A guide to appeals to the BVI Privy Council following lengthy delays to court judgments

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Commercial litigation can often seem like a long and expensive process, whether a party is prosecuting or defending a claim.

Charles Dickens's description of the fictional case of Jarndyce v Jarndyce in Bleak House has created a reputation for the legal system of interminable delay and expense, which at times seems difficult to shake off.

Perhaps worse than a drawn-out legal battle, however, is an excessive delay between the conclusion of proceedings and the delivery of judgment by the court. But what can a litigant do when he or she is faced with such a problem?

In Cobham v Frett [2001] 1 WLR 1775, the Privy Council found that a delay of 12 months between the hearing of a dispute and the delivery of a judgment warranted the description of "excessive delay". However, in a judgment which is frequently cited across the Commonwealth, Lord Scott of Foscote held that even where there is excessive delay, "a fair case must be shown for believing the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

This requirement for there to be a causal connection between a delay in the delivery of a judgment and some defect in the judgment almost appeared to mean that complaining of a delay was of limited value to a litigant.

Put briefly, if the judgment was flawed then it was liable to be set aside, whether it was delayed or not. Indeed, in the more than two decades since Cobham, there has not been an instance of the Privy Council overturning a decision of a court below on the basis that it was delayed and that such delay led to defects in the decision.

Two recent judgments from the British Virgin Islands (BVI) appear to indicate, however, that the

judicial attitude to delay is beginning to become more robust. Both cases relate to the test for granting conditional leave to appeal to the Privy Council.

Not an automatic right

It is well understood that the right to appeal to the Privy Council is not automatic. An appeal to the Privy Council only lies as of right if the value of the claim is at least £300 and the decision is a final one in civil proceedings (s 3(1) of the Virgin Islands (Appeals to Privy Council) Order 1967).

Where a decision is not final, the right of appeal to the Privy Council may still be possible if the appeal involves a question which is of great general or public importance "or otherwise" (s 3(2)(a) of the 1967 Order). Whether an appeal satisfies that test is usually determined by the Eastern Caribbean Court of Appeal when a party asks it for leave to appeal to the Privy Council, though a party may also seek special leave to appeal directly from the Privy Council itself.

The courts have developed an understanding of the "or otherwise" limb of s 3(2)(a) in previous cases. The classic statement of what "or otherwise" contemplates is to be found in the dissenting judgment of Wolfe JA in the Jamaican case of Olasemo v Barnett Ltd (1995) 51 WIR 191, where he said (at [201]): "Clearly, the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land."

Freezing orders

Emmerson International Corporation v Viktor Vekselberg et al [2023] ECSC J0727-3 concerned a case where the BVI court granted Emmerson permission to amend its pleadings and also granted freezing orders against certain of the Vekselberg parties up to the value of almost $900m.

The amended pleadings exceeded the scope of the amendments permitted by the order and so the BVI court disallowed the so called 'Schedule 6 claims'. Emmerson was granted leave to appeal this decision (the 'pleadings appeal').

Following the decision to disallow the Schedule 6 claims, the Vekselberg parties applied to have the freezing orders against them discharged. They succeeded, but the order discharging the freezing orders was stayed pending an appeal of that decision (the 'freezing orders appeal').

The freezing orders appeal was heard on 29 July 2019. After a delay of some 3½ years, judgment was handed down in February 2023, which upheld the decision of the BVI court to discharge the freezing orders against the Vekselberg parties (and thereby acknowledged the invalidity of the Schedule 6 claims).

However, in the intervening period, the pleadings appeal had been heard and dealt with by the Court of Appeal (in September 2020). In that judgment, the Court of Appeal found that the amended pleadings were in fact permissible. The judgment in the freezing orders appeal made no reference to the judgment in the pleadings appeal, with the net result that there were two conflicting decisions by the Court of Appeal on the validity of the Schedule 6 claims.

