[2022] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

APPLICATIONS NOS 148/2017 & 191/2018

MOTION NO COA2019MT00003

BETWEEN	**WINSTON FINZI**	**APPLICANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION, INC**	**1ST RESPONDENT**
AND	**JONATHAN GOODMAN**	**2ND RESPONDENT**
AND`	**JANET FARROW**	**3RD RESPONDENT**
AND	**DAVID ALEXANDER**	**4TH RESPONDENT**
AND	**JASON RUDD**	**5TH RESPONDENT**
AND	**NAUDIA SINCLAIR**	**6TH RESPONDENT**

Paul Beswick, Miss Gina Chang and Miss Aisha Thomas instructed by Ballantyne, Beswick & Company for the applicant

Mrs Sandra Minott-Phillips QC and Maurice Manning instructed by Myers, Fletcher & Gordon for the 1st, 5th and 6th respondents

28, 29 January 2020 and 11 March 2022

BROOKS JA

[1] I have read in draft the reasons for judgment of my learned sister. Her reasoning on the issues raised in this case reflects that which led me to agree with the decision handed down.

P WILLIAMS JA

[2] This is a notice of motion brought by Winston Finzi ('the applicant') for conditional leave to appeal to Her Majesty in Council from a decision and order of this court, delivered on 24 January 2019, with reasons for the decision delivered in a judgment dated 5 April 2019 (with neutral citation [2019] JMCA App 7). The decision handed down was in favour of the Jamaican Redevelopment Foundation, Inc ('JRF' and 'the 1st respondent'), Jason Rudd ('the 5th respondent') and Naudia Sinclair ('the 6th respondent') refusing to grant permission to the applicant to appeal the decision of Laing J ('the learned judge') made on 28 July 2017. In that decision, the learned judge had granted summary judgment in favour of the respondents, thereby bringing an end to a claim that the applicant had brought against them in February 2017.

[3] The motion was brought in reliance on section 110(2)(a) of the Constitution of Jamaica ('the Constitution'), which provides that an appeal shall lie to Her Majesty in Council, from decisions of the Court of Appeal, with the leave of the 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".

[4] On 29 January 2020, after hearing and considering the arguments from counsel on this application, we made the following order:

> "(1) Motion seeking conditional leave to appeal to Her Majesty in Council from the decision of this court handed down on [24 January 2019] is refused.
>
> (2) Costs to 1st, 5th and 6th respondents to be agreed or taxed."

[5] At the time we made those orders, we promised to give brief reasons in writing. This is a fulfilment of our promise, with apologies for the delay in doing so. It is noted that, in the interim, the applicant applied directly to Her Majesty in Council for permission to appeal from the judgment of this court and permission was granted.

The factual background and the court proceedings

[6] In his decision, with neutral citation [2017] JMCC Comm 20, the learned judge had succinctly set out the background to the matter in a manner that bears repeating:

> "[7] It is a matter of historical record that the 1990's in Jamaica was characterised by a period of extremely high interest rates. The reasons for this will be debated for years to come, but what is undeniable is that this high interest rate regime wreaked havoc on and/or led to the financial ruin of a number of individuals and businesses who became debtors and who were unable to service their debts. There was also what has been termed a financial meltdown of various financial institutions of various sizes and in 1997 the Government of Jamaica established the Financial Sector Adjustment Company (FINSAC) whose mandate was to restore stability to the financial sector. In pursuance of this mandate, FINSAC acquired a number of non-performing loans, debts, liabilities and securities which belonged to these financial institutions which had accepted the intervention and assistance of FINSAC.
>
> [8] This case has its genesis in that era and has a close connection to the financial arrangements born of what is now commonly known as '*the FINSAC era*'. The [applicant], and his companies, were debtors. Their debt portfolio to Mutual Security Trust and Merchant Bank and/or its subsidiaries or affiliates were eventually acquired by JRF under a Deed of Assignment dated January 30, 2002 ('the Assignment').
>
> [9] [The applicant] has been involved in extensive litigation with JRF in respect of his personal indebtedness and/or the indebtedness of three

> companies with which he has had a close connection namely, Jamaica Beach Park Limited ('JBP'), Universal Holdings and Unity Farms Limited…"

[7] There were seven suits to which the learned judge referred, with six of them spanning a period from 2003 to 2006. From the judgment, it can be gleaned that of the six, four were filed by the applicant and/or his company and the remaining two by JRF. It is further gleaned that in 2005, judgment was entered against the applicant in a claim filed in 2004 by JRF, and, in 2006, a consent order was entered in a claim filed by JRF against the applicant in 2005.

