BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 16 of 2016

BETWEEN:

SIGMA CONSTRUCTION INC	**INTENDED APPELLANT**
AND	
BIRCH DEVELOPMENT LTD	**INTENDED FIRST RESPONDENT**
CEDAR DEVELOPMENT LTD	**INTENDED SECOND RESPONDENT**
CHESTNUT DEVELOPMENT LTD	**INTENDED THIRD RESPONDENT**
CONIFER DEVELOPMENT LTD	**INTENDED FOURTH RESPONDENT**
HORNBEAM DEVELOPMENT LTD	**INTENDED FIFTH RESPONDENT**
SYCAMORE COMMON SERVICES LTD	**INTENDED SIXTH RESPONDENT**
WILLOW DEVELOPMENT LTD	**INTENDED SEVENTH RESPONDENT**
RAM HOLDINGS LTD	**INTENDED EIGHTH RESPONDENT**
KAUPTHING SINGER &	
FRIEDLANDER LTD	**INTENDED NINTH RESPONDENT**

Before The Hon. Sir Marston C. D. Gibson, K. A., Chief Justice, The Hon. Sandra P. Mason, and The Hon. Kaye C. Goodridge, Justices of Appeal.

2016: October 12
2017: February 21; March 28
2019: June 13

Mr. Bryan L. Weekes for the Intended Appellant
Mr. Ivan Alert for the Intended Eighth Respondent
Mr. Garth Patterson QC and Mr. Bartlett Morgan for the Intended Ninth Respondent

DECISION

GIBSON CJ:

INTRODUCTION

[1] This is an application by the intended appellant, Sigma Construction Inc. ("SCI"), for the following relief:

> (i) directions as to whether or not leave to appeal was required, pursuant to **section 54** of the **Supreme Court of Judicature Act Cap. 117A (Cap. 117A)**, to appeal against the decision of **Worrell J** dated 20 June 2016, upholding the summary judgment application of Kaupthing Singer & Friedlander Limited (in administration) (KSF);
> (ii) if leave is required, "that it be at liberty to file and present its application for leave to appeal out of time against the decision…" and
> (iii) an order for costs.

[2] The application raises two germane issues, namely (i) whether KSF's summary judgment application sought an interlocutory order within the meaning of **section 54** of **Cap. 117A**, in which case leave to appeal was in fact required, or whether the order sought was a final order, in which case, such leave was not required; and (ii) the ultimate issue, whether, assuming that leave to appeal was required, it is in the interests of justice to grant the application for leave to file an application for leave to appeal out of time under ***CPR 62.1(2).***

[3] For the reasons which follow, we find that the order sought by KSF was interlocutory in nature and therefore leave to appeal was, indeed, required under **section 54** of **Cap. 117A**. We further find that there is no justification for granting the application in the interests of justice.

FACTUAL AND PROCEDURAL BACKGROUND

[4] The procedural background to this application is somewhat tortuous. KSF is a company incorporated and registered in England and Wales and registered as an external company under the provisions of the **Companies Act Cap. 308 (Cap. 308)**.

[5] In 2006, KSF made a loan in the amount of USD $10,000,000.00 to the intended first to sixth respondents ("the intended first to sixth respondents"), which are all registered companies under **Cap. 308**. The loan was secured by way of deed of charge (mortgage) dated 14 October 2006 on a parcel of real property owned by the intended first to sixth respondents and located at Maynards in the parish of St. Peter.

[6] Appended to the loan was a letter dated 3 October 2006 from the Central Bank of Barbados which, so far as relevant stated:

> "We refer to previous correspondence ending with your letter dated August 10, 2006 seeking permission for a loan of US $10.0 million from [KSF] to [the intended first to sixth respondents]. We advise that approval is granted for [the intended first to sixth respondents] to borrow US $10.0 million from [KSF]…"

[7] Over four years later, SCI, a company incorporated under the provisions of **Cap. 308**, commenced High Court Action No. 236 of 2010 against the intended first to sixth respondents. SCI was seeking, among other things, damages and costs against the intended first to sixth respondents.

