[2010] UKPC 28
Privy Council Appeal No 0026 of 2010

JUDGMENT

E. Anthony Ross *v.* Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited

From the Court of Appeal of St Christopher and Nevis

before

Lord Phillips
Lord Mance
Lord Collins

JUDGMENT DELIVERED BY
Lord Mance
ON

23 November 2010

Heard on 12 October 2010

Appellant	*Respondent*
Frank E. Walwyn	Karl Hudson-Phillips QC Mr Thomas Roe
(Instructed by Barlow Lyde & Gilbert LLP)	(Instructed by Collyer Bristow LLP)

LORD MANCE:

1. In these proceedings, Mr E. Anthony Ross, claims against the Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Ltd (in liquidation) US$410,000 and interest in respect of two certificates of deposit expressed to mature on 10 December 1981. Mr Ross obtained judgment at first instance, but this was set aside in the Court of Appeal on 25 January 2010. Section 99 of the Constitution scheduled to the Saint Christopher and Nevis Constitution Order, 1983 (SI 1983/881) provides that an appeal shall lie to the Privy Council from decisions of the Court of Appeal as of right where the matter in dispute involves $5000 or upwards. Mr Ross has on 5 March 2010 filed a notice of appeal with the Privy Council, maintaining that he is entitled to appeal to the Privy Council as of right, without needing to seek or obtain leave from the Court of Appeal or the Privy Council. The first issue is whether that is correct. The second issue, if it is not, is whether the Board should grant Mr Ross special leave or permission to appeal under the Judicial Committee Acts 1833, section 3 and 1844, section 1.

2. The Board pays tribute to the quality of the submissions which it has received from Mr Frank Walwyn for Mr Ross and from Mr Hudson Phillips QC and Mr Thomas Roe for the Bank. For reasons which follow, the Board concludes in relation to the first issue that, even in respect of appeals expressed to be as of right under the Constitution, it remains necessary either to obtain leave from the Court of Appeal or, that lacking, to obtain special leave from the Privy Council, and in relation to the second issue that special leave should be granted for an appeal to the Privy Council in the present case.

3. It is common ground that prior to 21 April 2009 - when the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/224) ("the 2009 Order") brought the new Judicial Committee (Appellate Jurisdiction) Rules 2009 ("the 2009 Rules") into effect - Mr Ross's stance on the first issue would have been incorrect. He would have needed to seek and obtain leave from the Court of Appeal or, that lacking, the Privy Council. Rule 2 of Schedule 2 to The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982/1676: revoked in its entirety by the 2009 Order) provided in unqualified terms that:

> "2. 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."

4. The combination of section 3 of the Judicial Committee Act 1833 and section 1 of the Judicial Committee Act 1844 confirmed that the Privy Council had a general power to grant special leave to appeal to it. But the established practice in cases where the local Constitution provided for an appeal as of right was for leave to be sought in the first instance from the local Court of Appeal. The practice can be traced back to the 19th century, before Privy Council procedure was formalised in general rules: see e.g. *Ex p Rolfe* (1863) 2 W & W, I E & M 51; Macpherson's *The Practice of the Judicial Committee of Her Majesty's Most Honourable Privy Council* (Henry Sweet, 1873) and Bentwich's *The Practice of the Privy Council in Judicial Matters*, 3rd ed. (1937) pp.107-111.

5. The grant of leave by the court appealed from for an appeal as of right was "not, however, a matter of discretion for that court": *Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd* [1998] 1 WLR 202, 204E. The purpose of seeking leave to appeal from the court appealed from was to confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law. This is confirmed by article 5 of The Saint Christopher and Nevis Appeals to the Privy Council Order - as the West Indies Associated States (Appeals to the Privy Council) Order 1967 (SI 1967/224) may be cited (see The Saint Christopher and Nevis Constitution Order 1983 (SI 1983/881), Schedule 2 para 8, and The Saint Christopher and Nevis Modification of Enactments Order 1983 (SI 1983/882), Schedule, para 9). The Board will refer to this Order as the Privy Council Appeals Order 1967. Under article 5, the only permissible conditions involved the provision of security for costs not exceeding £500 and other conditions as to the time for steps to procure the preparation of the record and despatch it to England.