[8] In his submissions to this court, the applicant provided more information relating to the matters. He detailed that none of the matters had proceeded to trial, and he had discontinued two of the matters, and one matter had been stuck out as being statute-barred.

[9] On 28 August 2012, the applicant and JRF entered into a settlement agreement by which terms all outstanding matters between them were settled (endorsed on counsel's brief in suit no 2005HCV5397). Subsequently, the applicant defaulted in respect of one aspect of the settlement agreement, and this led to JRF filing a claim seeking to enforce the provision of the agreement in 2014. The applicant failed to enter an acknowledgement of service or defence, resulting in a judgment being entered against him.

[10] In 2017, the applicant launched a new claim against the respondents and others. Johnathan Goodman ('the 2nd respondent'), Janet Farrow ('the 3rd respondent') and David Alexander ('the 4th respondent') were never served and so did not participate in the matter. There were two other defendants named in the claim. The 7th defendant, Mr Allan Wood ('Mr Wood'), was a partner in the 8th defendant, the law firm of Livingston Alexander & Levy ('LIVAL').

[11] The cause of action for this new claim was based on the following allegation:

> "… for fraud and conspiracy to defraud arising out of the purported collection of debt alleged by them to have been transferred to [the 1st respondent, JRF] from FINSAC and from the illegal sale of lands comprised in Certificate of Title registered at Volume 1203 Folio 671 and at Volume 1255 Folio 157 in the Register Book of Titles under the disguise that they were for legitimate debts owed by the [applicant], and against ALLAN WOOD, Attorney-at-law and Partner of the firm Livingston, Alexander and Levy Attorneys-at-Law – a firm, both located at 72 Port Royal Street, Kingston, for failure to honour the undertaking for the return of Certificate of Title registered at Volume 1203, Folio 671 and for conspiracy to defraud the [applicant] herein …"

[12] In written submissions filed on 25 September 2019 in support of this motion, it was noted that:

> "[t]he remedies sought were essentially to reverse the effect of a series of judgments issued against the Applicant personally or now defunct companies for which he managed. The cause of action was the setting aside of those judgments which the Applicant contends were procured through fraud by the Respondents collectively."

[13] The respondents, along with Mr Wood and LIVAL, applied separately for summary judgment. The learned judge, in dealing with the application together, noted that "[w]hile each application had discreet issues there were issues common to both applications and as a result, a considerable degree of overlap".

[14] One of the issues common to both applications was the assertion that the respondents, along with Mr Wood and LIVAL, had been parties to a fraudulently concocted claim against the applicant, made in 2004 by JRF, for a debt allegedly owed by the applicant. The applicant contended that it was known to the respondents that there was no basis for the claim and, therefore, the claim was fraudulent. The scope of the fraud alleged against the 1st, 5th and 6th respondents went further and included an assertion that loans that formed the basis of other claims did not exist, that calculations

of interest were knowingly incorrect, and that compound interest was applied to debts in respect of which there was no provision for compound interest to be charged. The applicant contended that he did not discover the fraud against him until August 2011, after he had received an answer to his request for disclosure from FINSAC in the form of a letter from the general manager of the entity.

[15] The learned judge reviewed the law relating to abuse of process, which required, by extension, a consideration of the principles of *res judicata*. He noted that it was the applicant's contention that the evidence of fraud, in this case, was an important feature to be considered in analysing the arguments in relation to abuse of process.

[16] The learned judge identified that the submissions made by the parties offered two approaches where a litigant was seeking to set aside a judgment on the basis of fraud and, in so doing, he stated the following:

> "[51] … The first approach commended by the [respondents], is that an action which attempts to do so will be an abuse of process where the litigant is seeking to raise an issue of fraud which could have been raised before, that is to say it will be an abuse in the **Henderson v Henderson** [[1843-60] All ER Rep 378]*res judicata* sense. Accordingly the litigant alleging the fraud must prove the fraud by evidence which it could have obtained by due diligence at the time of the settlement or judgment… The second approach, commended by Mr Beswick is founded on the 'fraud unravels all' concept and proposes a broad based approach in the [interests] of justice which imposes none of the above conditions on the litigant which is consistent with, as Counsel puts it, '*the Court's abhorrence to supporting a fraud*'." (Italicised as in original)

