(b) what evidence is permitted to be admitted in relation to the claim - this is particularly important in common law jurisdictions, as many forms of estoppel are treated as a rule of evidence (i.e. whether the party is allowed to lead evidence in relation to the matter which is subject to the estoppel); and

(c) applicable limitation periods.[21]

(2) Whether any corporate entity which is party to the agreement had the necessary capacity to enter into the agreement.[22]

(3) The proper method of executing the contract.[23]

(4) Whether enforcement should be declined on the basis of public policy.[24]

3.008 Because the majority of the significant issues relating to the relevant credit documentation fall to be determined according to the chosen governing law, this reduces the risk for lenders that some unanticipated aspect of British Virgin Islands law might adversely affect a credit transaction which is expressed to be governed by (for example) the laws of Singapore.

(a) Lending and borrowing

3.009 Debt transactions in the British Virgin Islands are normally documented in one of three ways: either as a bond or other form of debt instrument, under a loan agreement (either in the conventional long form, or as a shorter facility letter), or under a promissory note. Promissory notes are considered further below. Generally speaking, outside of certain specific limited exceptions, there are no Governmental or regulatory approvals required to enter into a debt transaction in the British Virgin Islands.[25] Foreign financial institutions do not need licences or approvals to lend to British Virgin Islands companies or individuals.[26] Providing debt securities are not being issued to the public within the British Virgin Islands,[27] there are no general restrictions on British Virgin Islands companies or partnerships issuing debt. Debt financing transactions are not

[21] Where the *lex fori* is British Virgin Islands law, the relevant limitation periods will be 6 years for most contractual claims, or 12 years where the action is brought on a deed.

[22] *Banco de Bilbao v Sancha* [1938] 2 KB 176. In relation to natural persons, it seems that capacity will be governed by the proper law of the contract, see *Cooper v Cooper* (1888) 13 App Cas 88 and *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.

[23] The conflict of laws position on which law determines whether an agreement has been properly executed is not settled. There is authority support for (i) the law of the place where the contract was made (see *Guépratte v Young* (1851) 4 De G & Sm 217) and (ii) the proper law of the contract (see *Van Grutten v Digby* (1862) 31 Beav 561). The better view is probably that the British Virgin Islands courts will regard a contract as having been validly executed provided that it has been properly executed according to either one. This was the view formerly held by the editors of Dicey Morris & Collins prior to the introduction of the Contracts (Applicable Law) Act 1990 in the United Kingdom.

[24] The British Virgin Islands courts will always apply their own public policy limitations on enforcement of agreements, see e.g. *Kaufman v Gerson* [1904] 1 KB 591.

[25] See footnote 4.

[26] In certain cases, foreign financial institutions may need a licence to solicit persons within the British Virgin Islands to enter into certain types of financial transactions, but this does not normally affect non-resident British Virgin Islands companies. This is considered further below in Chapter 5.

[27] As to which see section 25(1) of the Securities and Investment Business Act 2010.

subject to any mandatory filings in the British Virgin Islands, and no notice is required to be given to any public authority in relation to entering in lending transactions.

3.010 It is possible to enter into lending transactions without any written documentation; a purely oral loan agreement would be legally enforceable if all the other requirements of a lawful contract were met. Sums advanced to a company without any formal documentation will be subject to a rebuttable presumption that they were advanced by way of loan.[28] However, the British Virgin Islands courts have been prepared to hold that sums of money advanced by a shareholder without other documentation to the company could be regarded as an equity contribution if the sums were so intended (even in the absence of issuing any further shares).[29]

3.011 Loan documents are usually structured in a broadly similar format: after any recitals and naming of the parties, they will describe the nature and amount of the relevant facility; they will set out the provisions for calculation and payment of interest; they will set out the mechanical process by which the borrower may draw the loan; they will include a list of covenants which the borrower undertakes to abide by, and a series of representations which the borrower will give which will normally be repeated at regular intervals until the loan is repaid; they will list events of default upon which the lender may accelerate the loan, and these will typically include non-payment, breach of covenants, breach of representations and insolvency; they will include a number of standard mechanical provisions relating to contracts generally; and will normally conclude with an express choice of governing law and the selection of the courts of a particular jurisdiction to determine any disputes in relation to the loan documents. Depending upon the complexity of the loan, there may be additional covenants which deal with syndication and transfers of participation, and treatment of increased costs of borrowing or adverse tax changes. All of these matters are largely regarded as direct matters of contract, and outside of highly unusual cases, the British Virgin Islands courts will not normally interfere with the agreed terms of the parties' bargain. The courts willingness to intervene in such transactions is normally limited to external factors which apply to contracts generally, such as fraud, duress, mistake, misrepresentation and undue influence.

