h) Whether the Court of Appeal ought to have held that the decision of the learned judge in the court below fell within the generous ambit afforded to him and whether or not the documents would otherwise satisfy the test for specific disclosure; and

(i) Whether, in exercising a fresh discretion, the Court of Appeal ought to have taken into account factors which went beyond the narrow issue of whether the documents satisfied the test for specific disclosure in the abstract.

Great general or public importance

[10] The approach taken by this Court to the question whether the question involved in the proposed appeal is of great general or public importance is not in dispute. In Martinus Francois v The Attorney General,[6] Saunders JA held that leave under the Saint Lucian equivalent of section 3(2)(a) is normally granted "where there is a difficult question of law involved." He continued:

> "In construing the phrase "great general or pubic importance", the Court usually looks for matters that involve a really 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 to the public."[7]

Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court

[5] Lonrho v Shell Petroleum Co. Ltd. [1980] 1 WLR 627.
[6] SLUHCVAP2003/0037 (delivered 7th June 2004, unreported).
[7] ibid at para. 13.

but is either unsettled, in the sense that there are differing views or conflicting dicta,[8] or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt.

[12] In Pacific Wire & Cable Company Ltd. v Texan Management Ltd,[9] this Court considered the principles applicable to a proposed appeal in which the question said to arise was "eminently procedural" in nature, such as the applicant's first question concerning the failure to give the respondent an opportunity to be heard on the application for leave. Bearing in mind the plethora of cases[10] in which the Privy Council expressed reluctance to interfere in matters of local practice and procedure which have no counterpart in the rules of the Supreme Court of England and which "are best left to be developed by the courts of the country concerned",[11] this Court considered that it would be appropriate to grant leave under section

[8] Etoile Commerciale SA v Owens Bank Ltd. (No. 2) (1993) 45 WIR 136.
[9] BVIHCVAP2006/0019 (delivered 6th October 2008, unreported).
[10] Mutual Life and Citizens Assurance Ltd v Evatt [1971] AC 793, at p. 798; Isaacs v Robertson (1984) 43 WIR 183; Lewis v St. Hillaire (1995) 48 WIR 134; Benoy Krishna Mukherjee v Satish Chandra Giri [1927] LR Col LV 131; Al-Sabah v Grupo Torras SA [2000] UKPC 38.
[11] Per Carrington JA [Ag.] in Pacific Wire & Cable Company Ltd. v Texan Management Ltd citing Lord Diplock in Isaacs v Robertson 43 WIR 126, 130b.

3(2)(a) where "the interpretation or application advanced by the local courts has a draconian effect or ... there are some other special circumstances that would render such guidance useful to the local courts."[12] Leave would be more readily granted where the procedural rule has an equivalent in England.

[13] But even where an applicant fails to establish that the question he or she wishes to pursue before the Privy Council is of great general or public importance, this Court may yet grant leave if it is satisfied that there are good grounds which would otherwise justify referral to Her Majesty in Council, as for example where there is some reasonable doubt as to the correctness of the decision of court.[13]

[14] With these principles in mind, I now turn to consider each of the questions which the respondent proposes to raise. Before doing so, I should mention that, quite curiously, Mr. Flynn, QC, who appeared for the respondent, said in his opening that if we were not with him on his proposed challenge to this Court's approach to without notice applications for leave to appeal, it followed that we should likewise not give him leave in relation to any other of the questions he wished to pursue on appeal. He clarified later, however, that he had no intention of abandoning any of his points. The consequence of his approach was that very little time was spent by either side in oral argument on the other proposed questions.

Whether notice should be given to a respondent to a permission to appeal application in order to allow the respondent to address issues which go to the threshold question of whether permission should be granted

[15] The respondent argued that this was a question of great general or public importance because the rule established by this Court in Cage (St. Lucia) Limited v Treasure Bay (St. Lucia) Limited was either unclear, or produced draconian results, or was simply wrong, and for any of those reasons ought to be submitted to the Privy Council for resolution.

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[12] Per Carrington JA [Ag.] in Pacific Wire & Cable Company Ltd. v Texan Management Ltd at para. 17 referencing Barbuda Enterprises Ltd v. Attorney General of Antigua and Barbuda [1993] 1 WLR 1052.

[13] Pacific Wire & Cable Company Ltd. v Texan Management Ltd, approving Attorney General of Trinidad and Tobago v Lennox Phillip et al (Civil Appeal No 155 of 2006, delivered 6th June 2007).

