

(1) Donovan Crawford  
(2) Regardless Limited and  
(3) Alma Crawford

*Petitioners*

v.

**Financial Institutions Services Limited**

*Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL UPON A  
PETITION FOR SPECIAL LEAVE TO APPEAL,

Delivered the 19th June 2003

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*Present at the hearing:-*

Lord Bingham of Cornhill  
Lord Hutton  
Lord Rodger of Earlsferry  
Lord Walker of Gestingthorpe  
The Rt. Hon. Justice Tipping

*[Delivered by Lord Hutton]*

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1. This petition for special leave to appeal against the judgment of the Court of Appeal (Forte P, Bingham and Langrin JJA) dated 31 July 2001 raises issues as to the powers of the Court of Appeal to stay proceedings in an appeal as of right to the Judicial Committee of the Privy Council and to rescind an order granting conditional leave to appeal.
2. The petition first came on for hearing on 14 January 2003 before a Board consisting of three members but because of the importance of the issues arising the petition was adjourned to be heard before a full Board.
3. The petitioners (and others) were defendants in an action brought by the respondent for the recovery of various sums of money and other assets of Century National Bank Ltd ("the bank") which had gone into liquidation and the management of which had been taken over by the Minister of Finance of Jamaica exercising his powers under the Banking Act. The

assets of the bank and all claims and rights to recover debt, damages or other compensation from persons liable to the bank subsequently became vested in the respondent. The first petitioner had been chief executive of the bank. The third petitioner is the mother of the first petitioner and the first petitioner, his wife and children owned all the shares in Regardless Ltd, the second petitioner.

4. The trial of the action took place before Wolfe CJ who, on 25 May 1999, gave judgment for the respondent (i) against the first and third petitioners for J\$703,393,931.94 with interest at J\$105,443.78 per day from 21 September 1998; (ii) against the first petitioner (and other defendants) for a number of lesser, though still substantial, sums; and (iii) against the second petitioner for a declaration that the respondent was the beneficial owner of certain premises and for an order that the second petitioner should transfer the premises to the respondent on demand. The Chief Justice further ordered that the petitioners (and other defendants) should pay the costs of the respondent. By Order dated 19 July 1999 the Chief Justice stayed parts of the judgment against the petitioners but he did not stay the order for costs against the petitioners. The petitioners appealed against the judgment and their appeal was dismissed by the Court of Appeal with costs on 31 July 2001.

5. The Constitution of Jamaica gives the petitioners an appeal as of right from the judgment of the Court of Appeal, section 110(1) of the Constitution providing:

“An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases –

- (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings.”

The procedure in appeals to the Judicial Committee of the Privy Council is set out in the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (SI 1962/1650) (“the Jamaica Appeals Procedure Order”) and it is necessary to set out the following sections of the order:

“3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only –

- (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay costs of the appeal (as the case may be); and
- (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

5. A single judge of the Court shall have power and jurisdiction –

- (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;
- (b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the

Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon.

...

11. When an appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may on an application in that behalf made by the respondent, rescind the order granting conditional leave to appeal, notwithstanding the appellant's compliance with the conditions imposed by such an order, and may give such directions as to the costs of the appeal and security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

6. By notice of motion dated 17 August 2001 the petitioners applied to the Court of Appeal for leave to appeal to the Judicial Committee from the court's judgment of 31 July 2001 and the notice stated that the matter in dispute had a value exceeding \$1000.

7. On the hearing of the motion on 8 October 2001 the Court of Appeal (Harrison, Forte and Panton JJA) ordered that:

"1. Conditional Leave to Appeal to Her Majesty in Council be granted;

2. Within Ninety (90) days hereof the 3rd, 6th and 9th Defendants/Appellants enter into good and sufficient security in the sum of One Thousand Dollars (\$1,000.00) for the due prosecution of the Appeal and the payment of Costs and;

3. Within the said period take all necessary steps for the preparation of the Record and the dispatch thereof to England and;

4. That the Judgment herein be stayed pending the outcome of the Appeal to her Majesty in Council."

It is not in dispute that the petitioners complied with the conditions imposed by the Court of Appeal by entering into security in the sum of one thousand

dollars and by depositing the record with the Registrar of the court within the time specified.