3.012 At present there is no separate regulation of public issues of debt instruments in the British Virgin Islands. Part II of the Securities and Investment Business Act 2010 provides for regulation of public issues of securities within the British Virgin Islands, but at time of writing these provisions have not been brought into force.[30] The provisions do not in any event purport to regulate a public issue of securities where the offer is not made to the public in the British Virgin Islands.[31]

[28] *Seldon v Davidson* [1968] 1 WLR 1083.

[29] *Alfa Telecom Turkey Limited v Cukurova Finance International Limited (No 2)* (BVIHCV 2007/072). Reversed on appeal on other grounds.

[30] However, certain activities connected with public issuance of securities may potentially be regulated as "investment business" if conducted in or from within the Territory, see paragraph 5.108.

[31] This would include where an offer is received by a person in the British Virgin Islands; Securities and Investment Business Act 2010, section 25(2)(b). However, for these purposes the receipt by a company incorporated in the British Virgin Islands of an offer at its registered office does not constitute receipt of an offer in the British Virgin Islands under section 25(2)(b).

3.013 With effect from 1 January 2012, there are no withholding taxes in the British Virgin Islands applicable to debt transactions. Up until 31 December 2011, it was possible for withholding to be imposed in certain limited circumstances pursuant to the EU savings directive,[32] but with effect from 1 January 2012 the option to withhold tax is no longer applicable.[33] Similarly, there are no exchange controls in force in the British Virgin Islands, and no restrictions on removal of currency. If the relevant loan document has a British Virgin Islands company as a party to it, then it will be exempt from British Virgin Islands stamp duty;[34] but if no British Virgin Islands company is a party, then it will be subject to stamp duty at a nominal rate.[35]

(b) Bills of exchange

3.014 Although financing transactions involving the British Virgin Islands often involve loan agreements or other debt documents which are governed by foreign laws, it is much more common to see bills of exchange, and in particular promissory notes (which are not, strictly speaking, bills of exchange, but are generally regulated as such), governed by the laws of the British Virgin Islands. It is beyond the scope of this work to give a comprehensive summary of the laws of the British Virgin Islands relating to bills of exchange, but there are a number of provisions of the Bills of Exchange Act 1887 which it is important to be cognisant of.

3.015 The practice of using a promissory note in addition to a standalone loan agreement is a common feature of North American lending transactions, and relates to the difficulties of obtaining an expedited judgment against the debtor on a payment default. Generally speaking, such limitations do not normally apply in the British Virgin Islands (where it is perfectly possible to obtain summary judgment on a loan agreement without a promissory note), but where the loan documentation provides that the courts of a relevant North American jurisdiction shall determine any issues relating to the loan documents, the additional precaution of taking a promissory note may be a wise step.

3.016 Promissory notes under British Virgin Islands law generally have one significant advantage which is that they may, by being indorsed, transfer the legal right to enforce the relevant debt. Otherwise under British Virgin Islands law debts may normally only be assigned in equity.[36] But hedged against that are a number of other difficulties and limitations, particularly relating to the requirement of certainty, and the various strictures under the legislation which prevent the parties looking outside of the express wording of the note to determine any of the issues relating to it.

[32] European Council Directive 2003/48/EC, incorporated into British Virgin Islands law by the Mutual Legal Assistance (Tax Matters) Act 2003.
[33] Mutual Legal Assistance (Tax Matters) (Automatic Exchange of Information) Order 2011.
[34] BVI Business Companies Act 2004, section 242(3).
[35] Stamp Act 1887. If the loan agreement is executed as a deed, then stamp duty is assessed at US$5.00, and if the loan agreement is executed as a simple contract, then stamp duty is assessed at 15¢. Stamp duty is payable on documents executed overseas when they are brought into the Territory.
[36] See paragraph 4.022 and following below.