[8] SCI notified KSF and the court of its application for a charging order over the same piece of property at Maynards, St. Peter, which was the subject of the KSF charge. By letter dated 28 March 2011, KSF's then attorney-at-law informed SCI's attorneys that KSF "ha[d] no objection to your application for Charging Order [sic] as my client's First Legal Charge results in my client being paid from the proceeds of sale before anything can be recovered by [SCI]." On 20 May 2011, SCI obtained and entered a final charging order over the property.

[9] Subsequently, by deed of assignment dated 8 June 2011, KSF, the assignor, through its agent Thomas Merchant Burton, assigned its legal and beneficial right, title and interest in the debt owed by the intended first to sixth respondents, to the intended eighth respondent, Ram Holdings Limited ("RHL"), for the sum of USD $5 million. RHL is incorporated as an international business company in Belize and is registered as an external company under the provisions of **Cap. 308**.

[10] On 1 July 2010, SCI obtained judgment against the intended first to sixth respondents in the sum of BDS $4,074,133.18 with interest at the annual rate of 8% from 1 January 2010 until payment.

[11] By letter dated 19 December 2011, KSF's attorney wrote to SCI, so far as relevant, as follows:

> "I act on behalf of [RHL]…who took an assignment of the mortgage made between [the intended first to sixth respondents and KSF] dated 14th October 2006.
>
> I note your client's judgement (*sic*) and hence am writing to you to advise that the property will now be put up for sale by my client.
>
> I have approached the leading Real Estate agents on the island with a view to marketing the property. You may be aware that the first charge which my client holds is just short of US $10,000,000.00. The agents have indicated that the property would not realize this price and would not entertain a listing price near the value of the charge held.
>
> I would appreciate receiving your client's view of the current market value of the property and whether they have any suggestions as to how to achieve the highest sale price.
>
> Kindly note that if I do not hear from you within the next 14 days, my client will proceed to list the property for sale in accordance with the advice received from the local realtors..."

[12] In order to preserve its interest, SCI responded by filing Civil Suit No. 92 of 2012 in July 2012 against the intended respondents seeking certain items of declaratory relief, which were set out in its re-amended Claim Form filed 9 October 2012.

[13] On 24 September 2012, KSF filed a notice of application for summary judgment against SCI pursuant to ***CPR 15*** and ***26***. On 10 October 2012, SCI also sought summary judgment against KSF.

[14] The gravamen of SCI's claim, and its summary judgment application, was that the USD $10 million loan made by KSF to the intended first to sixth respondents was illegal since it violated the **Financial Institutions Act, Cap. 324A** (**Cap. 324A**). SCI contended that KSF had engaged in banking business contrary to the provisions of **Cap. 324A** without first obtaining a licence to do so. As a result, the original loan and deed of charge were void, unenforceable and of no legal effect.

[15] SCI also contended that the assignment to RHL was of no legal effect and was an attempt by KSF to defeat its interests as a bona fide creditor of the intended first to sixth respondents. Of course, if SCI is successful in invalidating the loan by KSF and the subsequent charge, then its charge, which ranks second only to KSF's deed of charge, will be the only valid charge left on the property at Maynards.

[16] Both sides filed affidavits, and written and oral submissions were made to the court. Subsequently, on 20 June 2016, **Worrell J** granted summary judgment in favour of KSF, and dismissed SCI's summary judgment application. The judge awarded costs to KSF to be assessed if not agreed.

The Notice of Appeal

[17] Dissatisfied with this decision, two days later, on 22 June 2016, SCI filed a notice of appeal appealing from "[t]he decision of the learned Judge wherein he dismissed the Appellant's claims against the Ninth Defendant pursuant to the Ninth Defendant's application filed on the 24th day of September, 2012 pursuant to Part 15 and 26.3(3) of the Supreme Court (Civil Procedure) Rules 2008."

[18] The grounds of appeal were, *inter alia*, that the learned trial judge erred in law by holding that SCI had no reasonable prospect of succeeding in its claim for relief or, alternatively, that it had no reasonable basis for bringing its claim based on breaches of **Cap. 324A** by KSF. SCI sought orders (i) reversing the decision of **Worrell J**; and (ii) granting summary judgment in its favour pursuant to its application of 10 October 2012.

