

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0024

BETWEEN:

MULTIBANK FX INTERNATIONAL CORPORATION

Applicant/Appellant

and

VON DER HEYDT INVEST S.A.

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard Farara

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Hodge Malek KC and Mr. Hefin Rees KC, with them Mr. Philip Hinks for the Appellant
Mr. Tim Penny KC, with him Mr. Alexander Cook and Mr. Simon Hall for the Respondent

2022: April 25, 26, 27, 28, 29.

Commercial appeal – Appeal against refusal to adjourn trial – Appellate interference with judicial discretion - Appellate interference with case management decisions – Whether the learned judge erred in refusing to adjourn the trial – Whether the learned judge exceeded the generous ambit within which reasonable disagreement is possible in exercising his discretion - Whether the learned judge failed to take into account relevant factors in arriving at his decision

Von Der Heydt Invest S.A. (“VDHI”) instituted proceedings against 3 related companies including the appellant, Multibank FX International Corporation (“MBFX”). Three different claims were filed by VDHI but these claims were consolidated for hearing by a single judge

of the Commercial Court. The learned judge made an order that the consolidated claims should be expedited and listed the hearing to commence on 11th July 2022, with a time estimate of 12 to 15 days.

On 16th March 2022, MBFX applied for an adjournment of the trial to the first available date after 1st January 2023, with a time estimate of 6 weeks. The main grounds of the application were that: MBFX had 6 appeals pending before the Court of Appeal which would likely not be determined before the trial; the trial time estimate and timetable are unfair and would lead to unfairness to MBFX; and there was insufficient time for MBFX and the recently joined Mr. Naser Taher to properly prepare for trial.

At a case management conference (“CMC”) on 18th March 2022, the learned judge dismissed the application for an adjournment and gave directions for trial. On 29th March 2022, MBFX applied for leave to appeal this decision. The application was heard by the Court of Appeal together with related applications for leave to appeal and substantive appeals on 25th to 29th April 2022.

Counsel for the appellant argued that the learned judge failed to take into account the insufficiency of time to file witness statements and closing pleadings, make disclosure and obtain expert evidence. He argued that the trial timetable was simply unfair to the appellant, as it appeared that the appellant had a heavier burden of disclosure and producing witness evidence. He further argued that there were 6 outstanding appeals to be heard and determined, some of which have a clear and direct impact on the trial and therefore had to be determined before the trial could commence.

Counsel for the respondent argued that the worldwide freezing order (“WFO”) was a source of much pain for MBFX, as it had been complaining that the WFO had been causing significant loss and damage to it and its reputation. It is against this background that the learned judge ordered the trial to be expedited. He further argued that the adjournment application was served two days before the adjourned CMC. This, he stated, was evidence that if MBFX really had a legitimate concern that the trial would not be fair it would have raised the concern well before CMC.

Held: Affirming the orders made at (a), (b) and (c) of paragraph 6 hereof, and ordering VDHI to pay MBFX’s costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days, that:

1. Case management decisions are discretionary decisions which an appellate court will be slow to interfere with. The appellate court will only interfere with a decision arrived at pursuant to the discretionary powers of a judge, if in the exercise of his judicial discretion, the judge exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dufour and others v Helenair Corporation Limited and others (1996) 52 WIR 188 followed; **Employers International and Others v Boston Life and Annuity**

Company Ltd BVIHCVAP 2007/0005 (Re-issued 6th November 2008, unreported) followed.

2. Although the authorities stress the hesitancy of an appeal court to overturn a decision of the high court when that decision is made in the exercise of the judge's discretion, especially in the exercise of his case management powers, hesitancy to take a course of action should not lead to refusal to take that course of action, particularly when the interest of justice hangs in the balance. In this case, the Court found that a trial involving allegations of fraud of several millions of dollars by major players on the international finance stage should not be proceeded with in the face of an application for an adjournment by the party being accused of massive fraud when, less than 4 months before the trial date, pleadings had not been closed, witness statements had not been filed, experts had not yet been identified, disclosure had not yet taken place, and there were 6 pending appeals of various interlocutory decisions, all or some of which would have a direct bearing on the trial. Accordingly, the learned judge exceeded the generous ambit within which reasonable disagreement is possible and his decision was blatantly wrong.