3.017 A promissory note or other form of bill of exchange must be expressed to either be payable upon demand, or at a certain time.[37] A bill which does not state a time for payment is presumed to be payable upon demand. Where a promissory note is expressed to be payable *on or before* a certain date, there is case law which indicates that this is insufficiently certain as time for payment to constitute a promissory note,[38] although at least one leading textbook has suggested that the authority should not be followed.[39] The right to payment must be an unconditional right.[40] Payment of a promissory note cannot be made contingent upon the happening of an external event, and accordingly a promissory note normally cannot have events of default which accelerate the right to payment. There are two principal exceptions to this:

(1) Where a promissory note is expressed to be payable in instalments, and provides that the full amount shall become due if any instalment is not paid in full, this is acceptable as the basis for acceleration is determined within the payment obligations of the note itself.[41] Where a promissory note does provide for payment of instalments, the date of each instalment must be specified.[42]

(2) Acceleration which predicated upon the payor going into liquidation is also permissible, as liquidation would in any event accelerate the liability of the payor.[43]

3.018 A promissory note or bill of exchange must be for a certain sum.[44] Sums due on a bill may be made subject to interest, and unless otherwise stated the interest will run from the date of the bill. Because of the legal requirement that the sum due on a promissory note must be 'a sum certain in money',[45] it is generally thought that this limits the rate of interest to fixed rates, as charging a floating rate of interest would require reference to an external source to determine the rate. Accordingly, best practice is to assess interest on a fixed rate where possible. Furthermore the sum due must not be contingent or subject to possible additional amounts or deductions. Accordingly if a putative promissory note includes a reference to costs and expenses of enforcement, or bank charges, or any other supplemental amounts, then it will not be a promissory note.[46] At the time of payment it must be possible to ascertain the sum from the instrument itself.

3.019 Promissory notes and other bills of exchange may be issued to bearer or to a named payee, but if issued to a named payee then they must be identified with sufficient

[37] Bills of Exchange Act 1887, section 10(1).
[38] *Williamson v Rider* [1963] 1 QB 89. See also *Claydon v Bradley* [1987] 1 WLR 521.
[39] *Bylex on Bills of Exchange and Cheques* (27th ed.) at paragraph 24-06.
[40] *Colehan v Cooke* (1742) Willes 393.
[41] *Kirkwood v Carroll* [1903] 1 KB 531.
[42] *Moffat v Edwards* (1841) Car & M 16.
[43] Insolvency Act 2003, section 152(2).
[44] Bills of Exchange Act 1887, section 9.
[45] Ibid., section 84(1).
[46] *Smith v Nightingale* (1818) 2 Start 375; *Temple Terrace Assets Co Inc v Whynot* [1934] 1 DLR 124.

certainty.[47] This requirement is not usually problematic except in limited situations where a promissory note is issued in favour of a security agent under a syndicated loan. If the initial security agent is personally named, and then proceeds to endorse the note to any subsequent security agent on a transfer of the role, then no complications will ordinarily arise. However, if the promissory note is simply issued in favour of the security agent from time to time under the relevant credit documents by reference to their position rather than naming then, then this is likely to fall foul of the requirement to identify the payee with sufficient certainty and may invalidate the bill.

3.020 Where a promissory note or other bill of exchange is governed by British Virgin Islands law, it is important to bear in mind that where the physical bill is kept outside of the British Virgin Islands, although British Virgin Islands law will govern matters relating to the issue and validity of the bill, matters such as negotiation, presentation and payment may be governed according to the laws of the place where those actions occur.[48]

3.021 Where a document which is expressed to be a promissory note fails to comply with the legal requirements of a promissory note, it may still constitute evidence of terms upon which money was advanced.[49] However unless the document fits within the legal strictures applicable to promissory notes, it will not be negotiable under the Bills of Exchange Act 1887, and the underlying debt can only be transferred by way of assignment and subject to the relevant limitations on assignments of debt at common law.[50]

3.022 If a promissory note or other bill has a British Virgin Islands company as a party to it, then it will be exempt from British Virgin Islands stamp duty;[51] but if no British Virgin Islands company is a party, then it will be subject to stamp duty at a nominal rate.[52]

(c) Regulated entities

3.023 Generally speaking there is no requirement to obtain any governmental or regulatory consents to enter into debt financing transactions under British Virgin Islands law. However once key exception exists with respect to regulated entities. Companies or other business entities are required to hold licences in order to conduct certain types of regulated business "in or from within" the Territory. The principal types of regulated activity include banking business, trust business, insurance, investment business and company management business, although there are other less common types of regulated business as well.[53] Because of restrictions relating to the dispositions of ownership in relation to regulated businesses, it is not possible to grant a security interest to support borrowing over shares in a regulated entity beyond a certain

