Easter Term
[2024] UKPC 10
Privy Council Appeal No 0040 of 2023

JUDGMENT

Inderjit Kaur Chhina (Appellant) v Muhammad Nazir Muhammad Ismail and another (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Briggs
Lord Hamblen
Lord Stephens
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
14 May 2024

Heard on 17 April 2024

Appellant
Adrian Davies
(Instructed by Osmond & Osmond (London))

1st Respondent
Alexander Cook KC
Hossein Sharafi
(Instructed by Edwin Coe LLP (London))

LORD HAMBLEN:

1. Introduction

1. Constitutional and statutory provisions which govern leave to appeal to the Judicial Committee of the Privy Council commonly provide for an appeal as of right from a "final" decision in civil proceedings in certain categories of cases.

2. The present case concerns what the approach of the Judicial Committee should be in determining whether or not a decision is "final" for these purposes. This was a question raised but not decided in *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16 – see paras 9 to 10.

3. The issue arises in relation to an application for leave to appeal from a decision of the Court of Appeal of the British Virgin Islands ("BVI"), which is the Eastern Caribbean Supreme Court. By that decision, made in a pending appeal to the Court of Appeal, the Court dismissed the appellant's application for an extension of time to file and serve the record of appeal and struck out the notice of appeal for want of prosecution. By a further decision the Court decided that the appellant had no appeal as of right to the Judicial Committee and that it was not an appropriate case for leave to appeal.

4. The appellant applied to the Judicial Committee for leave to appeal, contending that she is entitled to appeal as of right. The panel considering the application (Lord Briggs, Lord Hamblen and Lord Leggatt) directed that there be an oral hearing of the question of whether the Court of Appeal was correct to hold that the appellant does not have an appeal as of right. A panel of five justices was convened for that hearing.

2. The factual and procedural background

5. The respondents brought proceedings in the Commercial Court of the BVI claiming ownership of the shares of a BVI company, Firmingham Ltd ("Firmingham"), that owned property in London, England. Following a four-day trial, in a judgment dated 1 October 2020, Jack J held that the second respondent was entitled to be recognised and registered as the legal owner of the shares, held on trust for the first respondent. He ordered that the register of members be rectified to remove the appellant and to show the second respondent as the sole shareholder of Firmingham.

6. The appellant filed a notice of appeal with the Court of Appeal on 12 November 2020. The date for filing the record of appeal was 10 August 2021 and the date for filing

the appellant's skeleton argument was 20 August 2021. Neither was done. On 18 March 2022 the respondents issued an application to strike out the appeal. On 25 April 2022 the appellant issued a cross-application for an extension of time for filing the record of appeal and the appellant's skeleton argument.

7. The application and cross-application were heard by the Court of Appeal (Thom JA, Farara JA (Ag) and Ward JA (Ag)) on 10 May 2022. On 22 July 2022, judgment was delivered allowing the respondents' application and dismissing the appellant's cross-application.

8. On 12 August 2022, the appellant applied to the Court of Appeal for conditional leave to appeal to the Judicial Committee. There was an oral hearing of the application on 9 February 2023. On 23 March 2023, the Court of Appeal (Thom JA, Price-Findlay JA and Webster JA (Ag)) gave judgment refusing leave to appeal.

9. On 16 May 2023, the appellant issued an application to the Judicial Committee for permission to appeal, asserting that she was entitled to appeal as of right.

3. The legal background

10. Appeals to the Judicial Committee from the BVI are governed by section 3 of the Virgin Islands (Appeals to the Privy Council) Order 1967 (SI 1967/234) ("the 1967 Order"). This provides:

> "**Appeals to Her Majesty in Council**
>
> 3.—(1) Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases—
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards, final decisions in any civil proceedings;
>
> (b) final decisions in proceedings for dissolution or nullity of marriage; and

(c) such other cases as may be prescribed by any law for the time being in force in the Virgin Islands.

(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases—

(a) 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, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by any law for the time being in force in the Virgin Islands.

(3) An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court in any civil or criminal matter."