8. The petitioners did not pay to the respondent its costs of the hearing before the Chief Justice and the appeal to the Court of Appeal which had been taxed in the sum of J\$7,631,883.33. On 12 February 2002 on the application of the respondent, Downer JA, sitting as a single judge of the Court of Appeal, made an order that:

“(1) All proceedings in and this Appeal to Her Majesty in Council be stayed until the Appellants pay the Respondent’s Attorneys-at-Law the costs agreed and/or certified as payable in the Supreme Court and the Court of Appeal being the sum of J\$7,631,883.33.

(2) The Respondent have liberty to apply to the Court of Appeal after 30 days from the date hereof for the variation or discharge of the partial stay of execution ordered by the Court on October 8, 2001 in the event of the sum at (1) above being then unpaid.”

9. The petitioners applied to the Court of Appeal for an order that the order of Downer JA dated 12 February 2002 be set aside and on the hearing of that application the Court of Appeal ordered on 22 April 2002 that:

“(1) The Order (of Downer JA made on February 12, 2002) will not come into effect until 60 days from the date hereof.

(2) The proceedings be further stayed until payment of costs by applicant within 60 days.”

10. On 12 April 2002 the respondent by notice of motion applied to the Court of Appeal for an order that the order granting conditional leave to appeal to the petitioners be rescinded and/or that the order for a stay of execution of the judgment granted by the Court of Appeal on 8 October 2001 be discharged. This application came on for hearing on 18 November 2002 when the Court of Appeal (Forte, Harrison and Walker JJA) ordered:

“1. The Order granting Conditional Leave to Appeal to the proposed Appellants (the Respondents on this application) is rescinded; and

2. The Order for a Stay of Execution of the Judgment granted by this Court on October 8, 2001 in terms of the Motion dated October 5, 2001, as amended, is discharged.”

11. On 17 March 2003, after the first hearing of the petition had taken place before the Board, Walker JA, sitting as a single judge of the Court of

Appeal, ordered that paragraph 4 of the order of the Court of Appeal dated 8 October 2001 be amended to read:

“That the Judgment herein be stayed on the same terms as the stay of execution granted by the Learned Chief Justice on July 19, 1999, pending the outcome of the Appeal to her Majesty in Council.”

Their Lordships are satisfied that this amendment can have no effect on the outcome of this petition.

12. In *Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd* [1998] 1 WLR 202 the Board considered the provisions of the West Indies Associated States (Appeals to Privy Council) (Grenada) Order 1967 (SI 1967/224) which are very similar to the provisions of the Jamaica Appeals Procedure Order, Article 5 of the Grenada Order corresponding to section 4 of the Jamaica Appeals Procedure Order. The Court of Appeal of Grenada in granting leave to appeal to the Judicial Committee had imposed under Article 5 a condition that the appellant enter into security in the sum of £500 (the maximum figure permitted by the Article), and the appellant had done so. The respondent then applied to the Judicial Committee for an order under its inherent jurisdiction that the appellant pay into court the sum of £130,000 as security for costs, but the Judicial Committee refused to make such an order. Lord Hoffmann referred at page 204E to Rule 2 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982/1676) (“the Judicial Committee Rules”) which provides that an appeal shall be either with the leave of the court appealed from or with special leave granted by Her Majesty in Council and then stated:

“It follows that notwithstanding that the case may be one in which an appeal lies as of right, the leave of the Court of Appeal must be obtained. Such leave is not, however, a matter of discretion for that court.”

He then stated at page 205B:

“It would therefore appear that the function of the Court of Appeal upon an application for leave is to satisfy itself that the case is one in which, under the Constitution of Grenada, a right of appeal exists and, if so satisfied, to consider the exercise of the power to impose conditions conferred by article 5. Leave is granted “in the first instance” subject to compliance with those conditions and final leave is granted when the conditions have been complied with.”