[47] Bills of Exchange Act 1887, section 7(1).
[48] Ibid., section 72.
[49] *Black v Pilcher* (1909) 25 TLR 497.
[50] See paragraph 4.022 and following below.
[51] BVI Business Companies Act 2004, section 242(3).
[52] Stamp Act 1887. Stamp duty is presently assessed at 35¢. Stamp duty is payable on a bill executed overseas when it is brought into the Territory.
[53] Financial services regulation is considered in more depth in Chapter 5.

threshold without approval.[54] What the relevant threshold is will depend upon the type of regulated activity: for trust and company management business it is 5%, and for each other type of regulated business it is 10%. If a shareholder wishes to grant security over a greater percentage of shares in a regulated entity then the require the approval of the Financial Services Commission.

Failure to obtain the relevant consent before granting security over shares in a regulated entity has two potential adverse consequences. Firstly, breach of the provision will potentially result in a fine of an amount normally up to US$10,000.[55] Secondly, the Commission has power (in the case of licensees under the Banks and Trust Companies Act) to require that the shareholder "rescind or reverse" the grant of the security interest, or modify the security interest in such manner as the Commission may think fit.[56] In relation to the latter provision, it is not clear what the position would be where the nature of the security interest is such that the charging shareholder has no power to amend or reverse the security interest, and it seems likely that the principal recourse of the Commission would be to withdraw or suspend the relevant licence. **3.024**

The foregoing strictures apply to the shareholders of regulated entities. In relation to licensed insurance companies, further restrictions apply to the licence holder itself. A licensed insurance company is not permitted to give guarantees or grant third party security to a "connected person"[57] without the prior consent of the Financial Services Commission.[58] It does not appear that there are any general restrictions on insurance companies granting security for its own indebtedness. **3.025**

It should also be noted that the Financial Services Commission has separate powers to monitor the financial circumstances of a licensee (irrespective of whether security interests are granted or not) where this is relevant to its regulatory function. Various types of licensed entities have capital maintenance requirements of their own under the Regulatory Code 2009 (although that primarily refers to equity capital rather than debt capital) and almost all types of licensed entities are required to provide accounts to the Commission for review, and in some circumstances are under a positive duty to report financial distress.[59] Similarly, the enforcement of (or any threat of enforcement of) any security over a licensee's assets would trigger a requirement to disclose under section 70 of the Regulatory Code 2009, which requires licensees to disclose to the Commission any matters which might reasonably be expected to have a significant regulatory impact. **3.026**

[54] See for example section 14(1) of the Banks and Trust Companies Act 1990 (banking business, trust business and company management business); section 11(1) of the Securities and Investment Business Act 2010 (investment business); section 21(1) of the Insurance Act 2008 (insurance business) and section 14(6) of the Financing and Money Services Act 2011 (financing and money services).
[55] See for example section 14(7) of the Banks and Trust Companies Act 1990, Schedule 7 of the Securities and Investment Business Act 2010, section 21(6) of the Insurance Act (for which the penalty is up to US$30,000) and section 14(6) of the Financing and Money Services Act 2011, (for which the penalty is up to US$30,000).
[56] Banks and Trust Companies Act 1990, section 14(8)(b)(i) and (ii).
[57] As defined in the Regulatory Code 2009, section 2(2). The definition is quite detailed, but broadly encompasses where (i) the two entities are affiliates (which is in turn defined as being members of the same group), (ii) where one entity has a significant interest (being either 5% or 10% depending on the nature of the regulatory licence) in the other, and (iii) where one is a director or senior manager of another.
[58] Insurance Act 2008, section 14(1)(b).
[59] See for example section 7(2) of the Securities and Investment Business Act 2010, section 72(2) and Schedule 3 of the Regulatory Code 2009 and sections 9(2) and 12(5) of the Insurance Act.

any other proceedings instituted under an enactment in so far as the rules made under that enactment regulate those proceedings.

8.007 Commercial Court practice is governed by the Civil Procedure Rules, including Parts 69A and 69B, brought into force by the Eastern Caribbean Supreme Court Civil Procedure Rules (Application to the Virgin Islands) (Amendment) Orders 2009 and 2010. These regulate matters such as which cases may be placed on the commercial list, the disapplication of certain sections of the Civil Procedure Rules, and costs.