11. For those categories of case which fall within section 3(1)(a) or (b) there is an appeal as of right in respect of "final" decisions. The question of whether a decision is final or interlocutory can be difficult to determine – see, for example, the comments of Lord Denning MR in *Salter Rex & Co v Ghosh* [1971] 2 QB 597 at pp 600G-601D. In England there have been two general approaches to the determination of that question. The "order" approach or test is that an order is final if it finally determines a matter – it depends on the nature and effect of the order as made – see *Shubrook v Tufnell* (1882) 9 QBD 621 and *Bozson v Altrincham Urban District Council* [1903] 1 KB 547. On this approach a striking out order would, for example, be final as it finally determines the proceedings. The "application" approach or test is that an order is final if it results from an application which will finally determine the matter, for whichever side the decision is given – it depends on the nature of the application rather than the order as made – see *Salaman v Warner* [1891] 1 QB 734. On this approach a striking out order would not be final as it involves an application which would not be finally determinative whichever way it is decided – if the application fails the proceedings continue.

12. The English courts eventually adopted the application test as a general rule – see *Salter Rex & Co v Ghosh* and *White v Brunton* [1984] QB 570 (where the authorities and alternative approaches are reviewed). Since 1988 this has been reflected in the rules of court/civil procedural rules – see RSC Order 59 r1A(3) – "A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible

appeal) have been finally determined whichever way the court below had decided the issues before it."

13. In the BVI leave to appeal to the Court of Appeal is required in relation to most appeals from interlocutory decisions in civil proceedings. As is common ground, it is well established in the BVI that the application test is applied to determine whether decisions are final or interlocutory. As the Court of Appeal stated:

> "6. It is settled law in the Eastern Caribbean that the court applies the application test to determine whether an order is final or interlocutory. This was settled by this Court on 18 September 1995 in *Othniel Sylvester v Satrohan Singh*...
>
> …
>
> 8. The application test is now codified in the Civil Procedure Rules 2000 ('CPR') Part 62.1(3) which states simply that 'In this Part – (a) a determination whether an order or judgment is final or interlocutory is made on the "application test"'.
>
> 9. The test has been followed in numerous decisions of this Court since then…"

14. Since the test to be applied in determining whether a decision is final or interlocutory is a procedural matter, the courts of the Eastern Caribbean have taken the view that the application test should similarly be applied to determine whether a decision is final for the purpose of appeals to the Judicial Committee. They consider that this is supported by the Board's decision in *Haron bin Mohammed Zaid v Central Securities (Holdings) Bhd* [1983] 1 AC 16 ("*Zaid"*) and the Board's general policy to defer to local courts on matter of procedure. That was the basis upon which the Court of Appeal held that there was no appeal as of right in the present case.

4. The parties' cases

15. Mr Adrian Davies for the appellant contended that the Court of Appeal was wrong to apply the application test to appeals under section 3(1) of the 1967 Order. While it is accepted that this test applies to appeals to the Court of Appeal itself, it does not follow that it applies to appeals from the Court of Appeal to the Board. That is a matter of the Board's practice rather than local practice.

16. Further, such previous decisions of the Board as touch upon this issue support the application of the order test. Reliance was placed in particular on the Board's decisions in *Ratnam v Cumarasamy* [1965] 1 WLR 8, *Lopes v Valliappa Chettiar* [1968] AC 887 and *Meyer v Baynes* [2019] UKPC 3.

17. Mr Alexander Cook KC for the respondents contended that the Court of Appeal was correct to conclude that the application test applies. This accords with (i) the long-standing policy of the Board to defer to decisions of the local courts on issues of procedure, (ii) a settled and well-established body of law in the Eastern Caribbean and (iii) the Board's own decisions in *Zaid* and *Tampion v Anderson* (1973) 3 ALR 414.

5. The authorities

18. The Board does not consider that the authorities relied upon by Mr Davies support the appellant's case that the order test applies. These will be addressed chronologically.

Ratnam v Cumarasamy (Malaysia)

19. Mr Ratnam issued proceedings claiming a half interest in some valuable properties. The claim was dismissed at first instance. Mr Ratnam was entitled to appeal as of right but did not file the appeal documents within the time prescribed by the rules of court. The Court of Appeal refused an application to extend time for doing so. The Court of Appeal held that the order dismissing the application was a final order in that it finally disposed of the rights of the parties and that leave was therefore not required to appeal to the Board. The Board dismissed the appeal, holding that the Court of Appeal was entitled to take the view that the only material before the court did not constitute material upon which they could exercise their discretion in Mr Ratnam's favour and that it was impossible to say that the Court of Appeal had acted upon any wrong principle.

20. Although this is an example of a case in which the local Court of Appeal applied the order test to the question of whether there was an appeal as of right to the Board, the Board did not itself consider that question. It only addressed the substantive appeal. Further, it appears from this and other cases that the established practice in Malaysia was to apply the order test when determining whether decisions are final or interlocutory. If so, it would be consistent with the decision of the Court of Appeal in the present case to apply that same test in relation to appeals to the Board.