On an application to appeal to the Privy Council from the freezing orders appeal, Webster JA gave an overview of the law in the area of delay, citing the relevant case law from the Privy Council and from the Eastern Caribbean Court of Appeal. He acknowledged that delay must be accompanied by defects in the judgment. While he did not think that the law on delay was unsettled, or could be considered to be an issue of great general or public importance, he was persuaded that the failure of the Court of Appeal to take the pleadings appeal into account in the freezing orders appeal was the kind of circumstance accompanying delay that could make the decision of the court unsafe.

Accordingly, Webster JA granted leave to appeal to the Privy Council under the "or otherwise" limb of s 3(2)(a) of the 1967 Order because "this court should entertain more than a reasonable doubt as to the accuracy of the [freezing orders appeal judgment]."

Sanction application

Krys v Farnum Place LLC [2023] ECSC J0823-5 concerned a sanction application by a liquidator of a BVI company. The procedural background was quite complex. The liquidator entered into an agreement (the trade confirmation) with the respondent to sell the respondent claims it had against a third party in the United States (the SIPA claim). Shortly after the trade confirmation was agreed, the prevailing price of the SIPA claim rose sharply. The BVI court (on an application made by the respondent) approved the assignment but the court also directed that the liquidator obtain approval or disapproval of the trade confirmation as a matter of US law from the US courts.

At first instance, the US court saw no grounds for disapproval of the trade confirmation (the first US decision). The liquidator therefore returned to the BVI court to seek sanction to appeal the first instance decision in the US. That application was refused, but the liquidator obtained leave to appeal it to the Court of Appeal (the first BVI appeal).

The liquidator succeeded on the first BVI appeal. Subsequently, a second US court affirmed the first US decision (the second US decision). Therefore, the liquidator again sought sanction from the BVI court to appeal that second US decision to the US Court of Appeal Second Circuit (the SCCA appeal). The BVI court refused and the liquidator appealed (the second BVI appeal). The SCCA appeal was ultimately heard in May 2014. The second BVI appeal was heard in July 2014, but judgment was reserved.

In September 2014, the SCCA vacated the second US decision and remitted the matter to be heard again. The trade confirmation was ultimately disapproved in October 2015, and that decision was upheld on appeal in 2017. The second BVI appeal was dismissed in March 2022, more than seven years after it was heard.

On an application by the liquidator to seek leave to appeal to the Privy Council, Price-Findlay JA considered the impact of the delay in delivery of the second BVI appeal judgment. The liquidator argued that the subsequent disapproval of the trade confirmation and the ultimate upholding of that disapproval by the SCCA were significant events which post-dated the hearing of the second BVI appeal and ought to have been taken into consideration by the court.

Price-Findlay JA surveyed the case law in this area and acknowledged that delay cannot on its own call into question the soundness of the court's judgment. However, she noted that the delay in this case was accompanied by circumstances which may have had a significant impact on the outcome of the appeal. The liquidator had informed the Court of Appeal that the SCCA appeal had been determined and it was open to the Court of Appeal to invite written or oral submissions on the significance of that event, which it did not do.

Like her brother judge in the Emmerson case, Price-Findlay JA noted that the law on delay was settled and was not an issue of great general or public importance.

However, the learned judge went on to say that she had some doubt as to the accuracy of the second BVI appeal judgment since it failed to take into account the SCCA appeal judgment.

She noted that in this case, the liquidator had achieved what he intended in the SCCA appeal only for the Eastern Caribbean Court of Appeal retrospectively to withdraw sanction for pursuing that same SCCA appeal. Price-Findlay JA thought this was a sufficient basis on which to grant conditional leave to appeal to the Privy Council under the "or otherwise" limb of s 3(2)(a) of the 1967 Order.

Conclusion

The Privy Council has yet to decide either of the appeals in Emmerson or in Krys. It remains to be seen, therefore, whether these appeals will succeed on the grounds of delay.

However, both judgments show a willingness on the part of the Eastern Caribbean Court of Appeal to treat delays seriously and to utilise the powers which it has under the 1967 Order for the benefit of aggrieved parties, where appropriate. This trend will provide comfort to international clients in an era where costs and time are increasingly determining clients' appetite for litigation.

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