JTrust Asia PTE Ltd. and Mitsuji Konoshita and A.P.F Group Co. Ltd (In receivership) v Showa Holdings Co., Ltd. et al BVIHCMAP2020/0031 (delivered 31st May 2021, unreported) distinguished; **Elliot Group Ltd et al v GECC UK (formerly known as GE CAPITAL CORPORATION) et al** [2010] EWHC 409 (TCC) considered.

REASONS FOR DECISION (The Adjournment Appeal)

- [1] **MICHEL JA:** This appeal arises from proceedings instituted by Von Der Heydt Invest S.A. (hereafter "VDHI") against 3 related companies, including Multibank FX International Corporation (hereafter "MBFX"). Three different claims were filed by VDHI but, by order of 12th October 2021, they were consolidated for hearing by a single judge of the Commercial Court. On 25th October 2021, Jack J [Ag.] made an order that the trial of the consolidated claims 'shall be expedited and listed to commence on Monday 11th July 2022 with a time estimate of 12 to 15 days'.
- [2] By notice of application filed on 16th March 2022, MBFX applied for an adjournment of the trial to the first available date after 1st January 2023, with a time estimate of 6

weeks (hereafter “the adjournment application”). In the notice of application, MBFX set out 12 reasons for seeking the adjournment, but highlighted the following 3 grounds in its skeleton arguments:

- 1) MBFX already has 6 appeals pending before the Court of Appeal which should be determined before the trial, which is unlikely under the current timetable.
- 2) The current trial time estimate and timetable are inadequate and will lead to unfairness to MBFX.
- 3) There is insufficient time to prepare for trial properly, particularly for parties such as MBFX and (the recently joined) Mr. Naser Taher (“Mr. Taher”) who are facing very serious allegations and require proper time to prepare their defences to the case. There is, in any event, insufficient time for all the procedural steps that are required to be taken before trial.

- [3] At the case management conference on 18th March 2022, Jack J [Ag.] dismissed the adjournment application and gave directions for the trial set to commence on 11th July 2022.
- [4] On 29th March 2022, MBFX applied for leave to appeal against the dismissal of the adjournment application and, if leave is granted, for the appeal to be heard and upheld. MBFX also filed skeleton arguments on 29th March in support of the leave application and in support of the actual appeal, if leave is granted.
- [5] On 12th April 2022, the Court of Appeal set down the application for leave to appeal against the dismissal of the adjournment application to be heard, together with related applications for leave to appeal and substantive appeals, on 25th to 29th April 2022.

[6] On 29th April 2022, the Court of Appeal, in an oral decision delivered at the conclusion of the 5-day special sitting of the Court, ordered that:

(a) “Leave is granted to the applicant/appellant to appeal against the order of Jack J [Ag.] dated 18th March 2022 by which the learned judge dismissed the application to adjourn the trial listed to commence on 11th July 2022 to the first available date after 1st January 2023.

(b) The appeal against the order is allowed and the order of the learned judge dismissing the application to adjourn the trial is set aside.

(c) The trial of the claims numbered BVIHC (COM) 2020/0215, 2021/003 and 2021/0073 is adjourned to a date or dates to be fixed by the Registrar of the High Court during the first term of the next law year commencing in January 2023.

(d) The award of costs in the application for leave to appeal and in the appeal is reserved.”

Leave to appeal

[7] As to the reason for granting leave to appeal, a perusal of the intended grounds of appeal against the learned judge’s denial of the adjournment application clearly reveals that MBFX had a real prospect of success on an appeal. As much as an appeal court will only sparingly exercise its power to overturn a judge’s case management decisions, it will do so when to do otherwise will result in serious injustice to the party seeking the adjournment. In the present case, a decision to proceed with a complex trial set to take place over a period of 12 to 15 days, with no witness statements and expert reports having been filed and no disclosure having taken place less than 4 months before the commencement of the trial, merits appellate review, and the appeal therefore has a real prospect of success. Accordingly, leave was granted to MBFX to appeal against the decision of the learned judge dismissing the application for the adjournment of the trial.