13. It is clear that the orders of Downer JA and the Court of Appeal of 12 February 2002, 22 April 2002 and 18 November 2002 were not made

pursuant to the powers given by section 4 of the Jamaica Appeals Procedure Order which are confined to imposing a condition of entering into security not exceeding £500 for the due prosecution of the appeal and the payment of costs in respect of the appeal and conditions as to the times for preparing the record and despatching it to England. Nor were the orders of 12 February 2002 and 22 April 2002 made pursuant to section 6 because the power given to the Court of Appeal by that section is a power to stay the execution of the judgment and is not a power to stay the proceedings in the appeal. Moreover the Court of Appeal did not have power under section 11 to make the order of 18 November 2002 rescinding the conditional leave to appeal granted on 8 October 2001, because that power arises when the appellant has failed to apply with due diligence to the Court of Appeal for an order granting him final leave to appeal and it was the court's own order of 22 April 2002 staying the proceedings in the appeal which prevented the petitioners from applying for final leave to appeal. Therefore their Lordships are satisfied that neither Downer JA nor the Court of Appeal had power under the Jamaica Appeals Procedure Order to make the orders which were made subsequent to the Court of Appeal's order of 8 October 2001 granting conditional leave to appeal.

14. Mr James, who appeared for the petitioners, submitted that where the Court of Appeal granted conditional leave to appeal in a case where there was an appeal as of right to the Judicial Committee, the Court of Appeal (whether by a single judge or a three judge court) had no power to restrict or impose terms upon the exercise of that right to appeal or to impose conditions additional to conditions falling within paragraphs (a) or (b) of section 4. Accordingly the orders made by Downer JA and the Court of Appeal subsequent to the Court of Appeal's order of 8 October 2001 granting conditional leave to appeal were *ultra vires* and the Court of Appeal, instead of making orders staying proceedings in the appeal and then rescinding the conditional leave to appeal, should have granted the petitioners final leave to appeal.

15. Mr Hylton QC, the Solicitor General, who appeared for the respondent, submitted that the Court of Appeal had inherent power to control its own procedure to stop it being abused. In support of this submission he cited the judgment of Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, 977D who referred to the court's:

“general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice.”

Mr Hylton also cited the judgment of Lord Woolf CJ in *Taylor v Lawrence* [2002] 3 WLR 640, 648:

“17. We here emphasise that there is a distinction between the question whether a court has jurisdiction and how it exercises the jurisdiction which it is undoubtedly given by statute. So, for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals.”

16. Mr Hylton argued that whilst the petitioners wished to exercise their right of appeal to the Judicial Committee, they had made no effort to comply with the orders for costs made against them by the Chief Justice and the Court of Appeal. Therefore the petitioners were abusing the process of the court by utilising it in so far as it assisted them whilst flouting orders which operated to their disadvantage, and the Court of Appeal was entitled to stop this abuse. Moreover the Court of Appeal had struck an appropriate balance between the rights of the petitioners and the rights of the respondent by giving the petitioners a lengthy period in which to comply with the costs orders before rescinding the conditional leave to appeal. Mr Hylton further submitted that it was clear from the procedure whereby an appellant had to apply to the Court of Appeal for final leave to appeal after he had been granted conditional leave, that the appeal process was still within the jurisdiction of the Court of Appeal before final leave was granted.

17. Their Lordships are unable to accept these submissions. Section 110(1)(a) of the Constitution gives the petitioners an appeal as of right to the Judicial Committee and the Jamaica Appeals Procedure Order lays down a code whereby leave to appeal is given by the Court of Appeal and which gives power to the Court of Appeal in granting conditional leave to impose certain conditions, to grant a stay of execution of the judgment appealed from, and to rescind conditional leave to appeal on failure by the appellant to apply with due diligence for final leave to appeal. Their Lordships are of opinion that the Court of Appeal is not entitled to exercise its inherent power to impose further conditions or to make further orders which restrict the right of appeal given by section 110(1)(a). The observation of Lord Hoffmann in the *Electrotec Services* case [1998] 1 WLR 202, 206H in relation to the Constitution of Grenada is equally applicable in the present case:

“the recoverability of costs by a successful litigant is not a universal requirement of justice and, as Sir Vincent Floissac CJ observed in the Court of Appeal, the Constitution appears to give priority to the free availability, in the designated cases, of the right to appeal to Her Majesty in Council.”

18. Mr Hylton further submitted that the provision in section 5(b) of the Jamaica Appeals Procedure Order that a single judge of the Court of Appeal shall have power and jurisdiction –

“generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require.”

gave Downer JA and the Court of Appeal power to make the orders which they did. Their Lordships do not accept this submission because they consider that an order or direction under section 5(b) must be made to give effect to the intent of section 110(1)(a) and cannot be made so that it operates to restrict the right of appeal given by that section of the Constitution.