6. Where leave was not obtained, for whatever reason, from the local Court of Appeal, then special leave could still be sought from the Privy Council. Bentwich (at p110) describes the 19th century position as follows:

> "Where the Court below should have granted leave to appeal, the question in dispute being of the appealable value, but it has refused, a petition should be presented addressed to Her Majesty in Council by way of appeal from such refusal, and asking that such order may be set aside and leave to appeal be granted: cf *Wilson v Callender*, 9 Moo 100; *Bank of Australasia v Harris*, 16 Moo 97; *Re Sibmarain Ghose*, 8 Moo 257."

The position was codified in slightly different terms, better reflecting the terms of the 1833 and 1844 Acts, in a single set of rules by the Judicial Committee Jurisdiction and Procedure: General Rules as to Appeals Rules 1908 (SR & O 1908, 405). Rule 2 provided:

> "All appeals shall be brought either in pursuance of leave obtained from the court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a petition in that behalf presented by the intending appellant".

Rule 2 of the 1982 Rules (para 2 above) effectively re-enacted this provision. Upon an application for special leave, if the Privy Council concluded that leave should have been granted as of right by the Court of Appeal, that would be a most material factor. But the Privy Council could, exceptionally, refuse special leave even in such a case, "as, for example, where it was clear that the appeal was wholly devoid of merit and was bound to fail": *Crawford v Financial Services Institutions Ltd.* [2003] UKPC 49; [2003] 1 WLR 2147, para 23.

7. The 2009 Rules contain no precise analogue of Rule 2 of the 1982 Rules. Rules 10, 11 and 18 of the 2009 Rules read:

> "**Permission to appeal**
> **10.** In cases where permission to appeal is required, no appeal will be heard by the Judicial Committee unless permission to appeal has been granted either by the court below or by the Judicial Committee.
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> **Filing of application for permission to appeal**
> **11.**—(1) Every application to the Judicial Committee for permission to appeal shall be made in the appropriate form.
> (2) An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later).
> ……
>
> **Form and filing of notice where permission not required**
> **18.**—(1) Every notice of appeal shall be made in the appropriate form.
> (2) The notice of appeal together with the requisite number of copies must be filed within 56 days of the date of the order or decision of the court below or of the date of the order or decision of that court granting permission to appeal (if later).

(3) The grounds of appeal may not (without the permission of the Registrar or the Judicial Committee) differ materially from those for which permission to appeal has been granted.
(4) The appellant must—
(a) serve a copy of the notice of appeal on each respondent before it is filed; and
(b) at the same time as the notice of appeal is filed, file a certificate of service.
(5) The appellant must also file
(a) a copy of the order appealed from and
(b) (if separate) a copy of the order granting permission to appeal and
if the order appealed from is not immediately available, the notice of appeal should be filed without delay and the order filed as soon as it is available."

8. The combination in Rule 10 of the opening words ("In cases where permission to appeal is required") and the provision that in such cases no appeal will be heard unless permission has been granted either by the court below or by the Privy Council suggest that there must be cases in which no permission to appeal is required from either the court below or the Privy Council. Rule 11(2) deals with cases where permission is required from the Privy Council, and is not therefore in point. Rule 18 is less clearly suggestive than Rule 10 of a conclusion that there may be cases in which no permission to appeal at all is required. It is true that para (2) requires a notice of appeal to be filed "within 56 days of the date of the order or decision of the court below or the date of the order or decision of that court granting permission to appeal (if later)". These two alternatives may be said to read more harmoniously, if the first contemplates a situation where no permission at all need be sought rather than one where permission has been sought and refused below. On the other hand, paras (3) and (5)(a) contemplate on their face that permission to appeal will have been granted below.