[17] In resolving the competing arguments, the learned judge conducted a careful consideration of the question of whether there was a reasonable diligence test under Jamaican law. He concluded that there was no binding judgment from the Judicial Committee of the Privy Council in support of the due diligence condition. He, however,

took the view that as a matter of precedent, it was open to him to find that "the current English position" was persuasive. This English position, he accepted, was that stated in **Takhar v Graceland Developments Limited and Others** [2017] EWCA Civ 147 ('**Takhar (Court of Appeal)**'), which held that the reasonable diligence test applied to fraud cases. Of particular significance to this appeal, the learned judge did not accept that the Privy Council decision of **Hip Foong Hong v H Neotia and Company** [1918] UKPC 65; [1918] AC 888 established conclusively that there was no due diligence condition to be applied in Jamaica. He was ultimately satisfied that the English position applied to the applicant's claim in respect of which the applications for summary judgment were made.

[18] The learned judge reviewed the claim for fraud as alleged and considered whether the allegations could be made out against the 1st, 5th and 6th respondents. He, however, found that it was not possible to make any determination as to the allegations but stated that he would nevertheless approach the application on the assumption that the claim for fraud had been substantiated, without so deciding, and would focus on the issue as to whether the claim amounted to an abuse of process.

[19] The learned judge accepted the submissions made on behalf of the respondents that although the applicant was pleading fraud for the first time, none of the various alleged components was new in the sense of not being founded on facts and issues previously raised by the applicant. He found that the applicant failed to do as much as he reasonably could have done to assert this claim of fraud. Specifically, the learned judge found that with the information received in 2011 and the conclusions he was asserting could be drawn from it, the applicant could have applied to amend his particulars of claim to elevate the claim to one of fraud, instead of entering into the settlement agreement in 2012.

[20] After conducting a review of all the material, the learned judge stated:

> "[105] … I find that the 1st, 5th and 6th [respondents] on whom the burden of proof rests have discharged that burden

and have satisfied this court that the claim against them is a breach of **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to these proceedings."

[21] He made the following orders:

> "1. Summary judgment is granted in favour to the 1st, 5th and, 6th [respondents] [and] the 7th and 8th defendants [Mr Wood and LIVAL] on the claim against the [applicant].
>
> 2. Costs of the claim is [sic] awarded to the 1st, 5th and 6th [respondents] against the [applicant] to be taxed if not agreed, and a special costs certificate is granted for two counsel (one senior and one junior) as well as instructing counsel.
>
> 3. Costs of the claim is [sic] awarded to the 7th and 8th defendants [Mr Wood and LIVAL] against the [applicant]on an Indemnity basis with such costs certified for two counsel (one senior and one junior) as well as instructing counsel.
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> 4. The [applicant's] application for leave to appeal is refused."

[22] The application for permission to appeal the learned judge's decision was renewed in this court. In seeking permission to challenge the learned judge's decision, among the grounds raised was that he had erred in finding that **Hip Foong Hong v H Neotia and Company** did not conclusively decide the issue in respect of the applicability of the reasonable diligence condition, and it was open for the court to follow the current English position that such a condition existed. It was also asserted that the learned judge erred when, in applying the condition, he found that the applicant had not done all he could to assert his claim of fraud before entering into the settlement agreement.

[23] In this court's decision, refusing the applicant permission to appeal, F Williams JA, writing on behalf of the court, accepted the submissions of Mrs Sandra Minott-Phillips QC,

on behalf of the respondents, that in **Hip Foong Hong v H Neotia and Company,** the issue of whether or not the reasonable diligence condition was applicable did not arise for consideration by the Privy Council. He stated:

> "[41] … I can see no reference whatsoever to the reasonable diligence condition or to a discussion of it in that judgment. The *ratio decidendi* seems to be what appears at page 894 of the judgment as follows:
>
> > '…where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud when the whole issue can be properly defined, fought out and determined, though a motion for a new trial is also an available weapon and, in some cases, may be more convenient.'
>
> [42] If that interpretation or understanding of the case is correct, then the learned judge cannot be faulted for having sought guidance from the English line of authorities and accepting the position that the reasonable diligence requirement applies. Additionally, for my own part, I would consider it injudicious to regard as binding authority for a principle, a case which does not expressly discuss and enounce that principle. In **Hip Foong Hong v H Neotia and Company** it is not expressly stated that no reasonable diligence condition existed or is required. Rather, the case is one that, in setting out a number of matters that might form an exhaustive list, fails to mention the reasonable diligence condition. So, here again the applicant's contention in this regard must be rejected. The timeline set out at paragraph [25] of this judgment, is, in my view, also sufficient to refute the contention that the learned judge erred in finding that the applicant had not done all that he could have done to assert his claim of fraud before he entered into the settlement agreement in August of 2012."