19. Therefore their Lordships are of opinion that the Court of Appeal was in error in not granting final leave to appeal to the Judicial Committee. The granting of special leave to appeal by the Judicial Committee is provided for by Rule 2 of the Judicial Committee Rules which states:

“No appeal shall be admitted unless either –

- (a) leave to appeal has been granted by the Court appealed from; or
- (b) in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council.”

20. In *Lopes v Valliappa Chettiar* [1968] AC 887 the petitioner had an appeal as of right to the Judicial Committee from the Federal Court of Malaysia under section 74(1)(a)(ii) of the Courts of Judicature Act 1964. The Federal Court refused leave to appeal holding that the appeal had no merits and was bound to fail and the petitioner appealed to the Judicial Committee for leave to appeal, or, alternatively, for special leave to appeal from the judgment of the Federal Court.

21. The Judicial Committee held that the Federal Court had no discretion to refuse leave to appeal, but refused to grant special leave to appeal and delivering the judgment of the Board Viscount Dilhorne stated at page 894E:

“The granting of special leave to appeal by the Judicial Committee is a matter of discretion and not a right: *Davis v Shaughnessy* [1932] AC 106, 112. Their Lordships agree with the Federal Court in their conclusion that this case is not a fit one for appeal to the Judicial Committee and they do not consider that they should exercise their discretion by granting leave solely on account of the fact that the

appeal was wrongly treated by the Federal Court as one in which that court had a discretion.”

22. In the *Electrotec Services* case [1998] 1WLR 202, 204C Lord Hoffmann stated:

“In the case of an appeal from the Court of Appeal of Grenada, the Judicial Committee of the Privy Council forms part of the Grenadian judicial system: *Ibralebbe v The Queen* [1964] AC 900, 922. The appeal procedure is governed by the West Indies Associated States (Appeals to Privy Council) (Grenada) Order 1967 (‘the West Indies Order’), which applies to the proceedings in the Court of Appeal, and the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (‘the Judicial Committee Rules’), which apply to the proceedings before their Lordships’ Board in London. Since these two instruments govern a single system of appeals, it is necessary to construe them as a coherent code.”

At page 206D:

“As for the inherent jurisdiction, their Lordships consider that there is much to be said for the view that any inherent power which the Board may have had to require security for costs in a case such as this has been impliedly excluded by the code of procedure for appeals constituted by the West Indies Order and the Judicial Committee Rules. No precedent has been cited of such a condition ever having been imposed by the Board in an appeal as of right and it seems to their Lordships to be inconsistent with the constitutional right of a Grenadian litigant to appeal to Her Majesty in Council subject only to a requirement of security limited to £500.”

And at page 206G:

“It is not however necessary to decide whether the inherent jurisdiction has been altogether excluded because their Lordships are satisfied that if it exists, it should be exercised only in exceptional cases; for example, when it appears likely that the bringing of the appeal is an abuse of process. It is not suggested that this is such a case.”

23. Having regard to the judgments in the *Lopes* and *Electrotec Services* cases their Lordships consider that, as stated in *Lopes*, they are not obliged to grant special leave to appeal to the petitioners solely because the Court of Appeal erred in refusing leave to appeal and that they retain a discretion to refuse leave. But they further consider, in accordance with the view stated

by the Board in *Electrotec Services*, that they should take into account in the exercise of their discretion that the petitioners are given an appeal as of right by the Constitution of Jamaica and that, where there is an appeal as of right, it would only be in exceptional circumstances as, for example, where it was clear that the appeal was wholly devoid of merit and was bound to fail, that the Board would refuse special leave to appeal or would impose conditions additional to those which the Court of Appeal is permitted to impose by the Jamaica Appeals Procedure Order.

24. Whilst their Lordships recognise that there appears to be considerable force in the respondent's argument that the petitioners are impecunious and undeserving litigants (the first petitioner having taken up residence in a jurisdiction in which Jamaican judgments cannot be enforced against him), their Lordships nevertheless consider that this is not a case where the appeal is wholly devoid of merit. One of the principal issues which arose on the trial before the Chief Justice was whether the first and third petitioners were liable to the respondent as guarantors of the debt of \$703,393,931.94 owed by Century National Development Ltd ("CND") to the bank. The respondent's case as pleaded was that in or about the year 1992 the first and third petitioners executed an instrument of guarantee:

"which was executed in blank by [the first and third petitioners] on the understanding that [CND] was the principal debtor whose total indebtedness was being guaranteed. By executing the document in blank the [first and third petitioners] impliedly authorised [the bank] to complete it by inserting [CND's] name, the approximate date on which it was executed, and the word 'unlimited'."