Grounds of appeal

[8] As to the substantive appeal, MBFX set out what are in effect 7 grounds of appeal in its draft notice of appeal attached to its application for leave to appeal filed on 29th March 2022. The grounds of appeal (without elaboration) are as follows:

- 1) When handing down the judgment, Jack J (Ag.) did not confirm that he was satisfied that a fair trial could proceed on the current listing.
- 2) There was no application by the parties for the trial to be expedited and it appears that the Judge did not in fact intend for the matter to be formally expedited.
- 3) MBFX explained the grounds on which the trial should be adjourned in order to ensure that a fair trial could proceed for all parties, setting out 12 separate grounds in its application notice.¹
- 4) The judge was wrong to dismiss the adjournment application notwithstanding the serious issues highlighted by MBFX.
- 5) The judge failed to take into account relevant matters (properly or at all) including:
 - the 6 pending appeals before the Court of Appeal - he wrongly found that there was sufficient time for these to be dealt with by the Court of Appeal prior to trial;
 - the inadequacy of the trial time estimate - he took into account speculative matters, such as the amount of time required for cross-examination of witnesses, including experts who had not been identified;
 - the lack of time for Mr. Taher to participate in the proceedings and defend himself;

¹ See notice of application for leave to appeal in Consolidated Appeals Bundle Volume 14.

- the unfairness to Mr. Taher which had been caused by VDHI's delay in taking steps to join Mr. Taher to the proceedings;
- there was no urgency for the matter to be heard at the listed trial date;
- the time allocated for disclosure was insufficient; and
- the complexity of the case.
-
- 6) The judge took into account irrelevant matters:
 - the judge considered that MBFX had insisted on an urgent fortification application because it wanted proceedings to be determined quickly;
 - the possibility of adding additional days after the long vacation;
 - the judge took into account in his calculation of the trial time estimate that it may be possible to hold the trial 'in- person';
 - the judge relied on the fact that "nothing had changed" since the matter was listed in October 2021 - but this was wrong and irrelevant to the question as to whether the trial should be adjourned and whether the defendants could possibly get a fair trial; and
 -
- 7) the judge erred in the exercise of his discretion.

In all the circumstances, the judge came to a determination which was outside the ambit of decisions to which he could reasonably come.

[9] From the notice of appeal and the submissions of counsel on both sides of the appeal, the essential questions to be determined in this appeal are twofold. The first is whether the trial timetable and trial date set for the trial of the proceedings in the court below were reasonable, practicable and/or workable, having regard to all that needed to be done before the trial, including the hearing and determination of 6 pending appeals before the Court of Appeal. The second is whether the expedited trial timetable and trial date could result in an injustice to the defendants who were more likely to be adversely affected or seriously prejudiced by the trial timetable and

trial date. The judge apparently decided that the trial timetable and trial date were reasonable, practicable and/or workable and that there would be no injustice to the defendants.

Appellant's Submissions

- [10] The appellant, MBFX, contends that the trial date of 11th July 2022 is 'entirely unworkable' and that the judge erred in dismissing the application for an adjournment. The appellant says that the challenge to the learned judge's decision is not purely concerned with the exercise of a case management discretion but it 'goes right to the heart of whether the [defendants] can in any way have a fair trial...'²
- [11] Mr. Hodge Malek KC, counsel for the appellant, argued that the date of 11th July 2022 is simply insufficient time to carry out the procedural steps required to bring the matter fairly to trial. He contended that the judge failed to take into account relevant matters, including the insufficiency of time to: (i) file witness statements, for which only 3 1/2 weeks had been allocated for the witness statements to be prepared following inspection of documents; (ii) file closing pleadings which, as ordered, would not have been until 8th April 2022 (3 months before the intended date of trial) which he says is unacceptable, given the complexity of the case; (iii) attend to the disclosure process - only 4 weeks had been allocated for disclosure, with a further week for inspection, and there are hundreds of thousands of documents that the appellant will need to review before it is in a position to meet its standard disclosure obligations; (iv) hear specific disclosure applications; (v) receive expert evidence from the experts in 5 separate fields, with the expert reports to be filed and served just 10 days after witness statements. According to the judge's timetable as set out at the CMC, the claimant - who is the respondent in the appeal - will not even produce a list of the issues the experts have to deal with in their respective reports until 22nd April 2022.