[16] In Cage, the appellant applied to a single judge of the Court of Appeal for leave to appeal against the refusal by a High Court judge to join it as a party to judicial review proceedings which Treasure Bay had commenced against the Gaming Authority. Cage served the application on Treasure Bay which duly filed a notice of objection. Cage's application for leave came before a single judge of the Court of Appeal who granted leave without an oral hearing. The single judge was not made aware of Treasure Bay's notice of objection. The single judge also granted a temporary stay pending an inter partes hearing. Treasure Bay then applied to the Full Court to review the orders made by the single judge. Queen's Counsel for Cage argued that the procedure for granting leave was a special one which did not permit Treasure Bay to participate unless specifically directed by the judge. Edwards CJ [Ag.] noted that a practice had developed in the Court of Appeal Registry whereby all notices of application, including applications for leave to appeal, were served on all parties named as applicant and respondent. However, she agreed with the conclusions Mitchell JA [Ag.] had reached in paragraph 9 of his judgment where he said:

> "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 the procedure is not only not authorised by the Rules, but might send the wrong signal to respondents."[14]

[17] For her part, Edwards JA thought that, though well-intentioned, the Registry's practice was misleading since "it erroneously induces a respondent to file a notice of opposition and other documents contrary to the procedure envisaged by CPR 62.2."[15] Accordingly, she advised that the Registry should desist from notifying respondents of applications for leave to appeal, "unless the Chief Justice or a single judge makes an order for an oral hearing and specifically directs the respondent to attend and participate in the manner the order directs."[16]

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[14] supra.
[15] supra, para. 27.
[16] ibid.

[18] Later, she elaborated on the rationale for the construction of the rules which the Court has adopted. She said at paragraph 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."

[19] The respondent contends that this Court's determination that applications for leave to appeal are to be determined without notice to the intended respondent is unclear for two reasons. Firstly, Mr Flynn, QC claims that the Court in Cage endorsed the decision of the English Court of Appeal in Jolly v Jay[17] which he said gave a proposed respondent the right to be heard on an application for leave solely to address the threshold test for leave. That endorsement, he claims, was apparent from paragraph 7 of the judgment of Mitchell JA, who, after nothing that CPR 62.2 does not provide for notice of an application for leave to be served on the proposed respondent, and that applications for leave to appeal are generally in the nature of ex parte or without notice proceedings, declared that the approach adopted by the English Court of Appeal in Jolly v Jay "commends itself". His Lordship then quoted the following passage from that case:

> "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

[17] [2002] All ER (D) 104; [2002] EWCA Civ 277.

> 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."[18]

[20] I can understand why Mr. Flynn, QC may have been led to think that Mitchell JA was commending a procedure which permitted intended respondents to make submissions on the limited question whether the appeal met the threshold test or to point out some material inaccuracy on the papers. But viewed in context, I think that Mitchell JA was more likely focusing on the concluding statement in the passage that it is not desirable that respondents should make submissions at the permission stage since it is essentially a without notice procedure. I say so because that is precisely the thought he had expressed just before referring to Jolly v Jay, and immediately afterwards he said this:

> "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."[19]

Then two paragraphs later, there appeared the passage in paragraph 9 with which Edwards JA expressed agreement, and the clear statement that "Treasure Bay was not entitled to file a notice of objection or otherwise to oppose CAGE's application for leave to appeal".

[21] In any event, whatever uncertainty may have been created by Mitchell JA's reference to Jolly v Jay, there can be no doubt that the ratio decidendi of the case is to be found in the judgment of Edwards CJ [Ag.]. Not only did Mitchell JA express his concurrence with it, but Thom JA made it clear that she was agreeing only with Edwards CJ's judgment.

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[18] ibid, per curiam.
[19] supra at para. 7.

[22] The second reason why Mr. Flynn, QC says that Cage is unclear is because paragraph 41 of Edwards CJ's judgment quoted above creates some uncertainty because it can be interpreted as precluding participation at the leave stage by the proposed respondent only in respect of "interlocutory questions and procedural matters", and not others. It is sufficient to say that it is only with great effort and imagination that the fair-minded reader could come to such a conclusion.

[23] For all these reasons, I do not accept Mr. Flynn's submission that this Court's determination in Cage that applications for leave to appeal are to be heard ex parte and without notice to the proposed respondent, except where the court otherwise directs, is in any way unclear or uncertain or unsettled such as to justify submission to the Privy Council for guidance. The rule has been consistently applied at least since the Cage ruling without any untoward consequences or complaint, except for the concerns raised in this case.