[19] SCI notified KSF of the notice of appeal filed and by letter dated 29 July 2016, KSF's attorneys-at-law responded as follows:

> "We are in receipt of the Notice of Appeal which was filed herein on behalf of [SCI] on June 22, 2016. On review, we are of the opinion that the Notice of Appeal ought to have been preceded by a successful application for leave. We, therefore, write to put you on notice that we intend to raise this point, *in limine*, when the matter comes on for hearing."

[20] In response, on 10 August 2016, SCI filed a notice of application seeking leave to file an application for leave to appeal out of time pursuant to ***CPR 62.1(2)***. The main grounds of the application are: (i) the delay in filing the application for leave to appeal was not extensive nor intentional, in that, only two days after the decision of the High Court, a notice of appeal was filed in error instead of an application for leave to appeal; (ii) the area of law with which the appeal is concerned is one of serious public importance, namely, whether entities may be concerned in the business of making loans to the public without being licensed pursuant to **Cap. 324A**; and (iii) the draft grounds of appeal are clearly arguable, in that, **Worrell J** made errors of law which led to his findings. SCI asserted that it would therefore be in the interests of justice to grant its application.

[21] On 5 October 2016, an affidavit deposed to by counsel for SCI, Mr. Bryan Weekes, was filed in support of SCI's of application for leave to file an application for leave to appeal out of time.

THE PROCEEDINGS BEFORE THIS COURT

[22] When the matter first came on for hearing before this Court on 12 October 2016, counsel for KSF, Mr. Garth Patterson QC, submitted that Mr. Weekes had framed his application in a manner inconsistent with the affidavit which had been filed. In particular, Mr. Patterson QC noted that ground 1 in

SCI's notice of application for leave to file an application for leave to appeal out of time was opposite to what paragraph 18 of the affidavit in support provided. That paragraph requested this Court to decide under **section 54 (3)** of **Cap. 117A** whether or not leave was required to appeal **Worrell J's** decision.

[23] Mr. Patterson QC further submitted that Mr. Weekes ought to concede that the notice of appeal was filed in error, and was therefore a nullity, or that the notice of appeal was effective and, therefore, the application before the Court was unnecessary, but that he could not have it both ways.

[24] With some prompting from the Court, Mr. Weekes then applied for an adjournment to allow him to file an amended application. The matter was adjourned to 21 February 2017 and costs were awarded to the intended ninth respondent to be agreed if not assessed.

[25] On 4 November 2016 SCI filed an amended notice of application seeking directions from this Court as to whether or not leave was required and if so, permission to file an application for leave to appeal out of time.

[26] On 21 February 2017, Mr. Patterson QC objected to SCI's amended application, which, according to counsel, was now in substance entirely different to the first application and was in fact a new application. Mr. Weekes consequently sought, and was granted, leave of the Court to

formally withdraw the original application filed on 10 August 2016. Costs were awarded to KSF to be assessed if not agreed and the matter was adjourned to 28 March 2017. The Court received **Worrell J's** reasons for his decision on 7 July 2017.

[27] On 28 March 2017, we determined, having looked at the authorities, that the order appealed from was, indeed, an interlocutory order and, therefore, leave to appeal was required. We briefly give our reasons.

DISCUSSION

Issue 1 - Whether the order made by Worrell J was interlocutory or final

[28] **Sections 54 (1) (f) (iii)** and **(g)** of **Cap. 117A** provide that:

> "(1) No appeal lies to the Court of Appeal
> . . .
> (f) without the leave of the Court of Appeal or of the judge making the order, from
> . . .
> (iii) a final order of a judge of the High Court made in a summary proceeding;
> (g) without the leave of the judge or of the Court of Appeal, *from any interlocutory order or judgment* made or given by a judge of the High Court…"
> (Emphasis added)

[29] **Section 54 (3)** of **Cap. 117A** provides that "[s]ubject to **subsection (2)**, any doubt that arises about what orders or judgments are final and what are interlocutory *shall be determined by the Court of Appeal*." (Emphasis added).