² Skeleton argument of the second defendant/appellant filed 29th March 2022 - Volume 14(v.3), paragraph 4 at pdf page 3.

[12] Mr. Malek KC also argued that the trial timetable is simply unfair to the appellant, as it appears that the appellant has a heavier burden of disclosure and producing witness evidence. Further, the appellant submits that although VDHI and the judge accepted that the 12 to 15 days set down for the hearing of the trial is insufficient, the unsatisfactory solution that further days be allocated in October and November 2022 will result in the trial going part heard. This is unfair to the appellant and the other defendants (Mex Securities and Naser Taher) whose case is likely to be interrupted, with a period of months between the opening and closing of their cases. In addition, the trial timetable is unfair to Mr. Taher, who was added as a party some 10 months into the proceedings. The appellant submits that the trial in July 2022 would only be possible if Mr. Taher's rights are abrogated in respect of matters such as service and time for filing his defence.

[13] The appellant argued too that the fact that there were 6 outstanding appeals to be heard and determined, some of which have a clear and direct impact on the trial and therefore had to be determined before the trial could commence (like for instance the recusal and forum appeals) rendered the trial of the matter less than 4 months away impracticable, because it could not then be predicted when the appeals, not yet heard, would be determined. Though after the fact, it can be noted that the 6 appeals, although heard, have not yet been determined.

Respondent's Submissions

[14] Mr. Tim Penny KC, counsel for the respondent, rejected the allegation that the learned judge erred in principle in not granting the adjournment application. He stated that the adjournment of the trial 4 months before its intended start date in July 2022 must be considered with reference to the position as at the date of the adjournment application and on the issues that were argued before the learned judge and not by reference to matters that have happened since then. He says that MBFX's fears of an unfair trial are hollow.

- [15] Mr. Penny KC submitted that the worldwide freezing order (“WFO”) was a source of much pain for MBFX, as it had been complaining that the WFO had been causing significant loss and damage to it and its reputation. It is against this background, Mr. Penny KC submitted, that the learned judge ordered the trial to be expedited. Further, he states that there was no appeal by MBFX against the expedition order and the time set. In relation to the unfairness to Mr. Taher, Mr. Penny KC submits that Mr. Taher had been joined in the proceedings before the CMC and even participated in the CMC of 8th March 2022 and gave an undertaking to the court on 3rd March 2022. Ultimately, Mr. Penny KC argues, the more the trial gets drawn out the more it will cost the parties and the noteholders damage.
- [16] Mr. Penny KC also submitted that the adjournment application was served two days before the adjourned CMC. This, he states, is evidence that if MBFX really had a legitimate concern that the trial would not be fair it would have raised the concern well before CMC. The last-minute application, he contended, was yet another device in an attempt to derail the process, especially when one also has regard to the use of gagging orders and MBFX’s approach to this litigation, which the respondent has described as abusive. Mr. Penny KC argued that MBFX does not want a trial, instead, they want to destabilize it.
- [17] Mr. Penny KC also contended that the judge was right to say that the application for an adjournment was surprisingly late. The judge relied on 3 things in his judgment to ground his decision:
- 1) There were a number of appeals pending. An appeal does not operate as a stay. MBFX was responsible for its appeals not being heard earlier. Mr. Penny KC argued that the judgment on the freezing order injunction was made on 4th October 2021 and there was no attempt to have that appeal heard in the January 2022 sitting, because it was in MBFX’s interest to allow the appeal to

come on in April, allowing it to say that the Court of Appeal had to grapple with all this and it is still to be expected for the trial to go on. They did not put in a record asking the court to sit for their freezing order and disclosure appeals in January; they did nothing. Further, it was submitted that had MBFX shown that they had got on with the appeals with any urgency then the court might be able to agree with them.

- 2) The Court of Appeal cannot be expected to hand down a judgment forthwith.
- 3) Time, particularly whether the time is too short. Mr. Penny KC submitted that the judge's decision was made 4 months before trial, the judge was best placed to assess whether trial can go ahead as he had been dealing intricately with the many prior applications and issues that had arisen between the parties. There was therefore no reason in principle why the case could not be ready for trial in July 2022.