[24] In concluding his discussion on the issue, he stated:

> "[47] Having regard to the history of the matter set out previously, and having regard to the authorities, the applicant cannot fairly be said to have established that he has a real chance of success in showing that the learned judge erred in holding that the respondents had discharged the burden of proving that the applicants' case was brought in breach of **Henderson v Henderson** abuse of process principles…"

The basis of the motion for conditional leave to appeal

[25] In his affidavit in support of the motion for conditional leave to appeal to Her Majesty in Council, the applicant deposed as follows:

> "100. The issues sought to be appealed to her [sic] Majesty in Council involves decisions in a civil proceeding that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
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> 101. There are several issues of law, an area of law in dispute, and, a legal question the resolution of which poses dire consequences for the public.
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> 102. The case is of gravity involving a matter of public interest, or some important question of law and affects property of considerable amount far in excess of the $1000.00 requirement.
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> 103. It is necessary to clarify the law governing the circumstances in which a new trial may be granted on the basis of fraud. The questions involved in the proposed appeal are [sic] by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, especially in circumstances where the Applicant herein has never had that opportunity to have his case heard on its merits due to the malicious actions of the Respondents.
>
> 104. It is in the interests of justice and confidence in the administration of Justice that the Respondents be required to answer to the allegations of fraud against

them for once in order to cause proper factual and meritorious resolution and bring finality to this litigation amongst the parties.

105. That the determination of the issues herein carry [sic] great national and international importance to the continued stability of the financial sector in Jamaica and the inspiration of confidence in future investors in the island, as parties such as the Respondent should be made to answer for their actions and not hide behind procedural applications which have been facilitated by the Courts.

106. It is in the interests of justice and confidence in the administration of justice that the Respondents be required to answer to the allegations of fraud against them for once in order to cause proper factual and meritous [sic] resolution and bring finality to this litigation amongst the parties."

[26] In the notice of motion, the following were identified as issues to be considered which were of public importance involving difficult questions of law:

"a. Whether the Privy Council decision in **Hip Foong Hong v H. Neotia & Co. [1918] AC 888** did conclusively decide the reasonable diligence condition was not applicable in this jurisdiction, being then a territory of the United Kingdom, and to a new trial on the basis of fraud?

b. Whether the reasonable diligence condition which was applied [in the] United Kingdom after independence in Jamaica is a basis for a new trial due to fraud is applicable and binding in this Jurisdiction.

c. Whether reasonable diligence is applicable in a matter or series thereof where there has never been a trial on its merits?

d. How exactly is reasonable diligence satisfied in the civil arena where allegations have been asserted in

pleadings but never decided at trial or otherwise on its merits?

e. Whether Laing, J erred in:- (1) when he applied the reasonable diligence condition in this jurisdiction and (2) when he found that the Applicant had not done all he could have done to assert his claim of fraud before the Court?

f. Whether fraud, properly pleaded and sufficiently supported by the evidence detailed in the Claim, is sufficient grounds to re-open cases, set aside the previous orders of the Court and/or reassess said cases in a new trial?

g. Whether particulars of fraud properly pleaded are sufficient to bring a new trial in circumstances where final orders have been given after the fraud was committed on and perpetuated upon the Court?

h. Whether the Court of Appeal erred in not acknowledging the clear breach of the Supreme Court Civil Procedure Rules which require that a Defendant applying for summary judgment first file a Defence?

i. Whether Section 110(2)(a) of the Constitution of Jamaica restricts the rights of Appellants who desire to have judgments which are deemed interlocutory pursuant to the 'application rule' but which are in fact final in nature and effect, such as the instant appeal, from appealing to Her Majesty in Council, as of right?"