8.008 In order to be placed onto the commercial list, the conditions in Part 69A.1 of the Civil Procedure Rules must be met. This provides:

> '(1) This Part applies to claims in the Commercial Division of the Supreme Court sitting in the jurisdiction of the Virgin Islands.
>
> (2) Subject to paragraph (3), in this Part and its practice direction, "commercial claim" means any claim or application arising out of the transaction of trade and commerce and includes any claim relating to-
>
> (a) the law of business contracts and companies;
>
> (b) partnerships;
>
> (c) the law of insolvency;
>
> (d) the law of trusts;
>
> (e) the carriage of goods by sea, air or pipeline;
>
> (f) the exploitation of oil and gas reserves;
>
> (g) the [sic] insurance and re-insurance;
>
> (h) banking and financial services;
>
> (i) collective investment schemes;
>
> (j) the operation of markets and exchanges;
>
> (k) mercantile agency and usages;
>
> (l) arbitration.
>
> (3) In order for a claim to qualify as a commercial claim, the claim or value of the subject matter to which the claim relates must be at least [US] $500,000.
>
> (4) Notwithstanding paragraphs (2) and (3) the commercial division [sic] judge may include in the commercial list a claim that has not satisfied the monetary value under paragraph (3) if he considers the claim to be of a commercial nature and warrants being placed on the commercial list.'

8.009 A claim can be placed on the commercial list at the time it is filed, or at a subsequent time.[6] The legal practitioner for the claimant or applicant filing a claim or application must file a certificate to the effect that the claim is appropriate to be treated as a commercial claim within the meaning of Rule 69A.1(2), setting out the facts relating to the claim which demonstrate this.[7]

[6] Rule 69A.4(1).

8.010 In February 2011 the Commercial Court issued a Note to British Virgin Islands practitioners relating to application bundles and skeleton submissions to be filed in accordance with Part 69A. It stressed the need for compliance with the time limits set out therein and for practitioners to inform the Judicial Assistant of the reason for any failure to do so in advance of any deadline passing. Failure to do so may lead to the application being adjourned at the cost of the defaulter. In addition, the court has new powers under Rule 26.7(4)[8] to order costs against a legal practitioner personally for certain "procedural defaults" which results in a party having to incur costs or a hearing having to be vacated.

(c) The Court of Appeal

8.011 The Court of Appeal is based in St Lucia but is an itinerant court and sits in the nine jurisdictions within its remit on a rotating basis. Decisions of the Court of Appeal are binding upon the High Court and Commercial Court (and the Magistrate's Court). For urgent matters, application can be made to the Court of Appeal to hear British Virgin Islands appeals whilst the Court of Appeal is sitting in another jurisdiction.[9]

8.012 The right to an appeal from a decision of the High Court is set out in section 30(1)(b) of the West Indies Associated States Supreme Court (Virgin Islands) Act 1969. This provides that:

> 'an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court, and for the purposes of, and incidental to, the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the powers, authority and jurisdiction of the High Court'.

8.013 In the majority of cases, there is therefore a general right of appeal under section 30(1)(b) without leave being necessary. However, this is subject to two exceptions. First, there is no right of appeal at all in some matters, for example where it is provided by law that the first instance decision is to be final.[10] Secondly, amongst other things, section 30(4) provides that:

> 'No appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases-
>
> ...
>
> (ii) where an injunction or the appointment of a receiver is granted or refused.'

[7] Rule 69A.4(2).
[8] Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011 effective 1 October 2011.
[9] See *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited* (HCVAP 2010/028).
[10] West Indies Associated States Supreme Court (Virgin Islands) Act 1969, section 30(2)(d).

8.014 Leave is therefore required for an appeal against an interlocutory order or judgment *except* where an injunction is granted or refused, *or* where the appointment of a receiver is granted or refused. A key question is therefore whether or not the judgment or order is "interlocutory".

8.015 The new Rule 62.1(3)(a) provides that a determination whether an order or judgment is final or interlocutory is made on the "application test". By Rule 62.1(3)(b) an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided. This reflects the position recently reached by the Court of Appeal[11] in *TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company*[12] where, at paragraph [8], Rawlins CJ noted that:

> 'A determination whether an order is final or interlocutory is made by our courts on the "application test". An order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application is decided. If the issues of liability on the claim are finally determined whether the outcome on an application is in favour of either party to the claim, the order would be final. The order would however be interlocutory, for example, if a ruling on the application in favour of the claimant would determine the issues of liability in favour of the claimant whereas a ruling in favour of the defendant would re-open the issue of liability for continued litigation. In determining whether an order is final or interlocutory, the court should consider the nature of the application and order and the circumstances that gave rise to them.'