[24] Mr. Flynn, QC next submits that this it is appropriate to grant leave in this case because, simply put, Cage is wrongly decided because the Court failed to give effect to CPR 11.8(1) which requires notice of all applications for 'court orders' to be given to each respondent and it contradicts the audi alteram partem rule. Unless the contrary intention appears, Mr. Flynn, QC submits, it is to be presumed that the Rules Committee intended that the respondent to an intended appeal should be heard on the application for leave.

[25] It is therefore necessary to revisit and take a closer look at CPR 62.2. That rule provides as follows:

> "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 of 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 62.2(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."

[26] CPR 62.2(4) is clear. If a single judge may give permission to appeal without hearing the applicant, it is implicit that he or she may do so without hearing the proposed respondent either. Furthermore, the mere fact that the draftsperson thought it fit to dispose of the need to hear the applicant only is a clear indication that it is only the applicant who is engaged in the process at this point in time. Implicit in the rule, in other words, is the assumption that the proposed respondent is not yet involved, whether by notice or otherwise. It is clear to me therefore that CPR 62.2 by necessarily implication excludes the audi alteram partem rule.

[27] In any event, I do not accept that the presumption in favour of a hearing applies in the case of an application for leave to appeal. The grant of leave by itself does not impact upon the intended respondent's rights. In most cases, an appeal may be filed without the leave of the court. It has never been suggested that the rule which gives an unsuccessful litigant the right of appeal without reference or notice to his or her opposite number in the court below causes any injustice. Lord Hoffman's admonition in National Commercial Bank Jamaica Ltd v Olint Corp. Ltd.[20] that the audi alteram partem rule is a salutary and important one and that judges should not as a general rule entertain an application for an injunction of which no notice has been given, applies with great force in cases where the order which is sought affects the rights of the defendant, as would be the case in every application for an injunction. Indeed, all of the cases cited by Mr. Flynn, QC in

[20] [2009] UKPC 16 at para.13.

support of his submission that the right to be heard presumptively applies to an application for leave to appeal were concerned with orders which had an immediate impact on the party who was not heard.[21] The grant of leave to appeal, on the other hand, has no immediate impact on the proposed respondent. An application for a stay of execution of the order to be appealed or a stay of the proceedings in the court below pending the appeal, is another matter entirely. The presumption in any such case is in favour of giving the respondent an opportunity to be heard and nothing said in Cage detracts from that principle.

[28] Further, Mr Flynn's reliance on CPR 11.8 is misconceived. CPR 11.8 applies exclusively to application before the High Court. CPR 11.1 declares that Part 11 deals with "applications for court orders made before, during or after the course of proceedings." "Court" is defined in CPR 2.4 as meaning "the High Court and, where the context so admits and in Part 62, the Court of Appeal." There is nothing in context which suggests that CPR 11.8 is intended to deal with applications to the Court of Appeal.

[29] In any event, it should also be apparent from the above that the application of CPR 11.8(1) is also implicitly excluded by CPR 62.2. CPR 11.8(1) and (2) provide as follows:

> "(1) The general rule is that the applicant must give notice of the application to each respondent.
>
> (2) An applicant may make an application without giving notice if this is permitted by a –
>
> (a) practice direction; or
> (b) rule."

[21] Re First Express Limited [1992] BCLC 824 (an order requiring a liquidator to transfer the books and records of a company, including a copy of his receipts and payments account, and all moneys held by him on behalf of the company); Bagnall v Official Receiver [2003] EWCA Civ 1925 (an order deferring the date on which a bankrupt will be automatically discharged); Re Premier Motors Auctions Leeds Limited [2015] EWHC 3568 (an order for the approval of a liquidator's expenses); Re A (a child) (Return to Sweden) [2016] EWCA 572 (a collection order which would permit social services to locate and collect a child from the custody of a parent); Kerman v Akhmedova [2018] EWCA Civ 307 (an order requiring a solicitor to attend court to give evidence).

CPR 18.8(2) permits the making of an application without notice if permitted by a practice direction or a rule. It does not say that such permission must be set out in explicit language, as Mr. Flynn, QC sought to argue. As I have already said, CPR 62.2 is premised upon the applicant alone being concerned with the application for leave and assumes that the respondent is not yet aware of the application and therefore need not be informed of the Court's intentions. Furthermore, CPR 11.8(1) states that the obligation to give notice is a general rule, thereby permitting of exceptions. An exception is implicitly created by CPR 62.2.

[30] I therefore do not agree that it can reasonably be said that Cage was wrongly decided.