[30] The distinction between a final order and an interlocutory order was formulated by Sir John Donaldson MR in the now celebrated decision of the UK Court of Appeal in **White v Brunton [1984] 2 All ER 606** at **607 (White v Brunton)** where his Lordship stated that "a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order itself." The Master of the Rolls further observed at **p.608** that the court "is now clearly committed to the application approach as a general rule…"

[31] This Court has applied the formulation of Sir John Donaldson MR in at least three decisions, which we discuss below.

[32] In **Bico Ltd. v McDonald Farms Ltd. Civil Appeal No. 33 of 1993** one of the issues to be determined was whether an order of this Court, from which the appellant sought leave to appeal to the Privy Council, was final or interlocutory. This Court, *per* **Moe JA**, answered that question in the following language:

> "Under the first head, the important question for determination is whether the applicant McDonald seeks to appeal from a final decision of the Court of Appeal. [Counsel's] submission for McDonald is that the decision of the Court of Appeal in an interlocutory appeal has the effect of disposing of the appeal. The contention is that while in this case the appeal from [the

> judge's] decision was an interlocutory appeal, the Court of Appeal's decision on that appeal was a final decision.
>
> This submission is not acceptable. The applicable principle may be gleaned from Salter Rex & Co. v Gosh [1971] 2 All E.R. 865 where Lord Denning, having pointed out that different tests have been stated from time to time as to what is final and what is interlocutory approved and followed Lord Esher, M.R.'s test that it was the nature of the application to the Court and not the nature of the order which the Court eventually makes, that is the determining factor. In White v Brunton, Sir Donaldson, M.R. in his judgment after a review of the authorities on the point stated at page 608, "the Court [Court of Appeal] is now clearly committed to the application approach as a general rule."

[33] In **Barbados Sugar Industry Ltd v Barbados National Bank, Crichlow and Hinds (No. 2) (1995) 50 WIR 64 (Barbados Sugar Industry Ltd.)**, this Court was again faced with the interlocutory versus final dichotomy in the context of an application seeking leave to appeal to the Privy Council. At **pp. 102-104** of **Barbados Sugar Industry Ltd.**, **Smith JA** cited with approval the line of cases supporting the application test, particularly Salter Rex & Co v Ghosh, *supra*, *per* Lord Denning MR, and **White v Brunton**, *supra*, *per* Lord Donaldson MR. **Smith JA** concluded that the application test was the relevant test, although he found additional support for his conclusion in a rule emanating from an amendment to the ***Rules of the Supreme Court*** (***RSC)***, ***1982***, the predecessor of the ***CPR***.

[34] A similar conclusion was reached in **CRL Ltd. v Charles Anthony Stoute Civil Appeal No. 1 of 2007**. There, after reviewing the same line of cases

examined by **Smith JA** in **Barbados Sugar Industry Ltd.**, **Sir David Simmons CJ** "[r]elying upon the terms of para. (cc) [the amendment to the ***RSC***] and the experience of the English Rules Committee" concluded that an order which sought to enforce an earlier default judgment and charging order was interlocutory.

[35] There is, accordingly, clear authority in this Court that, in determining whether an order is final or interlocutory, the correct test to be applied is the application test and not the order test. In applying this test to case before us, we have determined that the order made by **Worrell J** granting summary judgment to KSF was interlocutory. Accordingly, we agree with Mr. Patterson QC that leave to appeal was required and therefore the notice of appeal filed by SCI without leave, which had never been withdrawn, is a nullity.

[36] We turn now to consider the question of whether we should grant SCI leave to file an application for leave to appeal out of time in the interests of justice.

Issue 2 – Whether the application for leave to file an application for leave to appeal out of time should be granted in the interests of justice

[37] Where leave to appeal is required, the procedure to be followed is that contained in ***CPR 62.2(1)***, which provides:

> "(1) where an appeal may be brought only with leave of the court below or the Court of Appeal, a party wishing to appeal must apply for leave within 21 days of the order against which leave to appeal is sought."

[38] Having not availed itself of this provision, SCI now seeks to invoke ***CPR 62.1(2)***, which provides that, "[w]ithout limiting its powers conferred otherwise, the court may direct a departure from this Part whenever that is required in the interests of justice."