Lopes v Valliappa Chettiar (Malaysia)

21. Mr Lopes claimed specific performance of an oral agreement for the sale of land of a value in excess of $5,000 (the value threshold for appeals as of right to the Board under section 74(1)(a)(ii) of the applicable Act). His claim was dismissed, as was his appeal to the Federal Court of Malaysia. Although a further appeal to the Board was plainly an appeal as of right, applying either the application or the order test, the Federal Court refused conditional leave on the grounds that it had a discretion to refuse leave to appeal and the case was not a fit one for appeal. The Board held that the Federal Court had no discretion to refuse leave to appeal in cases where there was an appeal as of right. The Board did, however, have a discretion in relation to the granting of special leave to appeal and it refused leave.

22. In the course of the judgment of the Board *Ratnam v Cumarasamy* was referred to in the following terms:

> "In *Ratnam v Cumarasamy,* a decision on the Ordinance of 1958, it was held by the Court of Appeal that an order made by that court which barred the appellant from appealing to that court was a final order and consequently an appeal lay as of right to the Judicial Committee in a case coming within section 3(1)(a)(i) of that Ordinance. It was not suggested in that case that the reference to leave to appeal in section 3(1) meant that the court had a discretion to refuse leave to appeal against a final order coming within section 3(1)(a)(i).
>
> …
>
> That decision was on the basis that an appeal lay as of right from a final order coming within (a)(i). If so, the same must apply in relation to a final judgment or order coming within (a)(ii).
>
> …
>
> *Ratnam v Cumarasamy* was decided on the right basis and an appeal lies as of right in cases which come within (a)(i) and (ii)." (pp 893C-894C).

23. The issues on the appeal were whether the case fell within the category of cases for which there was an appeal as of right and, if so, whether the Federal Court had any discretion to refuse leave. As in *Ratnam v Cumarasamy,* there was no consideration or discussion by the Board of whether the decision was final or as to the appropriate test

for so determining. The decision was final whether the order or the application test was applied.

Meyer v Baynes (Antigua and Barbuda)

24. Mr Baynes made a claim against Mr Meyer for personal injuries suffered as a result of a road traffic accident and obtained judgment in default of defence. Mr Meyer succeeded in setting aside that judgment before the Master on the grounds that there were exceptional circumstances. Mr Baynes successfully appealed against this decision on the basis that there were no such circumstances. Mr Meyer applied to the Court of Appeal of the Eastern Caribbean for leave to appeal to the Board contending that the decision was a final decision and that he was entitled to appeal as of right. The Court of Appeal disagreed and refused his application but the Board granted permission to appeal. The Board dismissed the appeal but it also addressed the question of whether the Court of Appeal retained any control over appeals as of right where there was no genuinely disputable issue. The Board held that it did. At para 21 of the judgment of the Board given by Lord Kitchin it was stated as follows:

> "Section 122(1) of the Constitution Order provides that an appeal shall lie to the Judicial Committee of the Privy Council as of right against final decisions in cases such as the present which involve a claim concerning a right which has a value in excess of a prescribed threshold. Both parties accept that the decision of the Court of Appeal was final and that the threshold requirement was met. The question, therefore, is whether the Court of Appeal retained any control over a further appeal."

25. A decision in relation to an application for judgment in default would only be final applying the order test. However, it was common ground that the decision of the Court of Appeal was final and this was not addressed as a contentious issue by the Board. Again, there was no consideration of whether or not the decision was final or of the appropriate test for so determining.

26. In summary, in none of the cases relied upon by the appellant did the Board itself consider whether the decision under appeal was final or what test should be applied on appeals to the Board to determine that question. They are of no material assistance.

Zaid (Malaysia)

27. Turning to the authorities relied upon by the respondent, the principal case is *Zaid.* This concerned an appeal to the Federal Court of Malaysia against summary judgment granted by the High Court to a defendant against a third party. The defendant sought to dismiss the appeal for failure to obtain leave to appeal. This application was dismissed by the Federal Court on the grounds that the appeal was against a final order and the third party's appeal against the order granting summary judgment was allowed. The defendant appealed to the Board on both issues.

28. Under the Act governing appeals from the High Court to the Federal Court leave to appeal was required for appeals from an interlocutory order. The first issue on the appeal was whether the summary judgment order made by the High Court was final or interlocutory. The Board upheld the Federal Court's decision that the order test should be applied and that it was accordingly a final decision.