8.016 To give some colour to this test, an appeal against a strike out of a claim form or statement of claim, would, by reason of the application test, be an appeal against an interlocutory decision because if the appellant wins, then the claim is re-instated and the litigation determining liability continues, whereas if the appellant loses, then the claim remains struck out and the litigation determining liability does not continue.[13] The application test has the curious effect that although an appeal against strike out is an appeal against an interlocutory decision,[14] with no automatic right of appeal, a determination dismissing a claim would be final, affording an appeal as of right (because in both cases if the appeal is upheld, and if the appeal is dismissed, the issues would be determined).

8.017 In *TSJ Engineering*, applying the application test to a *Norwich Pharmacal* order, the court followed its previous decision in *Morgan & Morgan Trust Corporation*

[11] See previous consistent decisions in *Othneil Sylvester v Satrohan Singh* (Civil Appeal No 10 of 1992); *Pirate Cove Resorts Limited v Euphemia Stephens* (Civil Appeal No 11 of 2002); and *JnMarie & Sons Ltd v Jamie St Louis* (Civil Appeal No 14 of 2006).

[12] HCVAP 2010/013.

[13] *Pentium (BVI) Limited v Bank of Bermuda* (Civil Appeal 14 of 2003), at para 2.

[14] There is no equivalent to section 30(4) of the West Indies Associated States Supreme Court (Virgin Islands) Act 1969 which creates an exception, to the rule requiring leave for all interlocutory appeals, by expressly not requiring leave where an injunction or the appointment of a receiver is granted or refused.

Limited v Fiona Trust & Holding Corporation,[15] and found that the effect of such an order did not bring finality to the application. A *Norwich Pharmacal* order was therefore found to be an interlocutory order, not a final one, and leave was required.[16] However, Rule 62.1(3)(c) which came into force on 1 October 2011[17] now provides that: 'an order on an application for disclosure against a person who is not a party is a final order'.

8.018 As a matter of practice, given the potentially radical effect of a failure to seek leave (that the appeal is a nullity, as in *TSJ Engineering* [18] itself), if in doubt as to whether an order is final or interlocutory, it is advisable to seek leave and/or a declaration that leave is not required.

8.019 An application for leave to appeal may be considered by a single judge[19] of the Court of Appeal who may give leave without a hearing.[20] If a single judge is minded to refuse leave, he *must* [21] direct that a hearing be fixed—whether before a single judge of the full court.[22]

8.020 It has now been held that Rule 62.16(a), which gives the Court jurisdiction to vary, discharge or revoke any order, direction or decision of a single judge, applies only to interlocutory orders made within the context of a pending appeal (see *Cage St. Lucia Limited v Treasure Bay (St. Lucia) Limited*[23]). Until leave is granted there is no appeal in existence. The order granting leave is therefore not an interlocutory order made during the pendency of an appeal.

8.021 In the same decision the Court of Appeal also indicated that the application for leave is essentially a "without notice" procedure. Applications for leave to appeal are not strictly interlocutory applications and therefore the previous practice of the Registry, serving notices requesting compliance with the relevant Practice Directions, was described as "misleading" by the Court of Appeal, as it erroneously encouraged a respondent to file a notice of opposition and other documents, contrary to the procedure envisaged under Rule 62.2. The Respondent was not entitled to file a notice of objection or otherwise to oppose the applicant's application for leave to appeal.

8.022 A related issue which may arise is the meaning of the words "granted or refused" within the exception in section 30(4)(ii) for cases in which an injunction or appointment of

[15] HCVAP 2005/024.

[16] Ibid., at [31].

[17] By virtue of the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011.

[18] See also *Hamilton-Smith v Fundora* (HCVAP 2010/031) at [32] before a single Justice of Appeal.

[19] It should be noted that in relation to the determination of interlocutory appeals Rule 62.10(5) provides that the general rule is that an interlocutory appeal is to be considered on the papers by a single judge of the Court of Appeal. If the single judge is so minded he may direct that a hearing take place, and *may* direct that the hearing take place before the full Court of Appeal (Rule 62.10(7)).

[20] Rule 62.2(3) and (4).

[21] This mandatory requirement to direct that a hearing take place in these circumstances is a welcome new addition to the Rules (as result of the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011, effective 1 October 2011). The former rules merely provided that the singly judge *may* direct that a hearing take place.

