

## Cayman Islands Court of Appeal confirms limits on a party's ability to appeal to the Privy Council

In *Palladyne International Asset Management B.V. v Upper Brook (A) Limited and others*, CICA Appeal No. 5 of 2019, the Cayman Islands Court of Appeal (the “**CICA**”) was invited to consider an application by Palladyne for leave to appeal to the Judicial Committee of the Privy Council (“**JCPC**”) either: (i) as of right pursuant to section 3(1)(a) of the Cayman Islands (Appeal to Privy Council) Order 1984 No. 1151 (the “**1984 Order**”); or (ii) on the discretionary ground that the matter is of great general or public importance pursuant to section 3(2)(a) of the 1984 Order.

The appeal was in relation to an application for declaratory relief to the effect that Palladyne had not been validly removed as a director of the Upper Brook Companies due to lack of authority and/or to the operation of economic sanctions against Libyan assets. That application was dismissed both before the Grand Court and the CICA. Upon Palladyne seeking leave to appeal, the Fourth and Fifth Respondents submitted that the appeal failed to satisfy the financial threshold in section 3(1)(a) of the 1984 Order for leave to appeal as of right. The CICA held (11 February 2020, Unreported) that the appeal did not meet the financial threshold despite Palladyne’s argument that, if successful, it could control and potentially dispose of around \$700 million in assets. This is the first time that a Cayman Islands court has ruled on the parameters of an appellant’s ability to appeal to the JCPC.

Furthermore, the CICA held that the application did not satisfy the test for discretionary leave under section 3(2)(a) of the 1984 Order. The fact that the case concerned sovereign assets of Libya and involved a number of jurisdictions was not sufficient to show that it was a matter of great general or public importance.

### Appeal

The Applicant argued that it was either entitled to appeal as of right pursuant to section 3(1)(a) of the 1984 Order or that the CICA should exercise its discretionary power and grant it leave to appeal pursuant to paragraph 3(2)(a) of the 1984 Order. The CICA has jurisdiction to confirm whether, in cases where leave to appeal as of right is sought, the appeal is properly classified as such.

The 1984 Order states that:

#### Paragraph 3

- *Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her*

*Majesty in Council in the following cases-*

- *Final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim or question respecting property or a right of the value of £300 sterling or upwards;.....*
- *Subject to the provisions of this Order, An appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases-*
- *Decisions in any civil proceedings, where in the opinion of the Court the question involved in the appeal is one that, by reason of great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and*
- *Such other uses as may be prescribed by any law for the time being in force in the Cayman Islands.*

Similar provisions are found in a number of jurisdictions where the ultimate appellate court is the JCPC. While the monetary threshold has been increased in other jurisdictions, in the Cayman Islands it has remained at the level set by the 1984 Order and in the past that has not proved to be a genuine obstacle for appellants in a jurisdiction which is known for high value litigation.

Following the Fourth and Fifth Defendants submissions, the CICA adopted the approach of Lord Sumption in *Jacpot Ltd v Gambling Regulatory Authority (Mauritius) [2018] UKPC 16* at paragraph 14 (citing *Royal Hong Kong Jockey Club v Miers [1983] 1 WLR 1049*):

*“where no property is in issue, it is necessary to value the particular “right” which is at stake on the appeal. In order to do so, it is necessary to first identify the nature of the specific civil right involved in the appeal, and then to determine the value of that right”.*

The CICA confirmed that when considering whether an appellant has leave to appeal as of right pursuant to section 3(1)(a) of the 1984 Order it must first determine the nature of the specific civil right involved. Specifically, in circumstances where there is no money claim, the question for the CICA is whether an appeal would determine the existence of a property or a proprietary right to dispose of property worth more than £300.

In this case, Palladyne's interest in ensuring that the appointment or removal of directors of the respondent companies was lawful is not different in kind from the right which any person has to see that the law is applied. This is not sufficient to satisfy the threshold under section 3(1)(a) of the 1984 Order. It is also the case that appellants may not rely on the costs of the proceedings as a basis for meeting or exceeding the financial threshold.

Separately, the CICA was not satisfied that this was a case which justified it exercising its discretionary power pursuant to paragraph 3(2)(a) of the 1984 Order. The fact that the underlying assets formed part of the sovereign wealth of Libya and there were a number of jurisdictions with comparable sanction provisions was not a sufficient ground to refer the matter to the Privy Council on the basis that it was of *“great general or public importance or otherwise ought to be submitted to Her Majesty in Council”*. Indeed, Palladyne had failed to point to any inconsistent decisions on the point or areas of uncertainty which would merit determination by the Privy Council. Moreover, the CICA found that Palladyne had no real prospect of successfully arguing before the Privy Council

that voting frozen shares constituted a breach of the relevant sanctions legislation and therefore the appeal was doomed to fail in any event.

## **Conclusions**

The CICA has confirmed that the principles which the Privy Council have applied on appeals from other jurisdictions also apply to appeals from the Cayman Islands. Where a party does not assert a money claim or claim to property which exceeds £300 the question is whether the issue on appeal would determine the existence of a property right or proprietary right to dispose of property worth more than £300. It has long been the case that applications for leave to appeal as of right from the CICA to the JCPC have been seen as something of a formality and met with little if any resistance by respondents. However, there are cases, particularly those relating to declaratory or other non-monetary relief or public law measures such as judicial review which do not fall neatly within the parameters of the statutory scheme for leave to appeal as of right.

This ruling has highlighted the need for respondents to consider whether appellants can actually get through the statutory gateway for leave to appeal as of right or whether they must rely on a grant of special leave from the Court of Appeal or the Privy Council. The corollary is the need for plaintiffs / appellants to consider how appeals are framed. The CICA's ruling is likely to engender greater scrutiny by practitioners in these respects and the number of appeals from the Cayman Islands to the JCPC may be reduced as a result.

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