29. In giving the judgment of the Board, Sir William Douglas observed that the Malaysian courts had considered the question of whether orders are final or interlocutory in a number of cases extending over a period of 20 years and that the Federal Court had "established over the years a settled practice of applying Lord Alverstone CJ's test in *Bozson* v *Altrincham Urban District Council* [1903] 1 KB 547 in order to determine whether an order is final or interlocutory" (ie the order test). He concluded that:

> "Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal court" (pp 27-28).

30. It is correct, as Mr Davies submitted, that the Board's decision concerned the test to be applied to appeals to the Federal Court rather than to appeals from the Federal Court to the Board. Nevertheless, it does highlight the importance of deference to the local courts in matters of practice and procedure in the specific context of how to determine whether a decision is final or interlocutory.

31. It is also correct, as Mr Davies pointed out, that the Board described the order test as being "sound and convenient". However, both the order test and the application test may be so described and neither results in injustice. This is borne out by the fact

that each has been supported by English Court of Appeal decisions over the years. In England and the BVI, however, the application test has ultimately been preferred.

Tampion v Anderson (Australia)

32. The case concerned an appeal from the Supreme Court of Victoria to the Board in respect of an order staying an action on the ground that it was frivolous, vexatious and an abuse of process. The Board held that there was no appeal as of right as this was an interlocutory judgment.

33. In arriving at its decision, the Board had regard to how the Australian courts approached the question of whether a decision is final or interlocutory and noted that they had accepted as authoritative the English decisions on the topic. The Board accordingly considered the English authorities and found that they had consistently held that orders of this nature were interlocutory. The Board concluded that there was therefore no appeal as of right, "being satisfied that the consistent English decisions in this class of case, going back at least to that of *Price v Phillips* [(1894) 11 TLR 86] in 1894, have been accepted as correctly representing the law of Victoria" (p 417).

34. Although the decision does not address the question of whether the order test or the application test should be applied, it did place considerable reliance on how the local courts determined the question of finality, albeit that this then led the Board back to the English authorities. It is also an example of a case in which the application test was applied to determine finality for the purpose of an appeal to the Board, although not expressly.

35. In conclusion, none of the authorities directly addresses the question with which this Board is concerned, namely what should be the approach of the Board to determining whether a decision is final in respect of appeals to the Board. Of the authorities cited, the decision which is most relevant to that question is *Zaid.*

6. Considerations of principle

36. The starting point is that the word "final" in provisions governing appeals to the Board has no settled meaning. It can legitimately be interpreted as meaning decisions which meet the order test or decisions which meet the application test. This is illustrated by the history of English Court of Appeal decisions.

37. In those circumstances a crucial consideration is the context in which the word is used. When the Board is considering an application for leave to appeal from a particular

Privy Council jurisdiction it is sitting as the final Court of Appeal in that jurisdiction. As such, the practice and procedure of the jurisdiction in question is of particular importance and it informs the relevant context.

38. Where the relevant jurisdiction has a statutory provision, procedural rule or established practice as to how the finality of decisions is to be determined for the purpose of appeals as of right within that jurisdiction the Board considers that the same approach should be followed in relation to how finality is to be determined in relation to appeals as of right to the Board. There are a number of reasons for so concluding.

39. First, there is the need for legal coherence. As the final Court of Appeal, the Board is part of the appellate structure of the country or jurisdiction in question. The fact that the Board usually sits in London and usually consists of judges experienced in English law is irrelevant. In any appellate system one would expect the issue of finality to be addressed in the same manner at each appellate level. Any other approach introduces inconsistency and anomaly.

40. Secondly, it is important that there be consistency of interpretation. In any jurisdiction which requires leave to appeal to be obtained in relation to interlocutory decisions, or in relation to decisions which are not final decisions, a question of interpretation will arise as to what is interlocutory and what is final. In the appellate context, these are usually two sides of the same question. What is interlocutory will not be final and what is final will not be interlocutory. It is important that the question is approached consistently. This will only be so if "final" in the context of the provision governing appeals to the Board is interpreted consistently with the meaning of "final" or "interlocutory" in the provisions relating to appeals before the local courts.

41. Thirdly, the importance of consistency is highlighted by the perverse consequences which may otherwise arise. If, for example, the local courts apply the application test and the Board applies the order test then the test for an appeal to the highest court will be broader than that for lower courts. That would be a remarkable if not unprecedented outcome.