The submissions

On behalf of the applicant

[27] Mr Paul Beswick, in advancing the submissions on behalf of the applicant, identified and summarised the issues arising from the several questions to be posited to Her Majesty in Council as follows:

"a. Whether there is a reasonable diligence rule to be met in order to bring a suit to set aside judgment(s) by reason of fraud;

b. Whether *Henderson v Henderson* abuse of process/*res judicata* are applicable bars where a trial or merit-based determination of the issues has never taken place and in a suit to set aside judgment(s) by reason of fraud;

c. Whether *res judicata* is an applicable bar to settlement agreements where fraudulent misrepresentation arose and in the cause of action generally;

d. *Whether the so called 'application test' is a proper basis for the denial of a litigant's rights to appeal to the highest court of this jurisdiction*." (Italicis as in original)

[28] It was contended that this court and the court below had barred the applicant's claim to set aside the judgment alleged to have been procured by fraud against him or his defunct companies from proceeding, on the basis that he was not reasonably diligent in the history of the matter in putting forward what he now claims. It was submitted that this was a condition that does not exist and has never existed in English common law.

[29] Mr Beswick placed great reliance on the decision from the United Kingdom Supreme Court in **Takhar v Gracefield Developments Limited and Others** [2019] UKSC 13 ('**Takhar (Supreme Court)**'). This case, he said, "clarified the common law concerning reasonable diligence and applicability of the **Henderson v Henderson** rule in cases of setting aside judgments and [allowing] a new trial by reason of fraud". He also submitted that **Takhar (Supreme Court)** has "expressly dismissed the notion that there is a reasonable diligence condition applicable to a new claim to set aside a judgment on the basis of fraud". He contended that the panel of seven Law Lords unanimously confirmed that the "reasonable diligence condition was never part of the English common law in new actions to set aside judgments by reason of fraud".

[30] Mr Beswick submitted that abuse of process in terms of **Henderson v Henderson** could not arise when the issues in the cases have not been conclusively decided and where there are circumstances tantamount to default even when, strictly speaking, no default judgment had been entered. He posited that the reliance of this court on the **Henderson v Henderson** principle, in refusing the claim, was fatally flawed, as one of

the primary ingredients for its application did not exist in the history of this claim, there being no decision on the merits of the issues and pleadings.

[31] Mr Beswick submitted that in relation to the existence of a settlement agreement, there was "no judicial principle in our jurisprudence which imposes *res judicata* onto" such agreements. He, therefore, submitted that the courts erred in finding that the claim was barred by *res judicata* because a settlement agreement had been entered into.

On behalf of the respondents

[32] In response, Mrs Minott-Phillips urged this court to bear in mind that it was not the decision of the learned judge that the applicant was seeking to appeal but that of this court refusing leave to appeal the decision to this court. She submitted that questions (a) to (g) in the notice of motion, as stated at para. [26] herein, do not fall to be considered by Her Majesty in Council since this court had not, in effect, pronounced on the issues in arriving at the conclusion that the applicant had no prospect of success. Further, she submitted that questions (h) and (i) in the notice of motion were not addressed by this court and, in any event, there was nothing new and novel to be considered in these questions.

[33] She contended that it was not for this court to re-determine issues and that the overriding principle was that there should be no perception of a miscarriage of justice, and there was no such perception in this case.

[34] It was further submitted that the decision of **Takhar (Supreme Court)** had no bearing on the judgment of this court refusing the applicant's leave to appeal. She contended that an important consideration for the judges, in that case, in distinguishing it from the principles in **Henderson v Henderson**, was that the new point being raised must not have been in issue between the parties at the first trial and, if it had been, and the evidence had been led, a different outcome might have ensued. She noted that it was held that where new evidence pointed to fraud, an application for a new trial should be granted.

[35] Queen's Counsel submitted that the allegations on which the applicant now sought to establish fraud were not new and, even taken at its highest, did not constitute fraud. She contended that all the material on which the applicant relied to prove a massive fraud was not new but was in issue between the parties in previous proceedings and, therefore, was caught squarely in the **Henderson v Henderson** principles.

[36] Queen's Counsel ultimately concluded that this case was not about whether the reasonable diligence test should be applied but the facts themselves did not support the contention that any fraud was committed in securing the judgments or settlement. Further, she submitted, each case turns on its own facts and even if this court was guided by **Takhar (Supreme Court)**, there is no prospect of success for the applicant's dismissed claim because of the markedly different factual context from that in **Takhar (Supreme Court)**.