9. By Rule 3 of the 2009 Rules, it was envisaged that the Privy Council would issue Practice Directions "to supplement these Rules" and "to provide general guidance and assistance for counsel, agents and the parties". Practice Direction 1 contains this description of the Privy Council's jurisdiction:

"Section 2 The Jurisdiction of the Judicial Committee
I. *Commonwealth Jurisdiction*
A. APPEALS TO HER MAJESTY IN COUNCIL
2.1 An appeal lies from the countries listed at paragraph 2.2 *[which include St. Christopher and Nevis]* of which The Queen is head of

> State and from UK overseas territories and Crown Dependencies as follows.
> (1) By leave of the local Court of Appeal. The circumstances in which leave can be granted will depend on the law of the country or territory concerned. Leave can usually be obtained as of right from final judgments in civil disputes where the value of the dispute is more than a stated amount and in cases which involve issues of constitutional interpretation. Most Courts of Appeal also have discretion to grant leave in other civil cases.
> (2) By leave of Her Majesty in Council. The Judicial Committee has complete discretion whether to grant leave. It is mostly granted in criminal cases (where leave cannot usually be granted by the Court of Appeal) but it is sometimes granted in civil cases where the local Court of Appeal has for any reason refused leave."

10. Practice Direction 1 therefore contemplates the continuation of the old practice, whereby, even in cases where the appeal was under the local Constitution expressed to be as of right, application for leave to confirm this would be made in the first instance to the local Court of Appeal appealed from, and, failing the grant of such leave, special leave would then be sought from the Privy Council itself. Under Rule 3 of the 2009 Rules, Practice Direction 1 is supplementary to and intended to reflect the sense of the Rules, and it is entitled to some weight in their interpretation, although it would have to yield to the Rules if there was any clear conflict between it and them: compare, in the context of the English Civil Procedure Rules, *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 WLR 997 and *R(Mount Cook Land Ltd.) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C P Rep 12; [2004] 2 P & CR 22.

11. The Privy Council sits as the final court of appeal of any jurisdiction from which it hears appeals. But appeals to the Privy Council are regulated by a combination of provisions with different legal bases. Here, the Constitution prescribes the cases in which an appeal is open to the Privy Council; the Privy Council Appeals Order 1967 continues to provide powers and procedures covering applications to the Court of Appeal for leave to appeal in circumstances where the appeal is as of right; and the 2009 Order covers the powers of and procedures before the Privy Council itself.

12. Paras 4 to 7 of the Privy Council Appeals Order 1967 (see para 5 above) read as follows:

> "4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision

to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

5. 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 the 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 dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. 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.

7. Where the decision 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 decision 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 decision 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."

13. The 2009 Rules para 5 provide in relation to the Privy Council Appeals Order 1967 as well as various other, presently irrelevant, orders that

> **"Partial revocations**
> **5.** The instruments listed in column 1 of the following table (which have the references listed in column 2) are revoked only and in so far as they relate to the powers of the Judicial Committee of the Privy Council and the procedure to be adopted by it with respect to proceedings before it."

This formulation reflects a distinction between powers and procedures locally and before the Privy Council. It leaves untouched the provisions of the Privy Council Appeals Order 1967, so far as those provisions provide for and regulate the obtaining of leave for appeal from the local Court of Appeal. It is true that those provisions are in terms giving powers in respect of applications for leave, rather than expressly requiring such applications to be made locally. But the absence of any other like provisions in the 2009 Rules or elsewhere suggests that the Privy Council Appeals Order 1967 must have been intended to continue to regulate such applications. The alternative, that the 2009 Rules were intended to supersede rules 4 to 7 of the Privy Council Appeals Order 1967 in any case where the Constitution granted an appeal as of right would mean that no formal procedures had been provided for such appeals, and that the onus of confirming whether the criteria for an appeal as of right was, or could at a litigant's option be, thrown onto the Privy Council, without any formal basis for imposing conditions and without any requirement to seek or obtain leave from the court appealed from or the Privy Council.

14. In considering whether this can have been the effect of the 2009 Rules, it is important to bear in mind the constitutional developments occurring in and after 1967, which involved the attainment by St Christopher and Nevis of full independence. The Privy Council Appeals Order 1967 came into operation on the same day (27 February 1967) as The Saint Christopher, Nevis and Anguilla Constitution Order 1967 (1967 SI No. 228) brought into effect the main part of a

Constitution of those territories. Section 100 of that Constitution was the predecessor (with a lower limit of $1,500) of section 99 of the 1983 Constitution (para 1 above). Shortly after the enactment of the two 1967 Orders, Her Majesty's Government in the United Kingdom ceased to have any presently relevant responsibility for the government of St Christopher, Nevis and Anguilla, and it was provided that (subject to limited exceptions) no Act of the United Kingdom Parliament should extend to those territories without their consent: see the West Indies Act 1967, a statute of the Westminster Parliament, sections 2 and 3.