[18] In relation to issues post-judgment, particularly the proposed counterclaim served on 22nd April 2022, Mr. Penny KC contended that this is a matter for the first instance judge. According to learned King's Counsel, there was no issued application to have the proposed counterclaim brought in. Mr. Penny KC says that if the judge rules against the counterclaim it will have no bearing on the appeal, however, if the learned judge rules that the counterclaim should go in and additional parties be served, then this will no doubt have a "fundamental impact" on whether the trial can go on; however, that is a matter for the judge to decide. Further, there was no explanation as to why the counterclaim was not filed with the defence. Mr. Penny KC therefore says that this is another tactical ruse by MBFX to destabilize the trial.

The applicable law

[19] Case management decisions are discretionary decisions which an appellate court will be slow to interfere with. The appellate court will only interfere with a decision arrived at pursuant to the discretionary powers of a judge if in the exercise of his judicial discretion, the judge exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[20] The **Civil Procedure Rules 2000** (“the Rules”) which impact on decisions of this nature are, firstly, Rule 1.1 (1), which provides that the overriding objective of the Rules is to enable the court to deal with cases justly. Then Rule 1.1(2) provides that dealing with cases justly includes:

- “a) ensuring, so far as is practicable, that the parties are on an equal footing;
- b) saving expense;
- c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party;
- d) ensuring that it is dealt with expeditiously; and
- e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

Then Rule 1.2 provides that the court must seek to give effect to the overriding objective when it –

- “ (a) exercises any discretion given to it by the Rules; or
- (b) interprets any rule.”

Rule 26.1, which deals with the court’s case management powers, provides at subrule (2) that, except where these rules provide otherwise, the court may-

- “(a) adjourn or bring forward a hearing to a specific date;
-
- (w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.”

[21] The power to adjourn a hearing is clearly therefore within the case management powers of the court and any exercise of this power must be done in accordance with the court's overriding duty to deal with cases justly.

[22] One cannot speak of challenges to the exercise of the case management powers of a judge without reference to the oft-cited Court of Appeal decision of **Dufour and others v Helenair Corporation Limited and others**,³ where Chief Justice Sir Vincent Floissac said:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the 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 decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

The principles in **Dufour** have been judicially acknowledged by the Privy Council, even as recently as 2021, in its decision in **Byers and Others v Chen Ningning**.⁴

[23] In terms of appeals against case management decisions of a lower court, Rawlins CJ, in giving judgment in this Court in the case of **Employers International and Others v Boston Life and Annuity Company Ltd**,⁵ stated that:

"It is settled principle that an appellate court would not easily interfere with a case management decision of a judge or master. The following statement from *Royal & Sun Alliance v T & N Limited*⁶ elucidates this principle: "....[the] Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the

³ (1996) 52 WIR 188.

⁴ [2021] UKPC 4.

⁵ BVIHCVAP 2007/0005 (Re-issued 6th November 2008, unreported).

⁶ [2002] EWCA Civ 1964 Para 38. See also Note 52.3.8 to the UKCPR which states that "permission will be granted more sparingly to appeal against case management decisions."

decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.”

- [24] In a recent decision of this Court, in **JTrust Asia PTE Ltd. and Mitsuji Konoshita and A.P.F Group Co. Ltd (In receivership) v Showa Holdings Co., Ltd. et al**,⁷ Blenman JA had to consider the issue of whether the learned judge in the court below erred in dismissing an adjournment application.
- [25] In addressing the issue of whether the appellate court should interfere with the exercise of discretion of the case management judge, Blenman JA referred to the principles in **Dufour**, along with several other cases of this court, including **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**,⁸ **Ian Hope-Ross v Martin Dinning et al**,⁹ **Throne Capable Investment Limited v Agile Star Group Limited**¹⁰ and **Edy Gay Addari v Enzo Addari**.¹¹
- [26] Ultimately, Blenman JA concluded that it could not be said that the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors or was influenced by irrelevant factors, and as a result arrived at a conclusion which the evidence could not on any view support, so as to be considered plainly wrong. The appeal was accordingly dismissed, the appellant having failed to satisfy the high threshold that the exercise of the judge’s discretion was outside the generous ambit within which reasonable is possible.
- [27] The case at bar and the **JTrust Asia** case are similar in that they both involve an appeal against the refusal of the judge to adjourn an application or hearing. In addition, in both cases, the trial judge had been involved in the adjudication of the matters for a long time and knew the cases well. On the other hand, one point of distinction is that in the **JTrust Asia** case, the judge had already heard the parties

⁷ BVIHCMAP2020/0031 (delivered 31st May 2021, unreported).