[39] Mr. Weekes for SCI contends that the Court should grant the application seeking leave to file out of time in the interests of justice for three main reasons. First, the law relating to whether or not leave to appeal was required was "in need of some clarification". Second, although a notice of appeal was filed due to counsel's error, he took the necessary steps to bring the notice of application before the Court. Third, the intended appeal raises a question of public importance as it relates to the interpretation and legal effect of certain provisions of **Cap. 324A**.

[40] ***CPR 62.1(2)*** was analysed by this Court in **CGI Consumers Guarantee Insurance Co. Ltd. v Trident Insurance Co. Ltd.**, **Civil Application No. 9 of 2014.** There, **Burgess JA** (as he then was) stated, at **para [46]** as follows:

> "[W]e consider it important to make three general observations in relation to **rule 62.1(2)** at the very outset. The first is that, pursuant to **rule 2.1**, the criteria for exercise of the **rule 62.1(2)**

> discretion must be guided by the overriding objective of **CPR**, namely, enabling the court to deal with cases justly. The second is that, given the overriding objective of **CPR**, the exercise of this Court's discretion under **rule 62.1(2)** is exceptional in its nature and that there is a presumption in favour of strict adherence to the stipulated requirements in **Part 62**, and in particular **rule 62.2(1)**. The third is that, on the plain words of **rule 62.2(1)** (*sic*), the critical consideration in deciding on the exercise of that discretion is whether or not it is required "in the interests of justice"."

[41] Turning to the phrase "interests of justice", **Burgess JA** noted at **para [48]** that "***CPR*** itself does not elaborate on the specific factors or circumstances that should be taken into account in consideration of an "in the interests of justice" issue for purposes of **rule 62.1(2)**", and that the demonstrable lesson from experience is "that each "in the interests of justice" situation is different."

[42] His Lordship concluded that the determination in each case is "depend[ent] upon the totality of the facts and circumstances of that case" while observing at **para [49]** that this "does not mean that determination of an "in the interests of justice" issue under **rule 62.1(2)** can be an arbitrary exercise. In considering the totality of facts and circumstances in any case, there are always certain explicit factors or indicia, none of which by itself can be treated as determinative, which this Court must take into account."

[43] At **para [50]**, **Burgess JA** gave some examples of the "explicit factors" to be considered:

> "These factors include such things such as the conduct of the parties in helping the court to further the overriding objective of **CPR** as required by **rule 1.3**, the length of the delay, the explanation for the length of such delay, the chances of success on appeal and any prejudice to either party which may result from the grant or refusal of leave… [N]o one factor is determinative." (Emphasis added)

[44] The issue then is whether the "interests of justice" provides a basis upon which to grant leave to SCI to file an application for leave to appeal out of time. This requires, in turn, consideration of the above factors.

Length of the delay and explanation for the length of such delay

[45] On 20 June 2016, **Worrell J** delivered his decision, and on 22 June 2016, SCI filed its notice of appeal. By letter dated 29 July 2016, Mr. Patterson QC wrote to Mr. Weekes indicating that a preliminary point would be taken. On 10 August 2016, SCI filed its notice of application, and after Mr. Patterson QC objected to the inconsistencies between the application and supporting affidavit, SCI filed its amended notice of application on 4 November 2016.

[46] It therefore took over four months for the correct application to be brought before this Court. While there was delay by SCI in making its application, in our opinion, that delay was not inordinate.

[47] In relation to the explanation for the delay, there was no reason given by Mr. Weekes on behalf of SCI explaining the delay in the affidavit itself, but

in the grounds of the amended notice of application, SCI stated that, "the failure to file the requisite application for leave was not as a result of a conscious flouting of the law or the rules by Sigma Construction Inc. or its counsel." According to Mr. Weekes in his oral submissions "[t]he reason why the application for leave was not filed, being that counsel on behalf of [SCI] was clearly erroneously of the view that leave was not necessary when it was filed and the time that it was filed."