It appears not to be in dispute that the first and third petitioners also signed a letter authorising the bank to complete the instrument of guarantee.

25. In his defence the first petitioner pleaded that he and the third petitioner executed the guarantee as security for advances to him (the first petitioner) and to Regardless Ltd. In her defence the third petitioner pleaded that she executed the guarantee for the express purpose of guaranteeing a loan by the bank to Regardless Ltd. The first and third petitioners did not plead the Statute of Frauds and in his judgment in the Court of Appeal Langrin JA (at p 57) stated: "Since the Statute of Frauds was not pleaded in the Court below, the appellants cannot now rely on it".

26. At the trial the first and third petitioners did not give evidence. In his judgment the Chief Justice held that it was permissible for the court to infer from the factual situation who was intended to be the primary debtor, and having considered the factual situation he held that the first and third

petitioners intended to guarantee the debt of CND to the bank. The first and third petitioners submitted that the guarantee must fail for uncertainty in that it failed to name the debtor whose debts were being guaranteed and it also failed to specify the amount which was being guaranteed. This submission was rejected by the Chief Justice on the ground that as the document had been signed by the first and third petitioners they could only avoid being bound if they were able to show that they were misled into signing a document essentially different from that which they intended to sign, and it was not suggested in the pleadings or in the submissions of their counsel that they were mistaken as to the nature and quality of the document which they signed.

27. The Court of Appeal upheld the ruling of the Chief Justice in respect of the guarantee and Forte P stated at page 7:

“Mrs Benka-Coker for the appellants contended firstly that a contract of guarantee is strictly construed in favour of the guarantor, and no liability is to be imposed on him, which is not distinctly covered by the contract. In addition to this, she submitted, in this particular instance, the contract of guarantee was itself in writing. It is not permissible in law, she argued, for anyone to add to or vary the written document. It was not open to the learned judge to complete the contract for the bank and to insert his hypothesis of the name of the principal debtor and to seek to make certain that which was uncertain.

This submission is clearly wrong. The equitable remedy of rectification has always been available to correct or complete a document which does not express the intention of the parties. The decision in the case of *Whiting v Diver Plumbing and Heating Ltd* [1992] 1 NZLR 560 a case from New Zealand, cited by Mr Hylton QC for the respondent and with which I agree confirms this proposition.”

Langrin JA stated at page 57:

“I accept Mr Hylton QC’s submission that notwithstanding that there was no express authorization to fill in the name of the principal debtor the Bank was impliedly authorized to do so. Consequently, unless the defence of *non est factum* arose, the appellants were bound by the terms of Guarantee as completed by the Respondent.

In my view the learned Chief Justice was correct in concluding that the fact that the information had been missing at the time when the Guarantee was executed did not render the guarantee uncertain. Mrs

Alma Crawford acknowledged that the Guarantee existed and was clearly aware of its legal character. She did not plead or prove undue influence and accordingly was bound by the guarantee.”

Bingham JA concurred with Forte P and Langrin JA.

28. However in *Whiting v Diver Plumbing and Heating Ltd* [1992] 1 NZLR 560 Tipping J held that rectification and enforcement, while available in the same proceedings, are two distinct steps. The first step is for the court to determine whether the instrument in question ought to be rectified, and the second and separate step is to determine whether the instrument in its rectified form is enforceable. In the present case the respondent made no application to rectify the instrument signed in blank. Therefore their Lordships consider that having regard to the instrument of guarantee being signed in blank and to the absence of any application by the respondent to rectify the instrument, the appeal of the first and third petitioners is not wholly devoid of merit and that they should not refuse to grant special leave to appeal to the first and third petitioners. The claim of the respondent against the second petitioner related to the transfer of certain premises from the bank to Regardless Limited, and as that company is wholly owned by the first petitioner and his family their Lordships consider that they should not refuse to grant special leave to the second petitioner. Whether the Court of Appeal should have greater powers to impose conditions on a party seeking leave to appeal to the Judicial Committee is not a matter for their Lordships but for the legislature of Jamaica. Therefore their Lordships will humbly advise Her Majesty to grant the three petitioners special leave to appeal.