[22] Rule 62.2(5).

[23] HCVAP 2011/045.

a receiver has been granted or refused. In *Danone Asia Pte Limited v Golden Dynasty Enterprise Limited*,[24] it was argued that the "discharge" of an injunction was not the same as the "refusal" to grant an injunction. The Court of Appeal (in a majority decision) took a wide interpretation of the words "grant or refusal" and held that "refusal" did include the "discharge" of the injunction as well as the "re-grant" or "continuation" of such an order. Leave to appeal was therefore not required.[25]

8.023 The test for the grant of leave is set out in *Michael James v Tasman Gaming Inc*,[26] where the Court of Appeal held that:[27]

> 'It is trite principle … that leave to appeal will be granted if this court is of the view that the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be heard.'

8.024 The Court of Appeal's practice is governed by the Civil Procedure Rules, particularly Parts 61 and 62; the Court of Appeal rules and the following Practice Directions:

(i) No 2 of 2008 (Appeal Matters);

(ii) No 9 of 2011 (Appeal Management, Civil Appeals);

(iii) No 3 of 2008 (Interlocutory Applications) which establishes the standard directions to govern the conduct of interlocutory application in appeals; and

(iv) No 10 of 2011 (Skeleton Arguments and List of Authorities) which supplements Rule 62.11 and gives guidance as to when a skeleton argument should be lodged for an appeal or appeal application, its contents, length and consequences of non-compliance.

(i) *Time limits*

8.025 Where an appeal may be made only with the leave of the court below or the Court of Appeal, a party wishing to appeal must apply for leave within 14 days of the order against which leave is sought.[28] Where an application for leave has been refused by the court below, an application for leave may be made to the Court of Appeal within 7 days of such refusal.[29]

8.026 Rule 62.5(1)(a) provides that in the case of an interlocutory appeal where leave is not required, a notice of appeal must be filed within 21 days of the date the decision appealed against was made. Rules 62.5(1)(b) provides that in an interlocutory appeal, where leave is required a notice of appeal must be filed within 21 days of the date when such leave was granted. Rule 62.5(1)(c) provides that in the case of any other appeal a

[24] HCVAP 2009/002.
[25] Ibid., at [35].
[26] Antigua and Barbuda (Civil Appeal No. 6 of 2006).
[27] Ibid., at [9].
[28] Rule 62.2(1).
[29] Rule 62.2(1A).

notice of appeal must be filed within 42 days of the date when the order or judgment (whichever is earlier) appealed against was served on the appellant.

8.027 Where a notice of appeal is filed out of time, the Court of Appeal has a discretion under Rule 26.9 to correct mere procedural errors. This was considered in *Pemberton v Brantley*[30] where the Court of Appeal held that the discretionary power, although a very broad one, cannot be exercised in a vacuum but must be exercised judicially. The Court must seek to give effect to the overriding objective to ensure justice is done. Much depends on the nature of the failure, the consequential effect, weighing the prejudice, the length of the delay and whether there is any good reason for it which makes it excusable.

8.028 With regard to when the Court of Appeal will overturn a first instance decision of a trial judge exercising his judicial discretion, the Court of Appeal in *Tawney Assets Limited v East Pine Management Limited and others*[31] indicated that an appeal will not be allowed unless the appellate court is satisfied that: (1) that in exercising his judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be "clearly or blatantly wrong".

8.029 A transcript should usually be obtained from the Court Reporting Unit and placed before the appeal court with respect to the court of first instance's reasoning. However, for oral hearings and hearings in chambers where a transcript may not be available, or not available in time for the appeal hearing, Mitchell J.A. indicated in *Donald Frederick v Choo Loi Poi and another*[32] that the appellant is expected to apply to the Registrar asking for the Judge to provide a written note of the reasons for the decision. Further, where an appellant does not request written reasons for the decision there may be no basis upon which the trial judge's decision can be questioned.[33]

(d) The Privy Council

8.030 The Judicial Committee of the Privy Council, sitting in the United Kingdom, is the court of final appeal for the United Kingdom overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. If one (or both) parties are dissatisfied with a decision of the Court of Appeal, further appeal may lie to the Judicial Committee of the Privy Council pursuant to the Virgin Islands (Appeals to Privy Council) Order 1967.[34]

[30] HCVAP 2011/009.
[31] HCVAP2012/007.
[32] HCVAP 2012/005.
[33] *Gregory Knight v First Caribbean International Bank Limited* (HCVAP 2012/007).
[34] UK SI No 234 of 1967 (as amended by the Anguilla, Montserrat, and Virgin Islands (Supreme Court) Order 1983 (SI No 1108 of 1983).