[31] Neither do I agree that the rule that denies a proposed respondent the right to be heard on an application for leave to appeal is draconian in effect or in any other way tramples upon the rights of the unsuspecting respondent. The respondent will have ample opportunity to be heard on all relevant aspects of the appeal at the inter partes hearing. It bears repeating that the grant of leave in and of itself does not affect the respondent's rights. If there is any way in which the grant of leave does have immediate detrimental effect on the respondent, the processes of the court permit him or her to seek an expedited appeal at which those concerns may be raised. Where appropriate, relief may also be sought from the trial judge.

[32] In this case, the respondent opposed the adjournment of the trial, which was the only adverse impact which the grant of leave was said to potentially have, and although unsuccessful, was awarded the costs thrown away by the adjournment, even though this Court eventually thought that the appropriate order was that the costs would be determined in the trial. The respondent also applied to the trial judge to discharge the freezing order and judgment on that is awaited. The point is that the ordinary processes of the court are sufficient to accommodate the peculiar circumstances of any case and to provide a particular remedy. As the

Privy Council has said repeatedly,[22] the question whether a person has been denied the right to a fair trial is to be judged by having regard to the system as a whole, and not merely a part of it. There is nothing inherently unfair in granting leave to appeal without hearing the proposed respondent. Appeals and claims are routinely commenced without the respondent or defendant being consulted. Applications for leave to apply for judicial review are frequently determined ex parte. There is no rational basis for complaint that a system which permits consideration by a court of applications for leave to appeal in the absence of a proposed respondent for the purpose of weeding out unmeritorious appeals is unfair, far less draconian.

[33] I therefore see no merit in the respondent's claim that the question whether a proposed respondent is entitled to be heard on an application for leave to appeal is one of great general or public importance or which otherwise ought to be submitted to Her Majesty in Council for consideration.

Whether the test of materiality on an ex parte application for permission to appeal is the same as for a freezing order and, if different, what is the test?

[34] The respondent complained that on the ex parte application for leave, the appellant failed to present the respondent's position fairly, especially with regard to the impact which the grant of leave would have had on the impending trial, and failed also to disclose the fact that the respondent's assets had been frozen pending the trial of the claim.

[35] The Court's answers to these complaints were threefold. Firstly, as conceded by the respondent, the appellant did caution the Court that the grant of leave was likely to result in an adjournment of the trial. Secondly, a dissatisfied respondent had the opportunity to fully ventilate any objections he or she may have to the

[22] See for example Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and another consolidated with Trinidad and Tobago News Centre Ltd and others v Attorney General of Trinidad and Tobago and another [2004] UKPC 26 at para. 88.

grant of leave at the hearing of the appeal itself. Thirdly, the fact that the respondent's assets were frozen was not material to the decision to grant leave.

[36] Plainly, the Court thought that the omission by the appellants to present the respondent's case as fully as the respondent would have liked and the failure to disclose the freezing order were insufficient to warrant dismissing the appeal. There was no discussion in the Court's judgment on the question whether the test of materiality was the same as that applied in relation to freezing orders granted ex parte. There is nothing in the judgment which raises any question concerning the test which is to be applied. The issue which the respondent wishes to pursue does not arise on this appeal. This is simply a case where the Court determined on the facts that there was no material non-disclosure.

Whether and in what circumstances a party should be deprived of an order for permission to appeal obtained ex parte in breach of the obligations of full and frank disclosure?

[37] Put differently, it seems that the respondent wishes to seek guidance from the Privy Council on an applicant's obligations of full and frank disclosure on an application for leave to appeal. On the appeal, this Court determined that the time for the presentation of the respondent's arguments against the appeal was at the hearing of the appeal itself. To that extent, but to that extent only, the court implicitly determined that an applicant for leave to appeal was under no obligation to disclose what the respondent's arguments in opposition were thought to be. That is a wholly unobjectionable position to take. First of all, the court hearing the application would presumably have before it the judgment in respect of which leave is sought and would therefore be aware of the arguments against the grant of leave. It would be a bit much to require an applicant to present any additional arguments which it was thought the proposed but absent respondent might deploy. In any event, if the court eventually found any of the respondent's arguments on the appeal to be of such merit as to justify denying leave, the appeal itself would be dismissed. There would be no need to set aside the leave granted.

[38] Other than in this regard, in respect of which the court was plainly right, no attempt was made to explore the obligations of full and frank disclosure on an application for leave to appeal. The issue proposed to be raised by the respondent does not arise.

Whether reference to a document in evidence or a pleading has the consequence, without more, that it has to be disclosed in un-redacted form

[39] There is no finding by the Court that a reference to a document in evidence or a pleading has the consequence, without more, that it must to be disclosed in un-redacted form. The Court found that the effect of CPR 28.16 was that a document mentioned in evidence or a pleading was liable to be disclosed, but that there were circumstances in which disclosure might nevertheless be withheld, as for example when the document was privileged, or the party against whom disclosure is sought has no control over the document. In the case of the share register, the Court found that the un-redacted share register was directly relevant to the issues in the claim and ought to have been disclosed.