[48] In **Ruby Mitchell and Owen Mitchell v John Wilson CCJ Appeal No. GYCV2017/001 (Ruby Mitchell)**, the **CCJ** at **para [6]** made the following statements in relation to counsel errors:

> "Misunderstanding by counsel of the time limit for filing a Notice of Appeal is not considered a good reason for extending a time limit. An attorney's ignorance of the rules will rarely, if ever, provide a good reason for failing to comply with them…We acknowledge that minor infractions which do not prejudice the other parties, the timeliness of the resolution of the dispute and the administration of justice need not always result in turning away litigants from the seat of justice."

[49] While Mr. Weekes' argument was that he misunderstood whether leave to appeal was required or not, this cannot be considered a good reason for failure to comply with the time limits.

[50] It must be stressed that counsel's failure to comply with ***CPR*** has not assisted the Court in furthering the overriding objective.

[51] Having regard to the totality of the circumstances, we are of the view that there were no good reasons advanced by SCI for the length or explanation of the delay in filing its application for leave to appeal out of time. Nonetheless, those factors are not determinative and it is necessary to consider whether SCI has any chances of success on appeal.

Chances of success on appeal

[52] The main premise of SCI's application is its challenge to **Worrell J's** exercise of discretion in granting KSF's summary judgment application.

[53] In **Aaron Truss v Windsor Plaza Ltd, Civil Appeal No. 10 of 2015 ("Aaron Truss")** (aff'd on other grounds in **Aaron Truss v Windsor Plaza Ltd, 2016 CCJ 10 (AJ)**), this Court recited the off-quoted language of Lord Denning MR in **Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 W.L.R. 1507, 1523-D** that before an appellate Court can interfere with the exercise of a trial court's discretion, "it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale." (see, also, **Toojays Ltd v West Haven Ltd, Civil Appeal No. 14 of 2008** at **paras [19]-[21]**).

[54] So, at issue is whether SCI has any chance of success in showing that KSF conducted banking business without a licence when it made the loan to the intended first to sixth respondents, leading to the conclusion that both the loan and the underlying security were void. In our view, SCI would have to show that the trial judge was wrong in exercising his discretion to grant summary judgment to KSF while denying summary judgment to SCI. We do not consider that the judge fell into error in the exercise of his discretion for the reasons which follow.

[55] **Section 4(1)** of **Cap. 324A** provides that no person may carry on banking business in Barbados without first obtaining a licence from the Minister of Finance.

[56] **Section 2** of **Cap. 324A** defines "banking business" as "the business of

> (a) receiving money from the public on current account, deposit account or other similar account and paying and collecting cheques drawn by or over a period by customers, and making advances to customers; or
>
> (b) receiving money on a savings account from the public repayable on demand or after not more than 3 months' notice and generally the undertaking of any business appertaining to the business of banking provided that such business has not been specifically prohibited by the Central Bank."

[57] **Worrell J** stated at **para [9]** in his decision that he could find no affidavit evidence in support of SCI's application which would suggest that KSF

"committed each one of the acts referred to in the first limb of the definition of banking business without the requisite authority to do so".

[58] Further, the judge noted that Mr. Patterson QC submitted that the affidavit evidence in support of KSF's application for summary judgment is that at no time was KSF receiving money on a savings account from the Barbadian public which was repayable on demand nor did it undertake activities relating to banking business besides lending money, which cannot constitute banking business. This affidavit evidence, Mr. Patterson QC submitted, was not disputed by SCI.

[59] Moreover, based on the licensing requirements and guidelines for prospective licences of financial institutions, as set out in the Framework for Licensing of Financial Institutions No. 2 of 2013, **Worrell J** formed the view that KSF was not required to be licensed under **Cap. 324A** or the **International Financial Services Act Cap. 325**.

[60] **Worrell J** held that SCI's application "would…have to disclose facts which themselves must be consistent with such and be contained in the pleadings, namely the statement of Claim and Amended Statement of Claim to show that [KSF] did in fact receive money from the public on current account, deposit account or other similar account and that [KSF] paid and collected cheques drawn by…customers and made advances to

customers and was thereby bringing itself by such conduct within the meaning of [**Cap. 324A**]."