8.031 The Judicial Committee (Appellate Jurisdiction) Rules Order 2009[35] provides the procedure for civil and criminal appeals to the Judicial Committee of the Privy Council under its general appellate jurisdiction. There are also a number of Practice Directions issued by the Judicial Committee of the Privy Council[36] dealing with various matters including: the form of application for permission to appeal, hearings, and security for costs.

8.032 There are three avenues for appealing a decision of the Court of Appeal to the Judicial Committee of the Privy Council by way of:

(i) an "appeal as of right";

(ii) an appeal by reason of permission being granted by the Court of Appeal due to the general or public importance of the appeal therein;

(iii) "special leave" having been granted by the Judicial Committee of the Privy Council.

8.033 Article 3 of the Virgin Islands (Appeals to Privy Council) Order 1967 (as amended) provides that:

'3(1) Subject to the provision of the Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases –

(a) 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 to or question respecting property or a right to the value of £300 sterling or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage; and

(c) such other cases as may be prescribed by any law for the time being in force in the Virgin Islands.

(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with leave of the Court in the following cases-

(a) where in the opinion of the Court the question involved in the appeal is one that, by reason if its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by any law for the time being in force in the Virgin Islands.

[35] Which revoked in their entirety The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI No 1676 of 1982).

[36] Judicial Committee of the Privy Council Practice Directions 1–8.

(3) An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court in any civil or criminal matter.'

(i) *Appeals as of right*

8.034 Article 3(1)(a) of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 provides that only final decisions of the Court of Appeal can be appealed to the Privy Council as of right. An "appeal as of right" is not necessarily a guarantee of an appeal because the Privy Council could, exceptionally, refuse leave even in such a case, for example, where 'it was clear that the appeal was wholly devoid of merit and was bound to fail.[37]

8.035 Additionally, procedurally, an appeal as of right, by convention, still requires "leave" to be sought from the Court of Appeal, the purpose of seeking leave merely to confirm that the appeal is as of right, and to impose such limited conditions as might be permitted by the local law of the British Virgin Islands.[38]

8.036 There have been a number of cases where the correct procedure relating to an application for leave has been in issue. Article 4 of the Virgin Islands (Appeals to Privy Council) Order 1967 provides that applications to the Court of Appeal for leave to appeal shall be made by motion or petition within 21 days of the date of the decision to be appealed from and that the applicant shall give all other parties notice of the intended application.

8.037 A number of issues arise from this. First, the format of the application is required to be that of a Motion or Petition. A notice of application is apparently insufficient. However, the Court of Appeal has indicated that it considers that it has jurisdiction to grant relief from sanctions in such a case, to enable an applicant with an incorrectly formatted Notice of Application to amend it into the form of a Notice of Motion or Petition.[39]

8.038 Second, the time limit of 21 days is strict. The Court of Appeal has indicated that if the relevant document is filed outside this time limit, then the appeal process is a nullity and no application for leave to appeal exists.[40]

8.039 Third, "notice" must be given to "all other parties". It is unclear from the face of the Order whether this notice must also be given within the 21 day time frame, or merely within a reasonable time before the hearing of the leave application. Some parties have argued that the notice should also be given within 21 days, but this is not mandated by the Order and cases such as Attorney General of the *Gambia v N'Jie*[41] suggest that notice within a reasonable time of the hearing will suffice. This is also consistent with the approach of the Court of Appeal set out above in relation to leave applications, i.e. that they are essentially a without notice procedure.

[37] *Crawford v Financial Services Institutions Ltd* [2003] UKPC 49; [2003] 1 WLR 2147, para 23. Cited with approval in *E Anthony Ross v Bank of Commerce (Saint Kitts Nevis) Trust and Savings Association Limited* [2010] UKPC 28.

[38] For example, Article 5(a) Privy Council Order 1967 requiring the Appellant to enter security.

[39] *HMB Holdings Ltd. v Attorney General of Antigua* (HCVAP 2010/007).

[40] See *Fairfield Sentry Limited (in liquidation)*, (HCVAP 2011/042).

[41] [1961] AC 617.