[40] This question does not arise on the appeal because the Court made no such finding.

Whether reference to a document in evidence or a pleading in order to explain that it does not exist or is in the possession or control of another has the consequence that it should be disclosed

[41] There was likewise no finding by the Court that the effect of CPR 28.16 was that a reference to a document in evidence or a pleading merely to explain that it does not exist or is in the possession or control of another person has the consequence that it should be disclosed. Quite the opposite, the Court rejected the trial judge's finding that the financial information did not exist and found that there was sufficient evidence to indicate that the respondent controlled the financial information.

[42] As such, the issue which the respondent wishes to pursue on appeal did not arise for determination and was not determined.

Whether reference to a document in evidence or a pleading – where only part of that document is relevant and other parts are both irrelevant and confidential and sensitive to third parties – has the consequence that the document has to be disclosed in unredacted form

[43] Likewise, the Court made no such finding. The Court found that the entire share register, including its redacted portions, were relevant. The issue sought to be raised does not arise for determination.

Is the Lonrho test applicable in the Territory of the Virgin Islands and, if not, **what test is applicable in relation to the disclosure of subsidiaries'** documents?

[44] There is nothing in the judgment of the Court which suggests that the test in Lonrho v Shell Petroleum[23] is not applicable in the British Virgin Islands. In its written submissions, the appellant relied on the decision of the English Court of Appeal in North Shore Ventures v Anstead Holdings Ltd[24] which applied the Lonrho test of control. This court found on the facts that the respondent had control over the financial statements which were in its subsidiaries' possession. This is not a case in which the applicable law is in dispute or unclear. This is a case where the respondent is dissatisfied with the way the Court applied the law to the facts. It is not a case for the grant of leave under section 3(2)(a).

Whether the Court of Appeal ought to have held that the decision of the learned judge below fell within the generous ambit afforded to him and whether or not the documents would otherwise satisfy the test for specific disclosure

[45] The issue as framed is patently a challenge to the Court's finding that the trial judge had gone beyond the generous ambit within which reasonable disagreement is possible. There is no suggestion in the question as framed that the court

[23] [1980] 1 WLR 627.
[24] [2012] EWCA Civ 11.

applied the wrong legal test or that the applicable test is unclear. Once again, this is not an instance where the respondent seeks to raise a question of great general or public importance, but simply to challenge the correctness of the court's decision on the particular facts of this case.

Whether, in exercising a fresh discretion, the Court of Appeal ought to have taken into account factors which went beyond the narrow issue of whether the documents satisfied the test for specific disclosure in the abstract

[46] It appears from the respondent's written submission's which, for the reasons already given, were not developed in oral argument, that the factor which the respondent says the court ought to have taken into account in exercising its discretion afresh was the imminence of a trial date. Since at the time the appeal was heard the trial had already been adjourned and had by then been fixed for June 2019, the submission was that the Court ought to have put itself in the shoes of the trial judge at the point in time when he decided not to grant specific disclosure, at which point in time the trial was less than a month away.

[47] From the material which was provided to the Court on the appeal however, it does not appear that the imminence of the trial played any role in the trial judge's decision to deny disclosure of the specific documents. He denied disclosure because he thought the documents were not directly relevant to the issues in the claim or that they did not exist. In fact, he had granted disclosure of some documents on the same day, so it is hardly likely that the fast oncoming trial date influenced his decision to deny the others.

[48] Further, it does not appear from the transcripts of the arguments on the appeal that the Court was urged to exercise its discretion afresh on the basis that a trial date was imminent and liable to be adjourned if disclosure was permitted.

[49] The question which the respondent wishes to raise therefore does not arise.

Stay of Execution

[50] On 25th July 2018, this Court ordered that there be a stay of the order for disclosure made upon the determination of the appeal until after the hearing and determination of the respondent's application for leave to appeal to the Privy Council. The respondent applied for a further stay pending the hearing of a petition for special leave which Mr. Flynn, QC said he intended to make to their Lordships' Board. We granted a further stay until 12th November 2018 in order to give the respondent sufficient time to lodge its petition for special leave and to move their Lordship's to grant any further stay which they might think fit to grant. Mr. Chaisty, QC was unable to point to any prejudice his client would suffer as a consequence of a further stay.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Rolston Nelson, SC
Justice of Appeal [Ag.]

By the Court

Chief Registrar