42. Fourthly, this approach is consistent with the long-established policy of the Board to defer to the local courts in matters of practice and procedure. As stated by Lord Westbury in *Boston v Lelievre* (1870) LR 3 PC 157 at p 163:

> "Their Lordships would hesitate very much to interfere with the unanimous judgment of the Court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the Court had

> made a great mistake in the construction put upon these Statutes."

43. This policy has been consistently followed since then and is well illustrated by the Board's approach and decision in *Zaid.* A recent reaffirmation of that policy was made by Lord Briggs in giving the judgment of the Board in *Bergan v Evans* [2019] UKPC 33:

> "2. The Board approaches issues about civil procedure … with considerable restraint … the courts below … are generally better informed than the Board about the particular conditions and norms of civil litigation in which the rules of procedure … have effect. Even in a case, such as the present, where [the relevant procedural rule] closely follows … the Civil Procedure Rules of England and Wales, it forms part of a body of procedural rules which are by no means the same, read as a whole, and regulates the conduct of civil proceedings in a jurisdiction with which the courts below are much more familiar than is the Board. It by no means follows therefore, merely because a rule is …. worded in almost identical terms as its English ancestor, that it must be assumed to have precisely the same meaning, effect and scope."

44. In cases such as the present, the Board is concerned with a constitutional or statutory provision governing appeals to the Board rather than appeals to the local courts and so is not directly concerned with the local courts' procedure. Nevertheless, in a procedural matter arising in relation to appeals to the Board as the final appeal court of the local jurisdiction, it is right to give real weight to the local courts' practice and procedure. This is particularly so where the question of interpretation turns on the meaning of a word like "final", which has no single, settled meaning which can be derived from the statutory provision itself, without reference to the procedural context in which it is used.

45. Fifthly, it is consistent with the approach taken and the decision reached in *Zaid.* In terms of approach, the Board placed great weight on the local courts' practice in relation to how the finality of decisions was to be determined as this was "a matter of practice and procedure". In terms of decision, the Board considered that the local practice should prevail unless it could "clearly be shown" that it was contrary to the applicable statute (p 27). No contradiction arises if the finality of decisions for appeals as of right to the Board is interpreted consistently with local practice and procedure.

46. Sixthly, in terms of practicality there are obvious advantages for local parties and practitioners to know that the same approach will be taken to the issue of finality by the Board as is taken by the local courts. In particular, there is then no need to delve into how the issue is addressed in England or other Privy Council jurisdictions.

47. By way of example, as Mr Cook submitted, the Eastern Caribbean Court of Appeal has, over the years, produced a wealth of case law setting out how the application test applies to specific applications such as substantive applications within compulsory winding up proceedings, applications to set aside a judgment recognising an arbitration award, orders granting leave to file a derivative action, and applications for an interim payment. Practitioners before the Court of Appeal can rely on these authorities to provide increasing legal certainty. They could not do so if the Board were to apply a different test such as the order test in relation to appeals to the Board. Instead, they would have to research and seek to derive principles from old English authorities, and to examine decisions in potentially multiple other Privy Council jurisdictions.

48. For all these reasons the Board concludes that, where the local jurisdiction has a statutory provision, procedural rule or established practice as to how the finality of decisions is to be determined for the purpose of appeals as of right, the Board should follow the same approach in relation to appeals as of right to the Board.

49. There may, however, be some jurisdictions in which a distinction is drawn between interlocutory and final decisions in relation to rights of appeal but there is no rule or established practice as to how finality should be determined. In such cases the Board is likely to apply the application test. The reason for doing so is that in such a case it would be appropriate to look to the practice and procedure of the English courts for guidance and the application test is now the established test. This would always, however, be subject to particular considerations that may be relevant to the jurisdiction in question. There can be no rule to this effect.

7. Conclusion

50. In the BVI it is well established that the application test is used to determine whether a decision is final and this is expressly stated in the applicable civil procedural rules. In accordance with the approach of the Board set out above, it is appropriate for the Board to use that test to determine whether a decision is “final” for the purpose of appeals as of right to the Board under section 3(1) of the 1967 Order. It follows that the Court of Appeal applied the correct test and reached the correct conclusion. Applying the application test the decision in the present case was not a “final” decision and accordingly there is no appeal as of right.

51. In the light of that conclusion the appellant will have to establish that this is an appropriate case for leave to be given under section 3(3) of the 1967 Order. In accordance with the Board's usual practice, that application will be determined on the papers by a panel of three Justices.