15. In 1983 St Christopher and Nevis attained fully sovereign status, and the 1983 Constitution was enacted. The full history is recounted in *Attorney-General for Saint Christopher and Nevis v Rodionov* [2004] UKPC 38; [2004] 1 WLR 2796, paras 12-13. The Privy Council Appeals Order 1967 had by para 3 provided that:

> "An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceeding in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State."

However, in 1983, as the Board noted in *Rodionov* (para 13):

> "Reflecting the new independence of St Kitts, paragraph 8 of Schedule 2 to the 1983 Constitution provided that the 1967 Appeals to Privy Council Order should have effect as if section 3 …. were revoked. The provisions governing appeals were now to be found in the Constitution itself, not in a general Order applying to the Associated States and referring to the individual constitutions of each state."

Schedule 2, para 2(2) of the 1983 Constitution further provided:

> "Any existing law enacted by any legislature with power to make laws at any time before 19th September 1983 shall have effect as from that date as if it were a law enacted by [the St Christopher and Nevis] Parliament".

The Privy Council Appeals Order 1967 falls in these circumstances to be regarded as an integral part of the law of St Christopher and Nevis so far as it regulates matters within the jurisdiction of that state.

16. The constitutional position since at least 1983 has thus been that the Constitution and law of St Christopher and Nevis provide for appeals as of right and contain procedures regulating applications to the Court of Appeal and conferring on that Court powers in relation to such appeals. Neither the Constitution nor such procedures are capable of being affected by the 2009 Order. The 2009 Order was accordingly expressed to revoke the Privy Council Appeals Order 1967 "only if and in so far as" it related to "the powers of the Judicial Committee … and the procedure to be adopted by it with respect to proceedings before it". The procedures contained in the Privy Council Appeals Order 1967 do not expressly mandate an application to the Court of Appeal in respect of appeals as of right. But they reflect the long-standing practice for such an application to be made. The reasons for this practice are understandable and they and the procedures contained in the Privy Council Order 1967 would be undermined if appeals could simply be lodged as of right with the Privy Council without it being necessary to obtain permission for an appeal from either court.

17. The Board concludes in these circumstances that the 2009 Order should be understood and read as not intending to disturb the practice existing hitherto whereby leave has been required either from the court appealed from or, that lacking, from the Privy Council itself. The omission from the 2009 Order of express provision to this effect and the wording of rules 10 and 18 do not compel any contrary conclusion – particularly in the light of Practice Direction 1 which makes clear the contemplation that the previous practice regarding appeals as of right should continue. On this basis, Mr Ross is not entitled to appeal to the Privy Council without obtaining permission, either from the Court of Appeal or from the Privy Council.

18. In the ordinary course, such permission would have been expected to be sought in the first instance from the Court of Appeal. But Mr Ross's stance, that no permission at all is now required, was properly arguable under the 2009 Rules, despite the Board's rejection of it in this advice. Indeed, it carried the endorsement of another decision of the Court of Appeal (on an appeal from Anguilla) in *Edwin M. Hughes v La Baia Ltd* (23 February 2010). In that case, the court actually declined to deal with applications for leave to appeal to the Privy Council and for a stay of execution, taking the view that, as a result of the 2009 Rules, the correct course, and an essential pre-condition to the exercise of any power it might have to impose conditions or order a stay, was the filing of an appeal directly with the Privy Council. It therefore seems likely that any application by Mr Ross to the Court of Appeal for leave to appeal would have met with short shrift. The Board in these circumstances agreed to treat the matter before it as an application for special leave and to address the second issue identified at the outset of this advice.

19. Having considered the judgment of the Court of Appeal, the Board concludes that the case is appropriate for an appeal to the Privy Council. Had he

applied to the Court of Appeal, Mr Ross would have been entitled to appeal as of right, and the proposed appeal is clearly arguable. The Board will therefore humbly advise Her Majesty that Mr Ross should be granted special leave to appeal to the Privy Council. The parties are at liberty to make written submissions within 21 days with regard to any consequential issues and costs.