⁸ BVIHCVAP2020/0006 (delivered 16th April 2021, unreported).

⁹ AXAHCVAP2020/0005 (delivered 30th April 2021, unreported).

¹⁰ [2021] ECSCJ No. 433 (delivered 14th January 2021).

¹¹ [2005] ECSCJ No. 125 (delivered 27th June 2005.)

on a similar issue which the same judge handed down a detailed judgment on. The same cannot be said for the case at bar. The Court, in taking all the circumstances of the case into consideration, must bear in mind that the judge having extensive knowledge is only one of the factors which must be considered.

[28] Another point of distinction between the **JTrust Asia** case and the case at bar is that at the time of the judge dismissing MBFX's adjournment application, pleadings had not yet been closed, witness statements were not yet filed and served, experts had not been identified and standard disclosure had not yet taken place. These are steps that must take place in the course of any civil proceedings which could have brought up further issues. Therefore, even though the trial was 4 months away, it is questionable whether the judge was in the best position at the time to assess whether the trial could go on because of what had not yet taken place.

[29] The issue then comes down to the question of whether, given the timetable for trial set by the learned judge and the several procedural steps that were yet to take place in such a large and complex matter, was a fair trial still possible if the matter had proceeded in accordance with the timetable. Put another way, would the dismissal of the adjournment application enable the matter to be dealt with justly in accordance with the overriding objective of the Rules?

[30] Although not binding on this Court, I consider that the words of Coulson J in **Elliot Group Ltd et al v GECC UK (formerly known as GE CAPITAL CORPORATION) et al**¹² are useful. In that case, the learned judge was dealing with an application for an adjournment of the trial date and had this to say:

“In essence, on an application of this sort, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in

¹² [2010] EWHC 409 (TCC).

circumstances where that party has not had proper or reasonable time to prepare its case.”

Analysis and conclusion

- [31] There is a plethora of cases, both from within and outside of our Court, which all tell the same story about the hesitancy of an appeal court to overturn a decision of the High Court when that decision is made in the exercise of the judge’s discretion. This hesitancy is even more pronounced when the decision is made in the exercise by a judge of his case management powers. But hesitancy to take a course of action should not lead to refusal to take that course of action, particularly when the interest of justice hangs in the balance.
- [32] Whatever may be said about what the judge did or did not consider, sufficiently or at all, in coming to his decision not to adjourn the trial of the case in the High Court (scheduled to commence on 11th July 2022 and to continue for a period of 15 days) it cannot in our view be seriously disputed that a trial involving allegations of fraud of several millions of dollars by major players on the international finance stage should not be proceeded with in the face of an application for an adjournment by the party being accused of massive fraud when, less than 4 months before the trial date, pleadings have not been closed, witness statements have not been filed, experts have not yet been identified, disclosure has not yet taken place, and there are 6 pending appeals of various interlocutory decisions all or some of which will have a direct bearing on the trial.
- [33] In these circumstances, we are satisfied “(1) that in exercising his or her judicial discretion, the judge erred in principle ... by failing to take into account or giving too little ... weight to relevant factors and considerations ... and (2) that, as a result of the error or degree of error, in principle, the trial judge’s decision exceeded the

generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.¹³

- [34] For the above-stated reasons, we allowed the appeal against the decision of the learned judge to dismiss the application by the appellant (as a defendant in the court below) to adjourn the trial then listed to start on 11th July 2022.

COSTS

- [35] In the order made on 29th April 2022 granting leave to appeal the learned judge’s dismissal of the adjournment application and allowing the substantive appeal, we reserved costs. We find no reason to depart from the usual costs order that costs follow the event. Accordingly, MBFX having prevailed on both the leave application and the appeal, both of which were resisted by VDHI, VDHI shall pay MBFX’s costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Gerard Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar

¹³ Suora note 3 at 190 – 191.