[61] **Worrell J**, having reviewed the affidavit evidence of the parties and their respective submissions, concluded that there was no evidence that KSF was carrying on banking business within the meaning of the provisions of **Cap. 324A**.

[62] Based on our review of the material presented before this Court, we have arrived at a similar conclusion. SCI in its re-amended statement of claim only relies on the fact that KSF "openly state[d]" in the deed of charge made between KSF and the intended first to sixth respondents that "...the Mortgagee has at the request of the borrowers agreed to extend banking and loan facilities and other financial accommodation in accordance with the facility letter dated 5 July 2006…" The recitals of the mortgage, in our view, are not enough to satisfy the statutory criteria of banking business. Accordingly, we find that SCI has no chance of success in its intended appeal on the issue concerning KSF's engagement in banking business.

[63] **Worrell J** added that even if he was wrong on the issue of whether KSF was involved in banking business, it still appeared that there was a dispute as to whether KSF was involved in banking business and that such a determination would solely be for the Minister of Finance, not the court.

[64] In this regard, **section (4) 3** of **Cap. 324A** provides that "[i]n the event of any dispute as to whether a person is carrying on banking business the matter *shall be submitted to the Minister for his determination; and the decision of the Minister shall be final and conclusive* for all purposes of this Act" (Emphasis added).

[65] It is clear that a dispute has arisen as to whether KSF was involved in banking business. There is no evidence before us that the dispute between KSF and SCI as to whether KSF was carrying on a banking business has ever been submitted to the Minister of Finance as required by **section 4 (3)**. This is a matter which the Parliament of Barbados has clearly placed within the Minister's exclusive jurisdiction. In our view, it cannot be in the interests of justice to grant the application sought by SCI in a case where SCI has ignored the procedure specifically designated by Parliament in **section 4(3)** of **Cap. 324A** for this purpose.

[66] The upshot of this is that, in light of the exclusive jurisdiction placed in the hands of the Minister of Finance to resolve any dispute as to whether an entity is engaging in banking business in the circumstances adumbrated, the courts are without jurisdiction to resolve such dispute.

[67] Even if SCI had shown that banking business was being conducted by KSF, KSF's involvement in banking business would not invalidate the

mortgage unless the statute, by construction, requires that conclusion: **Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd [139] CLR 410**. In these circumstances, we find that SCI has no chance of success on appeal.

Prejudice to either party which may result from the grant or refusal of leave

[68] The final factor to be considered is whether either party may suffer prejudice by the grant or refusal of leave. Mr. Weekes has not made submissions on this factor. However, Mr. Patterson QC submitted that KSF had assigned its interest to RHL and that the effect of that assignment was to transfer all legal and other remedies to the assignee. Counsel further submitted that it was therefore unnecessary for KSF to be a party to the proceedings in the court below since SCI would still be in a position to pursue any claim it had against RHL. On the face of it, the deed of assignment is valid and in the absence of evidence to the contrary, KSF would suffer prejudice by having to continue to participate in the proceedings.

[69] We note also that SCI contended that leave should be granted because of the "public importance" of this matter. In this case, SCI has not demonstrated the "public importance" of the proposed appeal, which

essentially concerns **Worrell J's** exercise of discretion in relation to the summary judgment applications.

[70] Having regard to the foregoing, and based on the material which was before **Worrell J**, we are not convinced that SCI has shown that **Worrell J** "erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong…"

CONCLUSION

[71] The application by SCI seeking summary judgment was interlocutory, not final, and therefore leave to appeal from the order of **Worrell J** denying summary judgment to SCI, and granting summary judgment to KSF, was required. The notice of appeal filed without leave of the Court was accordingly a nullity.

[72] There is no basis for granting leave to file an application for leave to appeal out of time in the interests of justice since the underlying appeal lacked merit and therefore stands little chance of success.

DISPOSAL

[73] It is therefore ordered as follows:

1. SCI's application seeking leave to file an application for leave to appeal out of time against the decision of **Worrell J** dated 20 June 2016 is dismissed.
2. SCI shall pay KSF's costs of the application to be assessed if not agreed.

Chief Justice

Justice of Appeal Justice of Appeal