Discussion and conclusions

[37] There are several decisions from this court considering the provisions of section 110(2)(a) of the Constitution and establishing the requirements that must be satisfied for leave to appeal to Her Majesty in Council to be granted. Section 110(2)(a) provides that:

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

[38] The most useful place to start a discussion on these provisions remains the comments of Phillips JA, writing on behalf of the court in **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009. She stated the following at page 9:

> "Section 110(2) of the Constitution involves the exercise of the Court's discretion. For this section to be triggered, the Court must be of the opinion that the questions, by reason of their great general and public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> In construing this section there are three steps. Firstly, there must be the identification of the questions involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can properly be said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance."

[39] There are similarly several decisions from this court addressing the question of what is meant by "great general or public importance". In **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27, Morrison P succinctly defined it in the following way:

> "[33] ... [I]n order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and the public interest…"

[40] In **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470, Wolfe JA (as he then was), writing on behalf of this court, in addressing the question of what is meant by "or otherwise" stated at page 476:

> "… Clearly the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the

> Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some definitive statement of the law from the highest Judicial Authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships Board for guidance on the law."

[41] It is also settled that the question must not merely be one which the parties wish for the Board to consider to see whether they would agree with the decision of this court.

[42] The applicant has identified nine questions that he asserted to be of public importance involving difficult questions of law. The first is related to the decision in **Hip Foong Hong v H Neotia and Company**. Having read that judgment, I find that F Williams JA was correct in accepting the submissions that this decision made no reference to the reasonable diligence condition, nor was there any direct discussion of it in the judgment. Hence, the entire premise of the question proposed as to whether the learned judge had conclusively decided that the reasonable diligence condition was not applicable in this jurisdiction was unfounded.

[43] Regarding the issue of the setting aside of a judgment where there are allegations of fraud, and the significance of the reasonable diligence principle in the face of such allegations, it is noted that this issue was comprehensively reviewed and clarified in **Takhar (Supreme Court)**. This judgment was delivered after the decision of this court but shortly before the reasons for that decision. The Supreme Court allowed the appeal against the judgment on which the learned judge relied to conclude that the reasonable diligence test applied in fraud cases. Some of the questions, which the applicant sought to have Her Majesty in Council address, seem to be addressed by this decision from a seven-member Supreme Court panel, which will, undoubtedly, provide powerful guidance in matters where the issue arise, in this jurisdiction, in the future.

[44] In my view, that decision does not take away from the fact that the finding by the learned judge, in relation to this issue that was largely dispositive of this aspect of the

matter, was that the information that enabled the applicant to reach the conclusion that there was fraud committed by the respondents was received by him prior to his entering into the settlement agreement. There was no new material but rather the same material already available to the applicant being used to form the foundation of another claim. They were points already in issue between the parties which the settlement agreement had brought to an end.

[45] In any event, it is to be noted that this court did not make any conclusive pronouncements on the issue in arriving at the conclusion that the learned judge was not shown to have erred in holding that the respondents had discharged the burden of proving that the applicant's case was brought in breach of **Henderson v Henderson** abuse of process principles.

[46] In the particular circumstances of this case, questions (a) to (g), that the applicant proposed for the consideration of Her Majesty in Council, relating to this issue, did not raise any issue of great general or public importance in accordance with section 110(2)(a) of the Constitution.

[47] The applicant in his notice of motion, at questions (h) to (i), sought to have Her Majesty in Council consider questions relating to the procedure for summary judgments and the use of the "application test" in determining whether a matter is final or interlocutory for the purpose of applications for leave to appeal pursuant to section 110(1)(a) of the Constitution. Neither of those questions strictly arose from the decision of this court in this matter, and none of them would provide answers which would be determinative of the appeal.

[48] Finally, although the main thrust of the applicant's submission was that the questions involved in the proposed appeal raised issues that were of "great general or public importance" involving difficult questions of law, consideration was also given to the alternative criterion of "or otherwise" as included in section 110(2)(a) of the Constitution. I was, however, unable to identify any issues which "require some definitive

statement of the law from the highest judicial authority of the land". Accordingly, there was no basis for leave to be granted under the "or otherwise" rubric of section 110(2)(a).

Conclusion

[49] It was for these reasons that I agreed with the orders made at para. [4] herein that the motion should be refused with costs to the respondents to be agreed or taxed.

STRAW JA

[50] I too have read in draft the reasons for judgment of my sister and the reasoning is reflective of my decision to agree with the orders made at para [4].